ISMAIL NASARUDDIN ABDUL WAHAB

v.

MALAYSIAN AIRLINE SYSTEM BHD

Federal Court, Putrajaya
Nallini Pathmanathan, Hasnah Mohammed Hashim, Harmindar Singh Dhaliwal FCJJ
[Civil Appeal No: 02(f)-43-07-2021(W)]
3 October 2022

Administrative Law: *Judicial review — Application for — Quashing of award of Industrial Court upholding appellant's dismissal — Extent of protection afforded to employee for charge of misconduct by employer in relation to employee's acts carried out in his capacity as Trade Union officer or member — Considerations for determining whether act of alleged misconduct amounted to misconduct warranting disciplinary action or dismissal — Whether appellant's dismissal not warranted*

Labour Law: *Industrial Court — Award — Application for judicial review to quash award of Industrial Court upholding appellant's dismissal — Extent of protection afforded to employee for charge of misconduct by employer in relation to employee's acts carried out in his capacity as Trade Union officer or member — Considerations for determining whether act of alleged misconduct amounted to misconduct warranting disciplinary action or dismissal — Whether appellant's dismissal not warranted*

The respondent ('MAS') was the national carrier of Malaysia while the appellant ('Union Leader') was an employee of MAS for 25 years. At the material time, he was also the President of the National Union of Flight Attendants Malaysia ('NUFAM'). Sometime in 2013, the cabin crew employees of MAS were disgruntled and unhappy with MAS on two issues: (i) Weight Loss Exercise, a company ruling mandating the reduction of weight to achieve a certain body mass index; and (ii) Fleet Realignment Exercise ('FRE'), which severely affected many cabin crew's schedules and wages. NUFAM referred the FRE issue to the Director General of Industrial Relations as a trade dispute, pursuant to s 18 of the Industrial Relations Act 1967 ('IRA'). NUFAM and MAS failed to resolve the issues and on 7 November 2013, the Union Leader issued a press statement in his capacity as NUFAM President where he highlighted, inter alia, the plight of overworked and underpaid cabin crew members, and urged MAS to enact policies to ensure their welfare and safety. In the course of doing so, the Union Leader called for the resignation of MAS' CEO as a result of the latter's inability to resolve the problems faced by the cabin crew under his leadership of MAS in 2011. One day later, the Union Leader was suspended. Subsequently, he was issued a show cause letter by MAS describing his press statement as "serious misconduct", tantamount to "a breach of the express terms of his employment" with MAS and, further,

a breach of an implied term to serve MAS with "good faith and fidelity". On 29 November 2013, the Union Leader was dismissed by MAS for issuing the press statement. He challenged his dismissal at the Industrial Court, which upheld his dismissal as being for just cause and excuse. The Union Leader filed an application for judicial review to quash the award of the Industrial Court, which was allowed by the High Court. The Court of Appeal, however, allowed MAS' appeal against the High Court's decision. Dissatisfied, the Union Leader filed an application for leave to appeal to this Court and was granted leave to appeal on the following questions: (1) what was the extent of the protection afforded to an employee in respect of a charge of misconduct by an employer in relation to the employee's acts carried out in his capacity as a Trade Union officer or member, having regard to the relevant legal principles, including ss 4, 5 and 59 of the IRA, s 8 of the Employment Act 1955 ('EA'), ss 21 and 22 of the Trade Union Act 1959 ('TUA') and the International Labour Organisation's "Right to Organise and Collective Bargaining Convention, 1949"?; (2) whether the dismissal of a trade union leader for participating in trade union activities was an act of victimisation and unfair labour practice?; and (3) was a trade union officer speaking on behalf of the trade union obliged under the law to exhaust the trade dispute processes under ss 18, 19 and 26 of the IRA before issuing a press statement on the nature of such trade dispute? If the said trade union leader had not exhausted the above process, was the issuance of the said press statement an act of misconduct justifying dismissal?

Held (allowing the appeal with costs):

(1) Throughout many jurisdictions, activity which could properly be regarded as trade union activity was protected against reprisals by the employer. What constituted trade union activity was ultimately a question of fact dependent on the factual matrix of a case. Acts which were closely connected to an employee's role as union representative ought to come within the scope of trade union activities protected by law. It was when those acts were knowingly or recklessly false, or when they became tainted by unreasonableness, malice, or illegality, that they would fall outside the scope of protection afforded by law. Furthermore, given the provisions of s 8 of the EA, it would not suffice to merely look at the contents of the employment contract. Section 8 of the EA fortified the position that a workman could not be dismissed by reason of his participation in trade union activity alone. Under s 20 of the IRA, the onus was on the employer to establish that the dismissal was with just cause and excuse. It was not for the workman to establish that the dismissal was unfair. It was, therefore, clear that it was incumbent on the employer to undertake the exercise of assessing whether the conduct in question fell within the scope of trade union activity for the furtherance of or in the interest of trade union affairs or whether it exceeded such scope of activity. In the instant appeal, such an exercise was not undertaken at all. (paras 56-57)

(2) When determining whether an act of alleged misconduct which involved engagement in trade union activities amounted to misconduct warranting

disciplinary action or dismissal, the following considerations should assist both an employer and a workman: (i) the alleged act of misconduct should be identified; (ii) was the alleged act of misconduct related to a trade union activity?; (iii) was the alleged act of misconduct complained of by the employer closely connected with and carried out in the workman's role as a union representative?; or (iv) was the alleged act of misconduct while (stated to be) carried out by the workman, purportedly in the course of his activities as a union representative, knowingly or recklessly false, or tainted with malice, illegality and unreasonableness such that it could not reasonably be said to fall within the scope of bona fide trade union activity? In other words, acts or omissions actuated by malice rather than a bona fide attempt to find a solution to a trade union issue would fall outside the scope of acceptable conduct and might well amount to misconduct. This must be a question of fact in each and every case. Unfortunately, this exercise was not undertaken by the Court of Appeal at all. (paras 58-59)

(3) The Court of Appeal erred in focusing solely on the Union Leader's obligations under his contract of employment or collective agreement without according any or sufficient consideration to his duties as President of NUFAM. It also failed to give any consideration as to whether the acts were in furtherance of trade union activity. In doing so, the Court of Appeal disregarded the statutory provisions of the EA, IRA, and TUA. A contract of service could not be used to contract out of the rights of employees to join, participate in or organise trade unions in contravention of the express prohibition contained in s 8 of the EA. The contents of the Union Leader's press statement related wholly to problems faced by employees at the workplace and criticism of the management for failing to address the same. The Union Leader had not abused his office as union president for personal interest. His press statement was done in the name of NUFAM and for the benefit of the thousands of cabin crew members he represented with a view to improve workplace conditions. In the circumstances, the Union Leader's press statement amounted to participation in the lawful activities of a trade union and was not unreasonable, malicious, or knowingly or recklessly false. Accordingly, the Union Leader's conduct could not be labelled as misconduct which warranted dismissal. (paras 60-61)

