2/1/1980

NO. 7 of 1977

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :-

SOUTH EAST ASIA FIRE BRICKS SDN.BHD Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION

2. (a) TAN LEN KEOW
(b) YAP CHUK YOOK
(c) LOO TOK HO
(d) YAP AH KIAT
(e) YAP CHOON HOO
(f) TEH YOKE TOH
(g) TAN YEW
(h) ANUAR bin ABDUL
(i) CHOON AH SOO
(j) LEE KIM YAN
(k) SITI ZAIBIDAH binte MOAN

represented by the Union Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a Judgment dated 14th April, 1976 of the Federal Court of Malaysia (Gill, C.J. Malaya, H.S.Ong, F.J., Raja Azlan Shah, F.J.), allowing an appeal by the Respondents from a Judgment dated 18th June, 1975 of the High Court of Malaya at Kuala Lumpur (Abdul Hamid, J.). The Federal Court of Malaysia by allowing the appeal set aside the order of the High Court of Malaya to remove and quash the award of the Industrial Court and restore the award dated the 8th August, 1974 and 24th March, 1975 of the Industrial Court. (Encik K. Somasundrum, Y.B.Encik Tan Seng Toon, Encik Mohd. bin Zain, Encik Abdul Aziz b.Ismail). The awards of the Industrial Court ordered the Appellants to take

pp.189-199
pp.118-135
pp.135-137
pp.24-50
pp.75-97

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p. 50 p.97

back 73 Respondent employees into their employment with the Appellants, on or before 1st April, 1975, in their previous positions, and to accord them the same terms and conditions as before a strike commenced on the 4th February, 1974, paying wages and allowances without loss of benefits and privileges from 16th February, 1974. Sixty two of the Respondent employees were members of the Respondent Union and are represented by the Respondent union. The remaining 11 employees, it was held by the Industrial Court, were not members of the Respondent union but joined in the same strike and they are the further parties to the action.

pp.50-58

2. The issues of this appeal depend upon the following statutory provisions :-

Section 8 of the Employment Ordinance, 1955 as amended, provides :-

p.108 11.29-39

"8. Nothing in any contract of employment shall in any manner restrict the right of any labourer who is party to such contract -

(a) To join a registered trade union; or

(b) To participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

(c) To associate with any other person for the purpose of organising a trade union in accordance with the provisions of the Trade Union Ordinance, 1959.

p.106 11.5-14
p.107 11.18-26

Section 15 (2) of the Employment Ordinance, 1955, as amended, provides :-

"A Labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absence from work for more than two days -

(a) Without prior leave from his employer or without reasonable excuse; or

(b) Without informing or attempting to inform his employer of the excuse for such absence."

p.108 11.42

Section 2 of the Trade Union Ordinance, 1959, defines a "trade union" for the purposes of that ordinance as follows :-

""Trade Union" means any Association or combination of workmen or employers, being workmen or employers whose place of work is in the Federation or employers employing workmen in the Federation

...

(c) Having among its objects one or more of the following objects :

(i) The regulation of relations between workmen and employers, or between workmen and workmen, or between employers and employers; or

...

(iii) The promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provisions of pay or other benefits for its members during a strike or lock-out;"

Section 66(1)(b) of the Trade Union Ordinance, 1959, provides :- p.106 ll.40-42 p.107 ll.1-10

" 66(1) This ordinance shall not affect -

...

(b) Any agreement between an employer and those employed by him as to such employment;"

Section 4(3) of the Industrial Relations Act, 1967, as amended, (now section 4(1) as further amended) declares :-

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

Section 5(1) (d) of the Industrial Relations Act, 1967, declares :-

"5(1) No employer or trade union of employers, and no person acting on behalf of an employer or such trade union shall -

...

