KESATUAN PEKERJA-PEKERJA PERKILANGAN PERUSAHAAN MAKANAN

v.

F&N DAIRIES MANUFACTURING SDN BHD

Industrial Court, Kuala Lumpur
Anna Ng Fui Choo
Award No: 880 of 2016 [Case No: 3(1)/6-683/16]
2 August 2016

Industrial Court: *Interpretation of Court Award — Section 33(1) of the Industrial Relations Act 1967 ('the Act') — Award handed down stipulating effective date for duration of collective agreement — Whether ambiguous and uncertain in light of agreed article in CA on effective date — Whether interpretation ought to be rendered — Whether application ought to be allowed*

This was an application for Interpretation of Award No: 288 of 2016 ('the said Award') in Case No: 3/2-122/14. Award No: 288 of 2016 was handed down by this court after hearing the dispute over some of the Articles of the proposed 14th Collective Agreement ('14th CA') between the applicant/ Union and the Company. The application was filed by the Union pursuant to s 33(1) of the Industrial Relations Act 1967 ('the Act'). The said Award was handed down in respect of a trade dispute pertaining to the terms and conditions to be incorporated into the proposed 14th CA for the period from 1 May 2012 to 30 April 2015 as pleaded by the parties. The Union contended that the duration of the 14th CA should be effective on 1 May 2012 as provided for under art 3 of the 14th CA. It was stated that this was by virtue of the said Article being an Agreed Article and therefore it should not have been made effective from 1 October 2013 as stipulated in the said Award. The union contended that the interpretation was necessary for the purpose of removing an alleged ambiguity or uncertainty in the Award.

Held:

(1) There was no ambiguity in the said Award. The said Award was handed down after a considered and conscious effort without any error, regardless of the alleged 'ambiguity'. It was well within the confines of art 3.1 of the proposed 14th CA which was part of the Agreed Articles that the duration of the 14th CA could be superseded by an Award of the court. That was exactly what this court was empowered to do in the said Award when it ordered that the date of commencement of the then proposed 14th CA be made retrospective to 1 October 2013 only. Therefore, this court by a majority dismissed the applicant's application, there being no ambiguity or uncertainty to be removed from the said Award. (paras 18 & 22).

[Application dismissed.]

Case(s) referred to:

Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan v. Kumpulan O'Connor's (M) Sdn Bhd [2009] 2 MELR 724 (refd)

National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia v. Andaman Resort Sdn Bhd [2006] 3 MELR 115 (distd)

Nestle Food (M) Sdn Bhd (Formerly Known As Food Specialities (M) Sdn Bhd) v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1995] 1 MELR 59 (distd)

Riviera Bay Resort & Condo Management Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia [2004] 1 MELR 913 (refd)

Sarawak Commercial Banks Association v. Sarawak Bank Employees' Union [1990] 5 MLRH 410 (refd)

Transport Workers Union v. Dindings Transport Sdn Bhd Sitiawan [1981] 1 MELR 41 (refd)

Legislation referred to:

Industrial Relations Act 1967, ss 26, 30(4), (7), 33(1)

Other(s) referred to:

Collective Bargaining and Collective Agreements, Malaysian Employers' Federation, pp 155, 156

Counsel:

For the applicant: VK Raj; M/s Kuppusamy & Co

For the company: T Thavalingam (Sebastian Tay Hanxin with him); M/s Lee Hishamuddin Allen & Gledhill

AWARD

Anna Ng Fui Choo:

Background

[1] The Application for Interpretation of Award No: 288 of 2016 in the Case No: 3/2-122/14 was received and registered by the Industrial Court on 12 May 2016. Award No: 288 of 2016 was handed down by this court after hearing the dispute over some of the articles of the proposed 14th Collective Agreement ('14th CA') between Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan ('the applicant/union') and F&N Dairies Manufacturing Sdn Bhd ('the company').

[2] Ms Azlina binti Muzaini was the panel member representing the employer's panel for the sittings of the hearing until Award No: 288 of 2016 ('the said Award') was handed down on 16 March 2016. She could not be empanelled for the hearing of this application because she has not been reappointed as a panel member. Hence, Mr Rohizat bin Baharum

was empanelled to replace her in the hearing of this application while Mr Kamarul Bahrain bin Mansor was recalled as the panel member for the employee's panel.