(4) Following from the above, the questions of law would be answered as follows: Question 1: An employee ought not to be dismissed for participation in trade union activities carried out in his capacity as a trade union officer or member, unless the activities were extraneous to trade union affairs, or were carried out maliciously, or in a manner which knowingly or recklessly disregarded the truth. Question 2 was not answered as it had been dealt with by the answer to Question 1. Question 3: The first part was answered in the negative. This Court declined to answer the second part as it was set out in the provisions of the legislation and the IRA itself. (para 62)

Case(s) referred to:

Bass Taverns Ltd v. Burgess [1995] IRLR 596 (refd)

Bursa Malaysia Securities v. Mohd Afrizan Husain [2022] 4 MLRA 547 (folld)

Danilenkov & Ors v. Russia (Application no 67336/01) (refd)

Harris Solid State (M) Sdn Bhd v. Ors v. Bruno Gentil S/O Pereira & Ors [1996] 1 MELR 42; [1996] 1 MLRA 665 (refd)

Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 1 MELR 21; [2001] 1 MLRA 309 (folld)

Lyon v. St James Press Ltd [1976] ICR 413 (refd)

Morris (Appellant) v. Metrolink RATP Dev Ltd [2018] EWCA Civ 1358 (refd)

Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor [2020] 3 MELR 311; [2021] 1 MLRA 261 (folld)

Ognevenko v. Russia (Application No 44873/09) (refd)

Palomo Sanchez and Others v. Spain (Applications nos 28955/06, 28957/06, 28959/6 and 28964/06) (refd)

Shearer v. Everritt & Ors BC9806060 (refd)

Toronto (Municipality) v. Canadian Union of Public Employee [1997] OLAA No 893 (refd)

University College London v. Brown UKEAT/0084/19/VP (refd)

Workmen of Williamson Magor & Co Ltd v. Williamson Magor & Co Ltd [1982] 1 LLJ 33 SC (refd)

Legislation referred to:

Employment Act 1955, s 8

Interpretation Acts 1948 and 1967, s 17A

Industrial Relations Act 1967, ss 4(1), 5(1)(b), 8, 18, 20(1), 59(1)(d)

Trade Union Act 1959, ss 2, 21, 22

Trade Union and Labour Relations (Consolidation) Act 1992, s 152(1)(b)

Other(s) referred to:

OP Malhotra, *The Law of Industrial Disputes*, 5th edn, Vol 2 (India: Universal Law Publishing, 1998)

The Changing Roles of Trade Unions in India: A Case Study of National Thermal Power Corporation (NTPC), Unchahar, Asian Academy of Management Journal, Vol 14, No 1, 37-57, January 2009

Counsel:

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For the respondent: N Sivabalah (Jamie Goh with him); M/s Shearn Delamore & Co

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] This appeal is of critical importance to the trade union movement in the country. It examines the issue of the extent to which the nation's laws protect trade union activity. It also considers when activities of such a member or leader go beyond the ambit of acceptable limits as there is no complete immunity available in respect of trade union activities.

Background

[2] The respondent ('MAS') was the national carrier of Malaysia (now rebranded via another entity called Malaysia Airlines Berhad).

[3] The appellant was an employee of MAS for 25 years. At the material time, he was also the President of the National Union of Flight Attendants Malaysia (NUFAM). He will hereinafter be referred to as 'the Union Leader'.

[4] Sometime in 2013, the cabin crew employees of MAS were disgruntled and unhappy with MAS:

(i) Weight Loss Exercise, a company ruling mandating the reduction of weight to achieve a certain body mass index; and

(ii) Fleet Realignment Exercise ('FRE'), which severely affected many cabin crew's schedules and wages.

[5] NUFAM referred the FRE issue to the Director General of Industrial Relations as a trade dispute, pursuant to s 18 of the Industrial Relations Act 1967.

[6] NUFAM and MAS failed to resolve the above issues. On 7 November 2013, the Union Leader issued a press statement in his capacity as NUFAM President where he highlighted *inter alia* the plight of overworked and underpaid cabin crew members, and urged MAS to enact policies to ensure their welfare and safety. In the course of doing so, the Union Leader called for the resignation of MAS' CEO as a result of the latter's inability to resolve the latter's inability to resolve the problems faced by the cabin crew under his leadership of MAS in 2011. The relevant excerpts of the impugned press statement, as reported by The Sun Daily on 8 November 2013, are as follows:

> In a statement yesterday, Nufam Secretariat said it is calling on the Prime Minister to review Jauhari's contract and remove him as the CEO of MAS, which is a government appointed position, unhappy that there has been no changes in resolving the cabin crew's problems and they are have *(sic)* become demoralized

...

"Three years is long enough to observe how a CEO of a GLC (government-linked company) takes seriousness and consideration into the cabin crew's issues," it said.

...

"The management have cut costs drastically on the cabin crew and did not bother to review their allowances and salaries, " it further claimed.

...

"They (MAS management) said they had discussed with MASEU before putting these changes in to the CA (collective agreement), but the discussions are behind NUFAM's back,"

...

"It was not done in fairness and is a form of discrimination against employees. This is also the first time they are picking on this (weight control) issue,"...

...

"The crew are overworked according to schedules..."

...

"NUFAM wants the airline to straighten out their polices. All these policies concerning cabin crew must be regulated. The welfare and safety of the cabin crew must be looked into by the government," said Ismail.

[7] One day later, on 8 November 2013, the Union Leader was suspended. Subsequently, he was issued a show cause letter dated 12 November 2013 by MAS describing his press statement as "serious misconduct", tantamount to "a breach of the express terms of his employment" with MAS and further a breach of an implied term to serve MAS with "good faith and fidelity".

[8] On 29 November 2013, the Union Leader was dismissed by MAS for issuing the abovementioned press statement. He challenged his dismissal at the Industrial Court, which upheld his dismissal as being for just cause and excuse.