RECORD

(d) Dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman -

(i) Is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or

(ii) Participates in the promotion, formation or activity of a trade union;"

But; sub-section (2)(a) provides; -

"(2) Sub-section (1) shall not be deemed to preclude an employer from -

(a) refusing to employ a person for proper cause, or to promote a workman or to suspend, transfer, lay - off or discharge a workman for proper cause; "

pp.1-5
pp.26-48
pp.118-120
pp.189-190

3. The Appellants carry on the business of manufacturing fire bricks at their factory at 314, Batu 2½ Jalan Ipoh, Kuala Lumpur, Malaysia. A dispute arose over the Appellants refusal to recognise the Respondent trade union. By a letter dated the 31st December, 1973, the Respondent union informed the Appellants that unless the Appellants commenced negotiations for a collective agreement on terms and conditions of employment of its employees with the Respondent trade union and thereby recognise the Respondent trade union the Respondents would resort to a strike. On the 4th February, 1974, the Respondent employees went on strike. On the 4th and 5th February, 1974, the Appellants issued notices to the striking employees informing them that their services would be deemed to be terminated if they did not return to work immediately, or

p.16

"in any event," within 48 hours. The Respondent employees did not return to work but remained on

p.17

strike until the 16th February, 1974. On the 12th February, 1974, the dispute was referred to the Industrial Court by the Minister for Labour and Manpower under his powers contained in the Industrial Relations Act, 1967. Under section 41 and 42 of the Industrial Relations Act it is illegal to go on strike or to declare a lock-out after a trade dispute has been so referred to the Industrial Court and the parties concerned have been notified. The parties were notified and as a result on the 16th February 1974, the 73 Respondent employees presented themselves for work. The Appellants refusd to re-employ the 73 Respondent employees. The question

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to be determined by this appeal is whether or not the Industrial Court were correct when they held that the Appellants were guilty of an illegal lock-out on the 16th February, 1974; or, whether the 73 Respondent employees had ceased to be employees prior to the Minister's referral to the Industrial Court on the 12th February, 1974, and whether therefore, the Appellants action on the 16th February, 1974 was outside the Industrial Relations Act, 1967, definition of a lock-out. p.50

4. The Industrial Court held, inter alia, :-

(a) That it was no neglect of duty on the part of the Respondent employees to be in wilful breach of their contracts of employment as no person shall interfere with the right of the employee to participate in a strike as a "recognised trade union activity." p.40 ll.37-41

(b) That as the strike was lawful, in the sense that it complied with the local statutory provisions, it constituted a "reasonable excuse" within the meaning of section 15(2) of the Employment Ordinance, 1955. pp.40-41/37-2

In coming to the above conclusions, the Industrial Court appears to have accepted the reasoning of the Respondents that lawful activities for a trade union and its members include organising strikes and participating in strikes organised by a registered trade union, and are protected by section 2 of the Trade Unions Ordinance, 1959, read in conjunction with section 8 of the Employment Ordinance, 1955 and also sections 4(3), 5(1) of the Industrial Relations Act, 1967. p.48 ll.32-45 pp.38-41

Accordingly, it was held by the Industrial Court that the 73 Respondent employees contracts of employment had not terminated on the 16th February, 1974 and because of the Minister's reference of the trade dispute to the Industrial Court on the 12th February, 1974 the Appellants were guilty of an illegal lock-out. p.50 ll.16-30

5. The Appellants applied to the High Court of Malaya for certiorari, on the ground that the Industrial Court decision showed an error of law on the face of the record. The High Court granted the application and removed the case to the High Court of Malaya and quashed the Industrial Court's decision. The High Court held that the Industrial Court was wrong when it decided that any strike by a registered trade union constituted a reasonable p.74 pp.136-137 ll.28-20

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excuse within the meaning of section 15(2) (a) of the Employment Ordinance, 1955, and that other
p.130 ll.19-45 factors ought to have been considered. The learned Judge appears to have accepted that the Respondent employees were in breach of their contracts of employment by going on strike and that their contracts of employment were capable of being brought to an end under the provisions of section 15(2) of the Employment Ordinance, 1955, but only if the strike
pp.130-131 was not a "reasonable excuse". 10

6. The Respondents appealed to the Federal Court of Malaysia which held, inter alia,

(i) Concurring with the High Court of Malaya that certiorari lies to the High Court where the Industrial Court has erred on a point of law or has failed to consider relevant facts on
pp.190-191 the face of the record.