[3] This application was filed by the union pursuant to s 33(1) of the Industrial Relations Act 1967 ('the Act') and relates to the interpretation of the said Award. The said Award was handed down following a Ministerial reference in respect of a trade dispute pertaining to the terms and conditions to be incorporated into the proposed 14th CA for the period of 1 May 2012 to 30 April 2015 as pleaded by the parties. Based on the Form M of the Industrial Court Rules 1967 which the union had filed, the union contended that the duration of the 14th CA should be effective on 1 May 2012 as provided for under art 3 of the 14th CA. It was stated that this was by virtue of the said Article being an Agreed Article and therefore it should not have been made effective from 1 October 2013 as stipulated in the said Award.

The Application

[4] The details of the application filed by the union for the interpretation of the following provision of the said Award for the purpose of removing an alleged ambiguity or uncertainty were drafted in the following manner (the relevant paragraphs of the said Award were extracted):

> "[66] ... Section 30(7) of the Act states that an award may specify the period during which it shall continue in force, and may be made retrospective to such date as is specified in the award, provided that the retrospective date of the award may not be earlier than six months from the date on which the dispute was referred to the court. This dispute was referred by the Minister on 4 February 2014 and the period for the 14th CA from May 2012 to April 2015 has since lapsed. In accordance with s 30(7) of the Act, the court hereby orders that the date of commencement of the 14th CA be made retrospective to 1 October 2013 and it is for a period of three years."

Compared with:

> "[2] The proposed 14th CA was meant for the period from 1 May 2012 to 30 April 2015. There are a total of 47 Articles in the proposed CA wherein 38 Articles had been agreed upon and signed by the parties and are attached as part of this award."

And

> "[66] Articles 9 and 36 which have been agreed prior to the hearing, all the undisputed Articles which have been signed by the parties and the annexure shall form part of this award."

[5] The applicant has submitted that the provision for the duration of the 14th CA should be interpreted in the following manner as it was an Agreed Article under art 3.1 of the 14th CA and therefore should form part of the said Award:

> "This Agreement shall be effective and binding on the parties with effect from 1 May 2012 and thereafter continue in force until superseded by a new collective agreement or award or unless terminated as provided herein."

[6] It was contended by the applicant that it was not disputed that when this court stated in the said award that the agreed art 3 formed part of the award, it directly meant that the effective period of the 14th CA was from 1 May 2012 to 30 April 2015. The basis for this argument was that it was as per the signed and agreed art 3 between the parties, that had been annexed to the said award. It was submitted that the agreement between the parties pertaining to the effective period of the CA is a self-evident fact. Hence, it was argued that in those circumstances, there arose an ambiguity about the effective date of the CA. The alleged ambiguity arose because on one hand, the court had taken cognisance of the fact that by virtue of art 3, the parties had agreed that the effective date of the 14th CA was to be from 1 May 2012 to 30 April 2015. Moreover, it was submitted that the court had stated expressly in para 66 of the said Award that art 3 shall form part of the award. On the other hand, at the same para 66 of the said award, the court had ordered the CA to be implemented retrospectively from 1 October 2013.

[7] To fortify the applicant's submission that the actual date of implementation should be the agreed date of 1 April 2012, reference was made to the following facts in addition to the signed and agreed art 3:

(a) The union in its statement of case (SOC) specifically at para 2 therein had pleaded that the issues before the court were the terms to be incorporated into the proposed 14th CA for the period encompassing 1 May 2012 to 30 April 2015; and

(b) The company in its statement in reply (SIR) specifically at para 2 had confirmed the period of the CA from 1 May 2012 to 30 April 2015, and further embellished this point at para 3 therein, where it had confirmed the contents of para 2 of the statement of case.

[8] The applicant's learned counsel referred to the cases of: *Sarawak Commercial Banks Association v. Sarawak Bank Employees' Union* [1990] 5 MLRH 410, *Nestle Food (M) Sdn Bhd (Formerly Known As Food Specialities (M) Sdn Bhd) v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1995] 1 MELR 59 and *National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia v. Andaman Resort Sdn Bhd* [2006] 3 MELR 115 on the application and interpretation of s 30(7) of the Act. The court has read these cases and of the view that the facts of the two awards in *Nestle* (extending the duration of the agreement) and *Andaman Resorts* (non-compliance of certain articles in the collective agreement) cases can be distinguished from this case.