[9] In its award, the Industrial Court held that ss 4(1)1 and 5(1) of the Industrial Relations Act (IRA) 19672, which provisions protect against victimisation for trade union activity, were inapplicable to the instant case as the Union Leader was found guilty of the allegations of misconduct levelled against him. The Industrial Court further held that even if there was any breach of ss 4(1) and 5(1) of the IRA, they were capable of remedy under s 8 of the IRA 1967 and the Union Leader could not rely on ss 4(1) and 5(1) of the IRA in a s 20(1) reference.

Proceedings At The High Court

[10] The Union Leader filed an application for judicial review to quash the award of the Industrial Court.

[11] The gist of the High Court's decision can be summarised as follows:

(i) Being a member of a trade union *per se* should not be a shield to exclude liability for misconduct, and that liability for misconduct by a member of a trade union must be viewed based on the facts.

(ii) Sections 4(1) and 5(1)(d)(ii) of the IRA protect the right of a union member to participate in lawful union activities. The contents of the press statement, which highlighted *inter alia* the following:

a) the plight of overworked and underpaid cabin crew members;

b) fatigue issues faced by cabin crew workers;

c) the request for Department of Civil Aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing, health and safety; and

d) that MAS should straighten out its policies to ensure that the welfare and safety of cabin crew members are looked into, relate to the objective of a trade union as reflected in s 2 of the Trade Union Act 1959 ("TUA").

(iii) The statements made by the Union Leader did not involve any illegal act and therefore his conduct could not be labelled as misconduct warranting dismissal. The assessment of the applicant's misconduct must take into account ss 4(1) and 5(1) which provide in essence that an employer shall not interfere with a workman's participation in the lawful acts of a trade union and which preclude dismissals against a workman where he participates in the lawful activities of a trade union, respectively. In the instant case the employer failed to have regard to these provisions. Thus the Industrial Court fell into error when it failed to consider these provisions and further held that ss 4(1) and 5(1) are inapplicable.

(iv) The Industrial Court also erred in holding that s 8 could remedy a breach of ss 4(1) and 5(1) of the IRA. Section 8(1) specifically provides that where there is a complaint of a contravention of ss 4(1) and 5(1) relating to the dismissal of a workman the provisions of s 20 come into play.

(v) If s 22 of the TUA protects union members from any tortious act arising from union activities, then union members should also be protected from dismissals as a contrary interpretation would make s 22 ineffective in protecting union members.

(vi) MAS had failed to adduce cogent evidence showing that the Union Leader's press statements had caused disrepute to MAS.

(vii) Consequently, the Union Leader's judicial review application was allowed with costs of RM5,000 and the award of the Industrial Court was set aside.

Proceedings At The Court Of Appeal

[12] MAS appealed to the Court of Appeal, which held as follows:

(i) Any conduct of the employee, irrespective of their position as a trade union member which is likely to damage the reputation of the employer may constitute gross misconduct and will lead to disciplinary action up to and including dismissal. The breach of an implied duty of good faith in contracts of employment would amount to misconduct.

(ii) The misconduct need not be one that is in connection with the performance of the employee's duties and it is sufficient if it is conduct prejudicial to the interests or to the reputation of his employer, and that it is a matter of degree whether the act complained of is of the requisite gravity. The conduct must be so serious that it strikes at the root of the contract of employment. Past misconduct of an employee is a relevant factor to be considered in determining whether the punishment of dismissal is harsh.

(iii) The High Court erred when it decided that the Union Leader's past record on making press statements without consent from MAS does not carry much weight.

(iv) It was not open to the High Court to interfere with the findings of fact by the Industrial Court and substitute its own views in place thereof.

(v) On the application of s 22 of the TUA to the present case, the present action is not a tortious action but an action for unlawful dismissal. Thus, s 22 of the TUA is inapplicable to the present proceedings.

(vi) Where the law provides for an alternative procedure for the settlement of trade disputes arising under the collective agreement, this method must be adhered to by the parties. A

party cannot unilaterally bypass the settlement procedure. In the instant case, the settlement procedure was not exhausted by the parties when the Union Leader issued the press statement.

(vii) The Union Leader's contract of employment had implied into it a duty of good faith, and an implied duty that the employee would not, without proper and reasonable cause, conduct itself in a manner likely to seriously damage the relationship of trust and confidence between the parties.

[13] The Court of Appeal allowed MAS' appeal with costs of RM5,000. Dissatisfied with the decision, the Union Leader filed an application for leave to appeal to this Court. Leave to appeal to this Court was granted on the following questions:

The Leave Questions

1) What is the extent of the protection afforded to an employee in respect of a charge of misconduct by an employer in relation to the employee's acts carried out in his capacity as a Trade Union officer or member, having regard to the relevant legal principles including ss 4, 5 and 59 of the Industrial Relations Act 1967, s 8 of the Employment Act 1955, ss 21 and 22 of the Trade Union Act 1959 and the International Labour Organisation's "Right to Organise and Collective Bargaining Convention, 1949"?

2) Whether the dismissal of a trade union leader for participating in trade union activities is an act of victimisation and unfair labour practice?

3) Is a trade union officer speaking on behalf of the trade union obliged under the law to exhaust the trade dispute processes under ss 18, 19 and 26 of the Industrial Relations Act 1967 before issuing a press statement on the nature of such trade dispute? If the said trade union leader has not exhausted the above process, is the issuance of the said press statement an act of misconduct justifying dismissal?

Submissions By The Union Leader

[14] The Union Leader's submissions can be summarised thus:

(i) The answers to the leave questions ought to be decided in the context of art 10 of our Federal Constitution which guarantees the right to freedom of association;

(ii) The TUA is a piece of social legislation and its provisions should be interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted;

(iii) Since the IRA is social legislation, s 5(2) of the same should be interpreted to ensure maximum protection of the class in whose favour it was enacted. Thus, s 5(2) should not be interpreted in any manner so as to dilute the protections accorded to trade union officers/members for participation in trade union activities under s 5(1). "Proper cause" under s 5(2)(a) should exclude participation in trade union activities as any other interpretation would render the protections under s 5(1) illusory and ineffective;

(iv) While there are certain in-built statutory limitations imposed on trade union officers or members in carrying out their functions, there are no limitations or prohibitions imposed upon the issuance of press statements by trade union officers or members under the IRA;

(v) Sections 213 and 224 of the TUA provide immunities to trade unions and their officers and members from legal proceedings in certain cases. The TUA therefore affords protection to registered trade unions or any officer or member of the same in respect of acts/commissions performed in the course of their carried out in furtherance of a trade dispute;

(vi) Malaysia has ratified the International Labour Organization (ILO)'s Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Pursuant to Art 1 of the Convention, Malaysia has an obligation to ensure adequate protection against anti-union discrimination including dismissal of a worker by reason of participation in union activities;