(ii) That to go on strike does not terminate a contract of service under section 15(2) of
p.194 ll.38-4 the Employment Ordinance, 1955. 20

(iii) That section 8 of the Employment Ordinance, 1955, has removed the provision of section 15 of the Employment Ordinance, 1955, from the scene of trade disputes and as such can be safely overlooked when considering the legality of the activities of a registered trade union and a strike in contemplation of or in
p.193 ll.19-26 furtherance of a "trade dispute".

(iv) That when an employee goes on strike he is not in breach of his contract of employment. 30 Nor is a striking employee guilty of any wrongful or illegal act and his contract of employment is not thereby terminated but merely
p.194 ll.16-21 suspended.
p.196 ll.13-20

(v) That if the decision of the learned Judge in the High Court of Malaya was correct then it would have ominous repercussions for the trade
p.195 ll.23-25 unions in Malaya in respect of their "freedom to strike".

7. By an order, dated 15th November, 1976, the 40 Federal Court of Malaysia granted the Appellants
p.201 ll.1-30 final leave to appeal to his Majesty the Yang di Pertuan Agong.

8. The Appellants respectfully submit that both the Industrial Court and the Federal Court of Malaysia erred in holding that the Respondent employees

were not in breach of their contracts of employment by their going on strike on the 4th February, 1974. Further, the Appellants respectfully submit that the Courts in Malaysia erred in holding that the Respondent employees contracts of employment were not terminated either by the (a) Appellants warning notices sent to the Respondent employees on the 4th and 5th February, 1974, or (b) section 15(2) of the Employment Ordinance, 1955, as amended, or (c) section 15(2) of the Employment Ordinance, 1955 in conjunction with the said warning notices. Further, it is respectfully submitted that the Courts in Malaysia erred variously on the effects of the Employment Ordinance, 1955, the Trade Union Ordinance, 1959 and the Industrial Relations Act, 1967, when they held; (i) that these statutes provided that an employee on strike was not in breach of his contract of employment, or, that if he was so long as the strike was otherwise lawful, then the employee could legally require his job back at the end of the strike, or (ii) that an employee on strike is entitled to his job back at the end of the strike in circumstances where he has "a reasonable excuse" for such a strike, or (iii) that these statutes countenanced that an employee on strike was capable of suspending his contract of employment, the strike being lawful in all other respects.

p.196 ll.21-30

pp. 48, 196

9. The Federal Court held that section 8 of the Employment Ordinance, 1955 was not found in the earlier labour code and was passed to correct the mischief in the case of Wong Mook v. Wong Yin and three others (1948) 14 M.L.J.41. The Appellants respectfully submit that if section 8 of the Employment Ordinance, 1955 was intended to remedy mischief in the Wong Mook case that a clearer expression of intention would be expected and it is curious that section 53 (iv) (a) of the old labour code (cap.154) now section 15 (2) (a) of the Employment Ordinance, 1955, should have been re-enacted. Indeed section 15(2) was further amended in 1969 (P.U.A.) 409/69) by the inclusion of a new limb.

p.192 ll.26-30

10. The Appellants respectfully submit that whilst trade unions may legitimately have for their objects the organisation of strikes (see section 2 of the Trade Unions Ordinance 1959), the carrying out of those objects are subject to limitations. (see sections 40 and 41, Industrial Relations Act, 1967). The organisation of strikes in certain circumstances would not only be unlawful but may also expose the union to sanctions including De-registration (see section 15 and 16