The Company's Reply To The Application

[9] The company concurred with the union that paras 2 and 66 of the said Award provided that the undisputed articles which had been mutually agreed to by the parties, including art 3, shall form part of the said Award. However, the company submitted that art 3 should be read in its entirely. The company, like the union, also relied on art 3.1 of the 14th CA which are in the following words:

> "3.1 This Agreement shall be effective and binding on the parties with effect from 1 May 2012 and thereafter continue in force until superseded by a new collective agreement or award or unless terminated as provided herein."

[10] In addition, the company submitted that it has pleaded at para 42 of its Statement in Reply (for the CA hearing) as follows:

> "The company further avers that the effective date on the collective agreement is also subject to the mandatory provisions as prescribed under s 30(7) of the Industrial Relations Act 1967 which, *inter alia*, provides the Award of this Honourable Court cannot be back dated earlier than six months from the date on which the dispute was referred to the court."

[11] The company also made reference to the case of *Riviera Bay Resort & Condo Management Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia* [2004] 1 MELR 913. In that case, under the union's proposal for art 2 (effective date and duration), the collective agreement would have been deemed to have come into force on 1 January 2002 and should continue in force until 31 December 2004. The court decided that the provisions of s 30(7) of the Act did not allow an implementation date as sought by the union. It was stated that the date of the Ministerial reference was 22 April 2003. Therefore, to keep within the time frame stipulated in the proviso to s 30(7), the court could not order a retrospective date any earlier than 23 November 2002. Instead, an effective date of 1 January 2003 was deemed fair and equitable by the court as that would allow for a simpler calculation of benefits for the employees. The agreement was also ordered to remain in force until 31 December 2005.

The Considerations Of The Court

[12] This court must add that in reply to para 42 of the company's SIR (in the pleadings filed for the hearing) on the application of s 30(7) of the Act, the union had averred in its Rejoinder that "the union contends that once the effective date is agreed between the parties, it cannot be later changed pursuant to s 30(7) ...". In the written submission delivered to the court before the said Award was handed down, the company again raised this issue in its written submission but the union had failed to address this or submitted any reply to the company's submission regarding this issue.

[13] This court was aware that art 3 titled "Duration, Modification and Termination of Agreement" was an 'agreed' article and it was signed as early as 11 March 2013, long before the dispute on the proposed 14th CA was referred by the Honourable Minister to the court on 4 February 2014. That could explain why the company's counsel had raised the application of s 30(7) of the Act in its SIR. The company's learned counsel represented the company and must have taken instructions from the company, resulting in the pleading in the SIR that the court would be bound by s 30(7). As learned company's counsel had rightly pointed out, art 3.1 should not be read in isolation but the whole of art 3 of the CA should be read in its entirety. The court did not ignore

para 3.1 of the CA but had studied all the articles of the proposed 14th CA in depth before handing down the said award. It was also clear to the court that art 1 of the proposed 14th CA did not have a date of this proposed agreement.

[14] The issue on the commencement date of an award of the Industrial Court in respect of a trade dispute referred to it under s 26 of the Act, was dealt in the case of *Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan v. Kumpulan O'Connor's (M) Sdn Bhd* [2009] 2 MELR 724. The Industrial Court had held that the company's letters giving its proposals under the caption "New Collective Agreement Proposal 2006-2009" implied that the company agreed that the collective agreement would take effect from the expiry of the previous agreement on 31 October 2006. The company filed for judicial review for an order of *certiorari* to quash the Award No: 1343 of 2009 handed down on 13 January 2009. The High Court held that the decision of the Industrial Court that the date of commencement of the collective agreement should be 1 November 2006, which was upon expiry of the previous collective should on 31 October 2006, was an error of law as it was contrary to s 30(7) of the Act.

[15] I have endeavoured to get a copy of this High Court judgment but have not been able to do so. Hence, the court would cite the following from the book "*Collective Bargaining and Collective Agreements*" by the Malaysian Employers' Federation at p 155, "The High Court stated as follows:

> "Section 30(7) provides that were the effective date is to be retrospective, such date "may not .. be earlier than six months from the date on which the dispute was referred to the court". Thus in exercising the power conferred under the said section, the court does not have the liberty to ignore the time period expressly specified. Counsel for the 2nd respondent submits that the words "may not" indicates that it is discretionary. In my considered opinion despite permitting the effective date to be made retrospective, this provision imposes what is the permissible time period for deciding on the retrospective date. I agree with the counsel for the applicant that the retrospective date is limited to six months prior to the date of the Ministerial reference. In the present case the Industrial Court has decided on the effective date of the 6th CA that exceeds the time limited stipulated by s 30(7). Thus the Industrial Court has acted in excess of jurisdiction."