(vii) The dismissal of workmen and employees because of participation in trade union activities is an act of victimisation and unfair labour practice following *Harris Solid State (M) Sdn Bhd v. Ors v. Bruno Gentil S/O Pereira & Ors* [1996] 1 MELR 42; [1996] 1 MLRA 665;

(viii) Issuing a press statement amounts to a trade union activity and the issuance of such a statement should be protected by law unless it is malicious, or knowingly false;

(ix) The Union Leader's press statement was not extraneous, malicious or knowingly or recklessly disregards the truth;

(x) The Court of Appeal judgment has a negative impact on trade union rights in Malaysia as criticism of employers would result in dismissals;

(xi) The Court of Appeal, whilst citing ss 4, 5 and 59 of the IRA and s 8 of the Employment Act 1955, failed to apply the said statutory provision and did not provide any analysis on why those provisions do not apply to the instant case;

(xii) The Union Leader's dismissal was an act of victimisation and lacked *bona fides* in light of the fact that Malaysia Airlines System Employees Union (MASEU) union officials had also made similar statements calling for the dismissal of the Company's CEO, but no action had been taken against any of their officers and this was not considered by the Court of Appeal;

(xiii) The Court of Appeal erred in law when it held that once a "trade dispute" has been referred to and is pending before the Director-General for Industrial Relations and/or Industrial Court, trade union leaders are not able to engage the press/ media on anything related to the said trade dispute as no such principle of law can be found in the IRA, Trade Unions Act 1959 or the Employment Act 1955.

Submissions By MAS

[15] MAS on the other hand submits that:

(i) Sections 4 and 5(1) of the IRA do not apply in the present matter. In this connection, commencement of disciplinary action and dismissing a workman does not tantamount to a violation of s 5(1) of the IRA; and that this is reinforced by s 5(2) of the IRA;

(ii) Union members cannot claim immunity for their actions if their actions had tantamounted to acts of misconduct and had breached the terms of their employment contract;

(iii) Section 22 of the Trade Unions Act ("TUA") 1959 does not apply in the context of employment misconduct. Further, extending s 22 TUA 1959 to disciplinary proceedings in the Industrial Court would mean that union members are immune from any disciplinary action even if they acted in breach of their employment contracts. Such an interpretation would run counter to art 8 of the Federal Constitution and there is no rational basis for the foregoing;

(iv) In relation to the International Labour Organization ("ILO") Convention 1949, until and unless there is a law passed on this, it is not the role of the Courts to usurp the powers of the Executive;

(v) The Union Leader's dismissal was not an act of victimisation or unfair labour practice.

[16] On 20 January 2022 we heard the appeal and delivered our decision in favour of the Union Leader, setting aside the decision of the Court of Appeal and allowing the appeal with costs of RM50,000.00 to the Union Leader here and the court below, subject to allocatur.

[17] Our broad grounds delivered orally were as follows:

(i) the statements made by the Union Leader were not malicious, recklessly false, wholly unreasonable or extraneous;

(ii) the contents of the Union Leader's press statements relate wholly to problems faced by employees at the workplace and was criticism of management's failure to address the same.

(iii) Therefore the Union Leader's conduct which was carried out in the course of his duties as the President of NUFAM did not amount to a breach of his duty of fidelity to his employer and therefore did not justify dismissal.

[18] We now provide full grounds for our decision.

The Law

[19] We commence with a consideration of the law.

[20] The starting point of our discussion, and the focal point of parties' arguments, is the proper interpretation to be accorded to ss 4(1) and 5 of the IRA.

[21] Section 4(1) of the IRA states that:

> "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."

[22] While s 5 of the IRA states that:

> "(1) No employer or trade union of employers, and no person acting on behalf of an employer or such trade union shall-
>
> ...
>
> (c) discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;
>
> (d) dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman-
>
> (i) is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or

(ii) participates in the promotion, formation or activities of a trade union; or

...

(2) Subsection (1) shall not be deemed to preclude an employer from-

(a) refusing to employ a person for proper cause, or not promoting a workman for proper cause or suspending, transferring, laying-off or discharging a workman for proper cause;

…

[23] Subsection 5(1) of the IRA protects members of a trade union against reprisals by their employer when they participate in trade union activities. However, subsection 5(2) makes clear that subsection 5(1) does not prevent an employer from suspending, terminating or refusing to employ a person for proper cause. This leaves dismissals without proper cause outside the scope of subsection (2). In other words, subsection 5(2) only upholds an employer's right to suspend or terminate an employee if the suspension or dismissal is for proper cause.

[24] Apart from ss 4 and 5 of the IRA, it is also instructive to refer to s 59(1)(d) of the same which states:

"(1) Subject to the provisions of subsection 5(2), it shall be an offence to dismiss a workman or injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice, by reason of the circumstances that the workman

...

(d) being a member of a trade union which is seeking to improve working conditions, is dissatisfied with such working conditions;"

[25] The protection granted to employees under s 59(1)(d) is similarly qualified by subsection 5(2). As we have explained earlier, subsection 5(2) does not immunise employers against suspensions or dismissals without proper cause.

[26] Besides the provisions of the IRA, it is worthwhile to note that s 8 of the Employment Act 1955 states:

"Nothing in any contract of service shall in any manner restrict the right of any employee 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;

..."

> Section 8 fortifies the position that a workman cannot be dismissed by reason of his participation in trade union activity alone.

[27] The other provision which is of peripheral relevance is s 21 of the TUA. Section 21 of the TUA states as follows:

> "No suit or other legal proceeding shall be maintainable in any civil court against any registered trade union or any officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills."

[28] In essence it affords protection not only to a registered trade union but to a member of the same if he participates in an act done in furtherance of a trade dispute and which causes some other person to break his contract of employment or which has the consequence of interfering with the trade business or employment of some other person. While not directly relevant in the instant case as there was no such consequence to any other person, it evidences the extent to which *bona fide* trade union activities are protected by the legal framework in the TUA.

[29] Section 22 of the TUA also provides immunity for tortious acts to the trade union itself *albeit* committed by a member or officer of the trade union. It is therefore directly relevant to trade unions rather than providing individual protection for members of the union.

[30] We now turn to consider whether the termination or suspension of the Union Leader was with just cause or excuse under s 20(1) of the IRA. The primary issue in the instant case turns on whether the dismissal was with just cause or excuse or by reason of the Union Leader's breaches of his contract of employment as a workman, or whether his dismissal was tainted by his being punished for statements he made in furtherance of his duties as union leader in relation to the dispute that subsisted between the employer and NUFAM relating to the welfare of the cabin crew. In other words, was he victimised by reason of his position as the Union Leader of NUFAM? Was he subjected to unfair labour practice or victimised as a consequence of his position as the Union Leader of NUFAM?