of the Trade Unions Ordinance, 1959) and the workmen who participate in such strikes may be exposed to their membership being cancelled (see Section 26 of the Trade Union Ordinance, 1959). But for the protection afforded by section 21 of the Trade Union Ordinance, 1959, a trade union may still be liable for inducing a breach of the contract of employment between the employer and the striking workmen. It is respectfully submitted that the wording in section 2 of the Trade Union Ordinance, 1959 merely identifies an organisation as being a trade union by reference to its objects. It does not seek to legitimate all the activities referred to therein regardless of whether they may be breaches of contract, torts or crimes. It is respectfully submitted, that in the scheme of the Industrial Relations Act, 1967, as recognised by the Federal Court of Malaysia, the individual workman has no bargaining power in industrial relations. He can never enter into collective agreement. A trade union of workmen acts always exclusively as a principal and not as an agent for its members. Whilst a trade union may as one of its activities, organise a strike, the actual strike involves a cessation of work by workmen and this is an activity of the union members and not the trade union itself. It is in this light that the provisions of section 15(2) of the Employment Ordinance, 1955, should be read. A primary obligation of a workman under his contract of employment is to attend for work on the days and times specified in return for the remuneration offered, a principle reflected in the Employment Ordinance, 1955, by section 15(2), as amended. A provision in the law declaring that workmen may be absent from work on account of any lawful activity of the trade union would have far reaching consequences and would destroy the fundamental obligation under the contract of employment. If such was intended by the Malaysian legislature one would expect a much clearer overruling of the common law in relation to the contract of employment. It is respectfully submitted that when the striking Respondent employees failed to report for work as required by the warning notices served upon them by the Appellants they were in wilful breach of a condition of their contracts of employment which entitled the Appellants to terminate their services without notice under section 13(2) of the Employment Ordinance, 1955, as amended, and that those contracts of employment were terminated by the Appellants' notices. By attempting to report for work on the 16th February, 1974 in the Appellants' respectful submission, the Respondent employees and accordingly the action of the

Appellants was not a lock-out within the meaning of the Industrial Relations Act, 1967.

11. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, and that this appeal be allowed with costs, for the following (amongst other)

R E A S O N S

(1) BECAUSE there is no provision in Malaysian legislation which provides for the suspension of a contract of employment during a strike. Such an employee on strike is in breach of his contract of employment under the common law of contract. Such provisions as there are under the Malaysian legislation point to this conclusion, namely, sections 13(2), 15(2) of the Employment Ordinance, 1955, as amended; sections 21, 66(1)(b) of the Trade Union Ordinance, 1959.

(2) BECAUSE if the Malaysian legislature had intended to provide an employee on strike with protection from dismissal from his employment a much clearer expression of that intention would be necessary.

(3) BECAUSE the English cases relied upon by the Industrial Relations Court and the Federal Court of Malaysia were dealing with entirely different problems arising under English Statutes and far too much weight was placed on isolated dicta taken from these English cases, as a result the Malaysian Courts misunderstood the concept of "the right to strike" in England and Wales.

(4) BECAUSE there is a distinction between "termination" of a contract of employment and "breach" of a contract of employment and the Appellants respectfully submit that a breach of a contract of employment in the form of a strike is a repudiation of that contract of employment which may or may not be accepted by the employer. Because this distinction was not taken in any of the Malaysian Courts the Appellants respectfully submit that the Malaysian Courts assumed wrongly that the only alternative to holding that the Respondent employees in the present case were not in breach of their contracts of employment or if they were that the legislation protected them was that the

"right to strike" would be totally eroded. In the Appellants respectful submission in the present case there was nothing to prevent the Respondent employees from giving their proper contract of employment notices to the Appellants, thereby not only attracting the protection of the Malaysian legislation but also avoiding the consequences of being in breach of their contracts of employment.

(5) BECAUSE, the Appellants respectfully submit that the Malaysian Courts were wrong when they construed section 8 of the Employment Ordinance, 1955 and by inference section 5(1) of the Industrial Relations Act, 1967, in conjunction with section 2 of the Trade Union Ordinance, 1959 to mean that an employee was protected from any legal sanction and indeed had a positive right to participate in the activities of a trade union in breach of his contract of employment whilst pursuing the objects of that trade union as defined by section 2 of the Trade Union Ordinance, 1959. In the Appellants respectful submission there is a distinction between the activities of a trade union and the objects of a trade union and that these two words serve very different functions in these three sections. Further, in the Appellants respectful submission there is a distinction between an employee participating in the activities of a trade union and a trade union pursuing its objects and had that distinction been taken by the Malaysian Courts their construction of section 8 of the Employment Ordinance, 1955 would have been in favour of the Appellants.

GEOFFREY RIPPON

V.T. NATHAN

ALAN BISHOP

NO. 7 of 1977

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

SOUTH EAST ASIA FIRE BRICKS SDN.BHD
Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION

2. (a) TAN LEN KEOW
and 10 OTHERS
(lettered from (b) to (k))

represented by the Union Respondents

CASE FOR THE APPELLANTS

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