The High Court then dealt with the submission of the counsel for the trade union that the company had consented that the new collective agreement be effective immediately following the date of the expiry of the previous collective agreement. Although there was no such indication from the company's letters the High Court however stated:

> "In any event jurisdiction cannot be conferred by consent of the parties. In the case of *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1982] 1 MLRA 314, Eusoffe Abdoolkader J (as His Lordship then was) in delivering the judgment has this say on the issue of consent of the parties over the jurisdiction of the court and on breach of natural justice at p 318:

"In any event jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent by such consent or acquiescence. It is a fundamental principle that no consent or acquiescence can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction. (*Essex County Council v. Essex Incorporated Congregational Church Union* (at pp 820-821 per Lord Reid). This principle that jurisdiction cannot be conferred by agreement or estoppel was firmly reiterated recently by the English Court of Appeal in Secretary of State for *Employment v. Globe Elastic Thread Co Ltd* in a decision which was reversed by the House of Lords but affirmed on this point."

For the reasons stated above the Industrial Court committed an error of law by back dating the collective agreement to 1 November 2006, ie the date following the expiry of the previous collective agreement."

[16] It is further stated in the book above at p 156 that the above principle of law was also stated in the case of *Transport Workers Union v. Dindings Transport Sdn Bhd Sitiawan* [1981] 1 MELR 41. The President of the Court, Harun J (as his Lordship then was) held as follows:

"At the commencement of the hearing, the union and the parties had agreed that the new agreement will be for a period of three years with effect from 1 April 1980. As the reference is dated 13 November 1980, the agreed date 1 April 1980 will offend against s 30(7) IRA. It being more than six months from the date the dispute was referred to us. The earliest date this Award may be back dated is 13 May 1980 but for administrative convenience we think the effective date be 1 June 1980."

Decision

[17] The final decision of this court is by a majority after deliberating on this application. The honourable employee's panel member opined that in the union's SOC and the company's SIR, it was pleaded that the duration for the proposed 14th CA was from 1 May 2012 to 30 April 2015. He also said that during the hearing of the CA, the company had not brought any evidence on the effective date of the CA because that had been agreed upon by the parties. In light of this and to maintain good industrial harmony relations, he was of the view that the said award had contained an ambiguity. Therefore, he is of the opinion that the application of the union be allowed and for the period of the CA to be made effective from 1 May 2012, as fair.

[18] It is the majority voice of the honourable employer's panel member and the Chairman of this court that there was no ambiguity in the said Award. Before making the order for the CA to take effect from 1 October 2014 in the said award, I had perused the articles in the proposed 14th CA, read and considered the pleadings filed by the parties and the written submissions of learned counsel. I had also done research on the retrospective effect of an award under s 30(7) of the Act. Therefore, the said award was handed down after a

considered and conscious effort without any error on my part, regardless of the alleged 'ambiguity' of paras 2 and 66.

[19] The union's counsel had pointed out that the union members would lose out 17 months in the increment given if the said Award was not back-dated to 1 May 2012 and the court was urged to act in equity and good conscience. Likewise, acting in equity and good conscience, the court had considered if the company could pay the extra 17 months' increment for the Union members or if that could be a financial burden on the company. It is clearly stated under s 30(4) of the Act that in making an award in respect of a trade dispute, the court shall have regard to the financial implications of the award.

[20] In this regard, the company's counsel had highlighted the fact that this court had ordered a salary adjustment of 8% which was higher than the preceding collective agreements. In making that order, this court had taken into account the fact that the last salary adjustment for the Union members was made on 30 April 2009. Therefore, it was never the case that the court had not taken all these factors into consideration. I must also emphasise that the order for the 8% increment in salary was a unanimous decision of the court in the said Award.

[21] It was well within the confines of art 3.1 of the proposed 14th CA which was part of the Agreed Articles that the duration of the 14th CA could be superseded by an Award of the court. That was exactly what this court was empowered to do in the said Award when it ordered that the date of commencement of the then proposed 14th CA be made retrospective to 1 October 2013 only.

[22] Having considered all of the above and acting in equity and good conscience, this court by a majority dismisses the applicant's application, there being no ambiguity or uncertainty to be removed from the said Award.