[31] According to to OP Malhotra, *The Law of Industrial Disputes*, 5th edn, Vol 2 (India: Universal Law Publishing, 1998) at 1669-1670:

> "The expression 'victimisation' has not been defined in the statute and is not in any sense a term of law or art. It is an ordinary English word which means that (a) certain person has become a victim, in other words, that he has been unjustly dealt with...
>
> ...

> Victimisation may partake of various forms, such a pressurising an employee to leave the union or union activities, treating the employee unequally or in an obviously discriminatory manner, for the sole reason of his connection with union or his particular union activities; inflicting a grossly monstrous punishment which no rational person would impose upon such an employee. For instance, if for a very trifle or venial breach of duty, the employer proposes to dismiss a workman, the Tribunal may well consider, whether the employer in imposing the punishment, which was out of all proportion to the misconduct of which the workman was guilty, was not motivated by some other factor than the maintenance of discipline and the just protection of the employer."

[32] In the instant appeal, this aspect of the law appears to have been given no consideration by the employer in determining that the Union Leader's employment be terminated. This aspect, namely the Union Leader's issuance of statement in his capacity as a Union Leader, comprises an integral part of his contract of employment and therefore cannot be disregarded when determining whether his employment should be terminated. In other words, his role as a Union Leader of NUFAM is inextricably intertwined with his employment as a steward with MAS. It therefore became incumbent upon the employer to consider the dual aspects of his work as well as the statutory provisions affording him protection in relation to his trade union activities before arriving at a decision to dismiss him. This was not done. It would be pertinent to consider the law both in our and other jurisdictions in relation to his issue.

[33] In *Workmen of Williamson Magor & Co Ltd v. Williamson Magor & Co Ltd* [1982] 1 LLJ 33 SC the Indian Supreme Court accepted the interpretation of the word 'victimisation' as the normal meaning of being the 'victim of unfair and arbitrary action'.

Malaysia

[34] The concept of 'victimisation' is not unknown to Malaysian law. It was referred to by the Court of Appeal in the case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil S/O Pereira & Ors* [1996] 1 MELR 42; [1996] 1 MLRA 665. *Harris* is authority for the proposition that an employer may reorganise its commercial undertaking for any legitimate reason, such as promoting better economic viability, but it must not do so for a collateral purpose, for example, to victimise its employees for their legitimate participation in union activities. The Court of Appeal held that on the issue of victimisation, the proper question that the employment tribunal should have asked was whether the totality of the evidence, objectively viewed, reasonably supported the conclusion that the claimants were terminated because of their union activities.

Canada

[35] Canadian authorities have expressed a similar sentiment. In *Toronto (Municipality) v. Canadian Union of Public Employee* [1997] OLAA No 893, the

Toronto Labour Arbitrator was cognizant that union representatives are often required to challenge managerial decisions, and that as "front line advocates", they must be able to discharge their responsibilities without the threat of being disciplined by their employer. The protection is not unlimited and does not cover statements or actions which are knowingly or recklessly false or malicious, or illegal activity.

[36] In *Canada Post Corp and CUPW (Van Donk)* [1990] CLAD No 18, it was pointed out that it would be unrealistic not to expect union representatives to express "strong disagreement" with employers in "vivid and unflattering" terms in the course of discharging their responsibilities where union business is concerned, and that such statements from union stewards must be protected unless they are "malicious in that they are knowingly or recklessly false."

Australia

[37] In *Shearer v. Everritt & Ors* BC9806060 the claimant was an employee of the Waverley RSL Club, an establishment providing bar and licensed gaming facilities. He was also a union delegate. The respondents were members of its management committee. The claimant's employment was subsequently terminated by the respondents for the following reasons: 1) unsatisfactory attitude complaints from member and staff; 2) failure to attend shift as per the bar roster; 3) failure to correctly sign into the Club when not on duty; 4) a number of other matters that were the subject of counselling and/or official warnings. It was alleged by the Club that the claimant had breached a confidentiality clause in the staff Code of Conduct which prohibits employees from discussing Club matters and the running of the Club, by distributing to members of the Club a petition prepared by the union to contest an application to reduce wages and conditions at the Club. The respondents' general manager also claimed that the claimant was insubordinate and threatening towards the employer's official representative in discussing an industrial dispute involving another employee. In short the respondents sought to prove that through a series of incidents during his employment the claimant was guilty of misconduct and it was this misconduct the respondents relied on when terminating the claimant's employment. The Federal Court of Australia found that much of the excessive and unreasonable disciplinary action taken against the claimant was causally linked to the claimant's role and activities as a union delegate and it followed that his termination was probably motivated in whole or in part by one or the other of the statutorily proscribed reasons.

Europe

[38] In the Case of *Palomo Sanchez and Others v. Spain* (Applications nos 28955/06, 28957/06, 28959/6 and 28964/06), the European Court of Human Rights ('ECtHR') observed that under the applicable law in the Member States of the Council of Europe, any abuse of freedom of expression is capable of justifying disciplinary measures including dismissal, and for that purpose, factual elements of an objective nature are taken into account, such as: the

seriousness of the misconduct; the characterisation of the comments, the extent of their publication, and also certain subjective elements, the latter of which includes the question of whether the conduct falls outside normal trade union activity.

[39] In *Danilenkov & Ors v. Russia* (Application no 67336/01), members of the Dockers' Union of Russia who participated in a two-week strike calling for salary increases and better working conditions and health and life insurance were dismissed as a result of the structural reorganisation of the seaport company they were employed at. Here, the ECtHR stressed in particular that any employee or worker should be free to join, or not, a trade union without being sanctioned. It then found crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action capable of ensuring real and effective relief.

[40] The ECtHR observed that the employer had used various techniques to encourage employees to relinquish their union membership, including their re-assignment to special work teams with limited opportunities, dismissals subsequently found unlawful by the courts, decrease of earnings, disciplinary sanctions, etc. In addition, despite the existence in Russian civil law at the time of a blanket prohibition against discrimination on the ground of trade union membership or non-membership, the judicial authorities had refused to examine the applicants' discrimination complaints having held that discrimination could only be established in criminal proceedings. Consequently, it was held that there was a violation of Article 14 (prohibition of discrimination) in conjunction with Article 11 of the European Convention on Human Rights ('ECHR'), Russia having failed to provide clear and effective judicial protection against discrimination on the grounds of trade union membership.

[41] In *Ognevenko v. Russia* (Application No 44873/09) the Rosprofzhel trade union in Russia, of which the applicant train driver was a member, decided to a call a strike in April 2008 after the failure of wage and bonus negotiations. The railway company did not apply to the courts to have the strike declared unlawful and the applicant took part in it. The applicant arrived for work on the day of the strike, but refused to take up his duties. The strike caused delays in the sector where the applicant worked and he was dismissed for disciplinary breaches, including taking part in the strike.

[42] The ECtHR held that there had been a violation of Article 11 of the ECHR, finding that the applicant's dismissal had been a disproportionate restriction on his rights. It noted, in particular, that train drivers and some other types of railway workers were included in occupations which were prohibited from striking. That restriction had not been sufficiently justified by the Russian Government and was in conflict with internationally recognised labour rules. The ECtHR observed that sanctions such as dismissals inevitably had a "chilling effect" on others who might consider striking to protect their interests.

United Kingdom

[43] The law governing unfair dismissals in the UK is not dissimilar to the position here. In *Lyon v. St James Press Ltd* [1976] ICR 413 two employees were dismissed for soliciting colleagues to join a trade union. The industrial tribunal found that the employer was entitled to take objection to the way in which the applicants had solicited their colleagues, including the fact that they had not told the employer what they were doing. The decision of the industrial tribunal was reversed by the Employment Appeal Tribunal ('EAT'). Phillips J acknowledged that it was possible to make a distinction between a dismissal for carrying out trade union activities and a dismissal for misconduct occurring in the context of such activities. He explained that protection for trade union activities is not an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. Philips J identified "wholly unreasonable, extraneous or malicious acts" as examples which could potentially fall outside the scope of statutory protection afforded to trade union activities.

[44] In *Bass Taverns Ltd v. Burgess* [1995] IRLR 596 an employee who was a shop steward was invited by the employer to give a presentation at an induction course for new employees at which they could be encouraged to join the union. During the presentation he made comments highly critical of management's attitude to health and safety which he later accepted were "over the top". He was demoted. The employee claimed that his demotion constituted a constructive unfair dismissal for taking part in trade union activities. The industrial tribunal dismissed his claim in that regard but its decision was overturned by the EAT. The employer's appeal was dismissed by the English Court of Appeal. Pill LJ opined that the employee was plainly taking part in trade union activities in making the remarks in question and that there was "nothing beyond the rhetoric and hyperbole which might be expected at a recruiting meeting for a trade union". Pill LJ further held that the employee's admission that he had gone over the top could not support the conclusion that in law the contents of the speech were outside the scope of trade union activities.

[45] *Lyon* and *Bass Taverns* were both referred to in *Morris (Appellant) v. Metrolink RATP Dev Ltd* [2018] EWCA Civ 1358. In *Morris*, the claimant was dismissed for storing and circulating confidential information. He challenged his dismissal as unfair, *inter alia*, under s 152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR"), because he had been dismissed for carrying out trade union activities. The claimant argued that he had used the information not solely for his own benefit but as part of a collective grievance on his members' behalf.

[46] Under s 152(1)(b) of the TULR, the dismissal of an employee is regarded as unfair if it or the principal reason for the dismissal was that the employee had taken part, or proposed to take part, in the activities of an independent

trade union at an appropriate time. This is broadly in line with para 5(1)(b) of our IRA.

[47] In *Morris* Underhill LJ recognised that there would be cases where a dismissal in the course of trade union activities would fall outside the scope of s 152(1)(b). He identified these as acts which are "wholly unreasonable, extraneous or malicious". However, His Lordship also remarked that the protections introduced by the TULR should not be undermined and that employees "should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable" (see paras 19-20).

[48] In *University College London v. Brown* UKEAT/0084/19/VP, the claimant was an IT Systems Administrator for University College London ('UCL'). He was also an active member and elected representative of the University and College Union, a trade union recognised by UCL. The claimant was issued a formal disciplinary warning for refusing to implement management's request to delete an email distribution list used, *inter alia*, for circulating communications from the trade union. He challenged the issuance of the warning on the ground that he had suffered a detriment by reason of taking part in union activities. The Employment Tribunal ('ET') concluded that the claimant's acts of creating the list and his refusal to take it down constituted protected trade union activity, and that the main purpose of disciplining him was to penalise him for taking part in trade union activities. The ET's decision was upheld by the EAT.

Our Analysis And Decision

[49] Historically, union representation and collective bargaining have been integral to the growth of a stable working population in developed economies, and have made it possible for employees to receive a more equitable share of the wealth that they create (see "The Changing Roles of Trade Unions in India: A Case Study of National Thermal Power Corporation (NTPC), Unchahar", *Asian Academy of Management Journal*, Vol 14, No 1, 37-57, January 2009 at 38). Strong trade unions protect basic worker and human rights by pushing for better working conditions and job security.

[50] It is trite that the interpretation of an Act should be undertaken with the purpose and object of the Act in mind. In *Bursa Malaysia Securities v. Mohd Afrizan Husain* [2022] 4 MLRA 547, this Court referred to s 17A of the Interpretation Acts 1948 and 1967 and expressed the view that in the construction of statutes, any reading which is purely textual, as opposed to contextual, is to be rejected. Therefore the provisions of the Acts relating to union representation and prohibiting discrimination against workmen in their employment by reason of participation in trade union activities should be construed contextually and holistically rather than each provision being read *in vacuo* within each statute. Ultimately the various sections harmonise with each other in their common purpose to prohibit victimisation of a workman for his trade union activities.

The IRA

[51] The IRA has been judicially recognized as a piece of social legislation, to be construed liberally. In *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 1 MELR 21; [2001] 1 MLRA 309, this Court opined that:

> "... the IRA is a piece of social legislation whose primary aim is to promote social justice, industrial peace and harmony in the country. As such, the approach to interpretation must be liberal in order to achieve the object aimed at by Parliament. This had been described by Lord Diplock as the 'purposive approach', an approach followed by Lord Denning in *Nothman v. Barnet London Borough Council* [1978] 1 WLR 220, who reiterated that in all cases involving the interpretation of statutes, we should adopt a construction that would promote the general legislative purpose underlying the provision."

[52] The preamble of the IRA states that it is an Act:

> "... to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."

[53] We note that the IRA, which consolidated all previous laws concerning industrial disputes, contains several protective measures for trade unions as a peace offering meant to forestall opposition to permanent compulsory arbitration, and that it was legislated not only to safeguard the legitimate rights and interests of employers and workers or their trade unions, but also to ensure the speedy and just settlement of industrial disputes, so that public and national interests are not prejudiced while the parties promote their own particular interests (see Parliamentary Debates, Dewan Rakyat, Second Parliament, Fourth Session, 22 June 1967, 1531-1532 (V Manickavasagam)).

The TUA

[54] The TUA, on the other hand, was enacted amid government support for "the growth of national, responsible, strong and free trade unions." (see Parliamentary Debates, Dewan Rakyat, Second Parliament, Second Session, 10 August 1965, 1733 (V Manickavasagam)).

[55] In our opinion, while there are certain statutory restrictions imposed on trade union officers or members in performing their functions, the legislative scheme in place does not prohibit the issuance of press statements by trade union officers or members. Furthermore, if reference is made to the International Labour Organisation's 1994 publication titled "*Freedom of Association and Collective Bargaining: Trade Union Right and Civil Liberties*" the "right to express opinions through the press or otherwise" is described as an "essential aspect of trade union rights" (see *International Labour Organisation, Freedom of Association and Collective Bargaining*, 1994, para 38).

[56] Our discussion above discloses that throughout many jurisdictions, activity which can properly be regarded as trade union activity is protected against reprisals by the employer. What constitutes trade union activity is ultimately a question of fact dependent on the factual matrix of a case. In our opinion, acts which are closely connected to an employee's role as union representative ought to come within the scope of trade union activities protected by law. It is when those acts are knowingly or recklessly false, or when they become tainted by unreasonableness, malice, or illegality, that they would fall outside the scope of protection afforded by law. Furthermore, given the provisions of s 8 of the Employment Act 1955, it would not suffice to merely look at the contents of the employment contract. Section 8 of the Employment Act fortifies the position that a workman cannot be dismissed by reason of his participation in trade union activity alone. We pause to note here that under s 20 of the IRA, the onus is on the employer to establish that the dismissal was with just cause and excuse. It is not for the workman to establish that the dismissal was unfair: *Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor* [2020] 3 MELR 311; [2021] 1 MLRA 261 CA.

[57] It is therefore clear that it is incumbent on the employer to undertake the exercise of assessing whether the conduct in question falls within the scope of trade union activity for the furtherance of or in the interest of trade union affairs or whether it exceeds such scope of activity. It must be recalled that in the instant appeal, such an exercise was not undertaken at all.

The Test

[58] What then is the test to be utilised when determining whether an act of alleged misconduct which involves engagement in trade union activities amounts to misconduct warranting disciplinary action or dismissal? The following considerations should assist both an employer and a workman in determining this issue:

i. The alleged act of misconduct should be identified;

ii. Was the alleged act of misconduct related to a trade union activity?

iii. Was the alleged act of misconduct complained of by the employer closely connected with and carried out in the workman's role as a union representative?

Or

iv. Was the alleged act of misconduct while (stated to be) carried out by the workman, purportedly in the course of his activities as a union representative, knowingly or recklessly false, or tainted with malice, illegality and unreasonableness such that it could not reasonably be said to fall within the scope of *bona fide* trade union activity?

v. An example of this would be the case of *Palomo Sanchez (supra)*. Here the employees were dismissed for publishing a cartoon showing their colleagues giving sexual favours to the director of human resources. The ECtHR held that the employees' dismissal had not been a manifestly disproportionate or excessive sanction, requiring the state to afford redress by annulling it or replacing it with a more lenient measure. Thus, if trade union representatives publish obscene caricatures or make lewd statements relating to the CEO or other members of management, that might well fall outside the scope of activities *bona fide* in furtherance of a trade dispute.

[59] In other words, acts or omissions actuated by malice rather than a *bona fide* attempt to find a solution to a trade union issue would fall outside the scope of acceptable conduct and might well amount to misconduct. This must be a question of fact in each and every case. Unfortunately, this exercise was not undertaken by the Court of Appeal at all.

[60] In our judgment, The Court of Appeal erred in focusing solely on the Union Leader's obligations under his contract of employment or collective agreement without according any or sufficient consideration to his duties as President of NUFAM. It also failed to give any consideration as to whether the acts were in furtherance of trade union activity. In doing so, the Court of Appeal disregarded the statutory provisions of the Employment Act, IRA, and TUA. In our view, a contract of service cannot be used to contract out of the rights of employees to join, participate in or organise trade unions in contravention of the express prohibition contained in s 8 of the Employment Act 1955.

[61] We accept that the contents of the Union Leader's press statement relate wholly to problems faced by employees at the workplace and criticism of the management for failing to address the same. We do not think the Union Leader abused his office as union president for personal interest. His press statement was done in the name of NUFAM and for the benefit of the thousands of cabin crew members he represented with a view to improve workplace conditions. In the circumstances, we are of the opinion that the Union Leader's press statement amounted to participation in the lawful activities of a trade union and was not unreasonable, malicious, or knowingly or recklessly false. Accordingly, we agree with the High Court that the Union Leader's conduct cannot be labelled as misconduct which warrants dismissal.

Conclusion

[62] Following from the above, we answer the questions of law as follows:

Question 1

What is the extent of the protection afforded to an employee in respect

of a charge of misconduct by an employer in relation to the employee's acts carried out in his capacity as a Trade Union officer or member, having regard to the relevant legal principles including ss 4, 5 and 59 of the Industrial Relations Act 1967, s 8 of the Employment Act 1955, ss 21 and 22 of the Trade Union Act 1959 and the International Labour Organisation's "Right to Organise and Collective Bargaining Convention, 1949"?

Answer

An employee ought not to be dismissed for participation in trade union activities carried out in his capacity as a trade union officer or member, unless the activities are extraneous to trade union affairs, or were carried out maliciously, or in a manner which knowingly or recklessly disregards the truth.

Question 2

Whether the dismissal of a trade union leader for participating in trade union activities is an act of victimisation and unfair labour practice?

Answer

We do not answer Question 2 as it has been dealt with by the answer to Question 1.

Question 3

Is a trade union officer speaking on behalf of the trade union obliged under the law to exhaust the trade dispute processes under ss 18, 19 and 26 of the Industrial Relations Act 1967 before issuing a press statement on the nature of such trade dispute? If the said trade union leader has not exhausted the above process, is the issuance of the said press statement an act of misconduct justifying dismissal?

Answer

We answer the first part in the negative. We decline to answer the second part as it is set out in the provisions of the legislation and the Act itself.

Endnotes:

1. Section 4(1) of the IRA states that:

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.

2. Section 5(1) of the IRA states that:

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

(a) impose any condition in a contract of employment seeking to restrain the right of a person who is a party to the contract to join a trade union, or to continue his membership in a trade union;

(b) refuse to employ any person on the ground that he is or is not a member or an officer of a trade union;

(c) discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;

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

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

(ii) participates in the promotion, formation or activities of a trade union; or

(e) induce a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person.

3. Section 21 of the TUA states that:

No suit or other legal proceeding shall be maintainable in any civil court against any registered trade union or any officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

4. Section 22 of the TUA states that:

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

(2) Nothing in this section shall effect the liability of a trade union or any trustee or officers thereof to be sued in any court touching or concerning the specific property or rights of a trade union or in respect of any tortious act arising substantially out of the use of any specific property of a trade union

except in respect of an act committed by or on behalf of the trade union in contemplation or furtherance of a trade dispute

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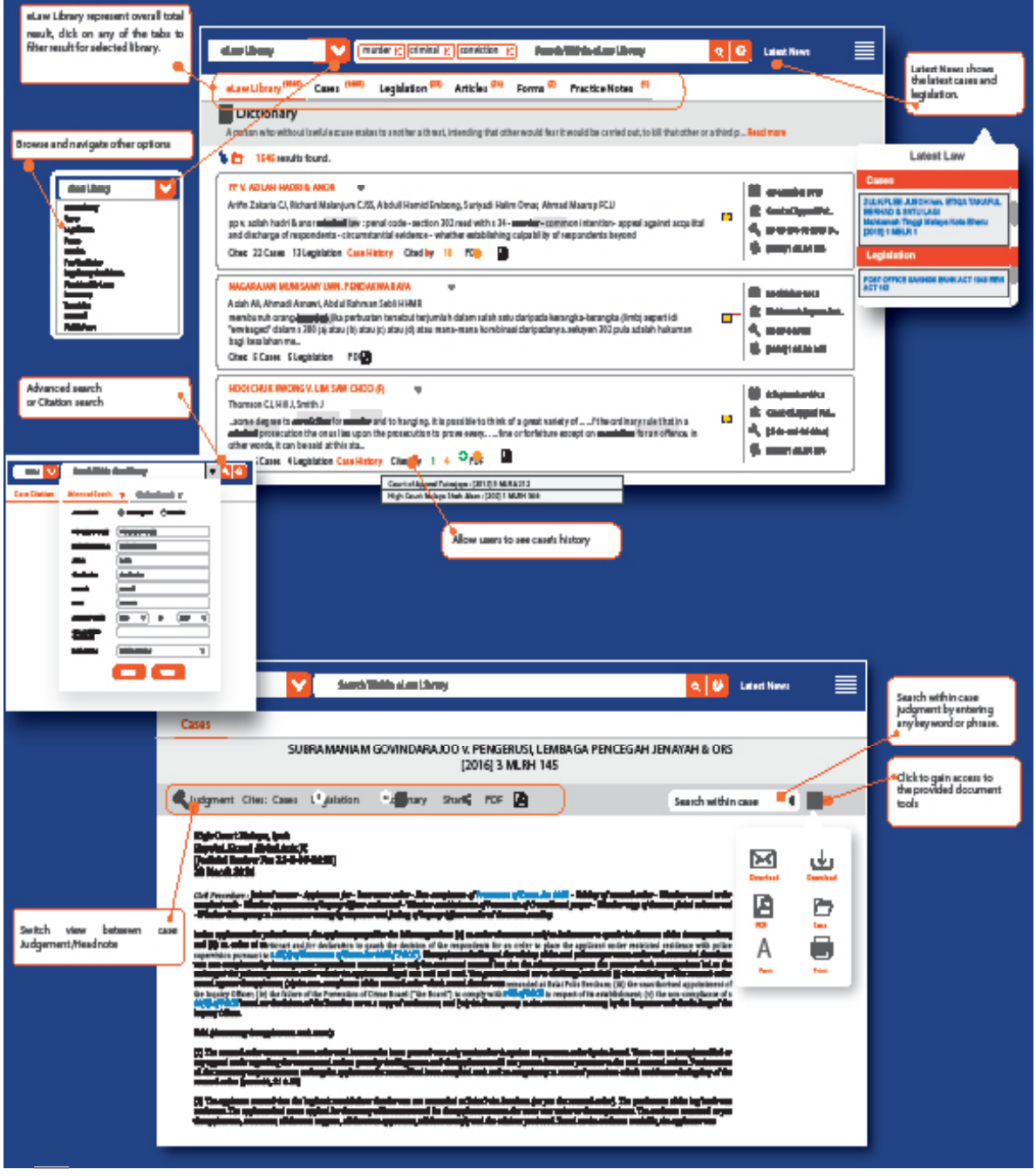

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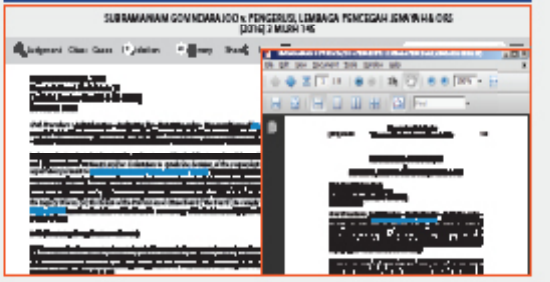

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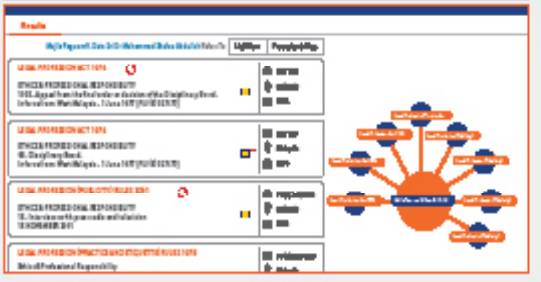

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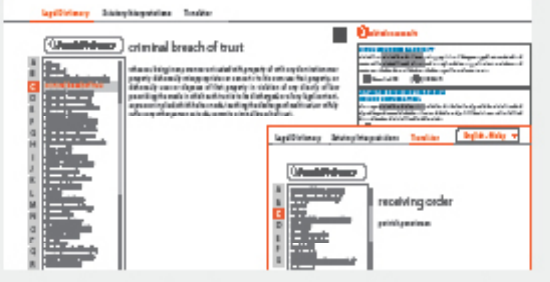

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