M Vasagam a/l Muthusamy v Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–39 OF 1999
FAIZA TAMBY CHIK J
12 DECEMBER 2002

Administrative Law *— Judicial remedies — Judicial review — Procedural impropriety — Allegation that first respondent's decision not to renew applicant's contract was procedurally wrong and unlawful — Whether first respondent's decision-making process can be called into question in application for judicial review before High Court*

Labor Law *— Employment — Contract of employment — Contract for fixed term — Non-renewal of contract on expiry of fixed term — Whether contract was genuine fixed term contract or a contract of employment — Whether first respondent had right not to renew the said contract upon expiry*

Labor Law *— Industrial Court — Award — Application to quash — Findings of fact made by Industrial Court based on credibility of witness — Whether High Court must accept findings of fact made by Industrial Court as true — Whether High Court should interfere*

By a letter dated 15 April 1993, the first respondent offered the applicant employment as its executive secretary for a period of one year with effect from 15 April 1993. At the first respondent's council meeting held on 8 January 1994, the first respondent resolved to extend the applicant's contract of employment for a further one year period from 15 April 1994 to 15 April 1995. The applicant was not consulted on the extension and no letter was given by the first respondent to the applicant confirming the extension of his contract of employment. The applicant continued working for the first respondent after his contract of employment expired on 15 April 1994. By a letter dated 17 April 1995, the first respondent informed the applicant that it had decided to renew the applicant's contract for a further year from 15 April 1995 to 15 April 1996. Then, by a letter dated 14 April 1996, the secretary of the first respondent informed the applicant that it was not renewing the applicant's contract of employment upon its expiry on 15 April 1996. No reasons were given in the said letter as to why the applicant's contract of employment would not be renewed. Being dissatisfied with his termination from service, the applicant lodged representations at the Industrial Relations Department to seek the remedy of reinstatement under s 20 of the Industrial Relations Act 1967. As the applicant's dispute with the first respondent could not be resolved, the Minister of Human Resources referred the applicant's dispute with the first respondent to the Industrial Court (the second respondent) for adjudication. The applicant's complaint at the Industrial Court was that the first respondent's decision not to renew the applicant's contract was

A procedurally wrong and that the said decision was made unlawfully. The Industrial Court reached the conclusion that even if there were such an irregularity, the ultimate issue to be determined was whether the contract was a genuine fixed term contract or otherwise. The Industrial Court held that there was a genuine fixed term contract and the first respondent had a right not to renew the said contract upon B expiry. The Industrial Court accordingly dismissed the applicant's action. This was the applicant's application for an order of certiorari to quash the award of the Industrial Court.

C **Held**, dismissing the application:

(1) The court was of the opinion that it should be slow to interfere with the findings of the Industrial Court made on the facts of the case based on the credibility of witnesses. In the instant case, the applicant's contention that the Industrial Court had erred in law when it doubted the testimony of the applicant's witness had no D place in an application for judicial review. It is trite law that finding of facts based on credibility of witnesses cannot be challenged. The applicant therefore should not challenge the Industrial Court's findings of facts, which were based on credibility of witnesses (see p 272B–D).

E (2) The applicant had failed to show how the Industrial Court committed an error of law in its decision making process on the issue of whether there was a genuine fixed term contract. The applicant's contention was that due to the nature of his duties as an executive secretary, his contract was not a genuine fixed term contract. This was a clear example of the applicant challenging a F finding of fact to quash the Industrial Court's award in the guise of an application for judicial review (see p 272E–G); *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v National Union of Teachers in Independent Schools, W Malaysia* (1988) 1 ILR 611 distinguished.

G (3) The applicant's complaint was that the decision of the first respondent not to renew the applicant's contract was procedurally wrong and that the said decision was made unlawfully. Procedural impropriety can only be a ground for judicial review where the procedural error was committed by the Industrial Court in making the award. Therefore, the first respondent's decision H making process could not be called into question in an application for judicial review before a High Court. It was only the Industrial Court's decision which can be challenged in such an application (see p 273A–D).

(4) The first respondent was under no obligation to state any reasons for the non-renewal of a fixed term contract as it was clear to both I parties that the fixed term contract was to expire by a specified date. The fact that a finding was reached that there was a genuine fixed term contract between the first respondent and the applicant,

the issue of whether or not there were good reasons not to renew the contract was irrelevant (see pp 273H–274B). A

(5) The burden was on the applicant to prove that the president of the first respondent had ulterior motive or harbored ill-will against him, which resulted in the non-renewal of his contract. Therefore, it was not for the first respondent to produce its president as a witness at the Industrial Court. The burden on the first respondent was limited to only establishing before the Industrial Court that the contract in question was a genuine fixed term contract and that the expiry of the same was not a termination of the applicant's services without just cause or excuse (see p 274D–G). B C

(6) The Industrial Court had correctly addressed the issue in this case by first determining whether the contract in question was a genuine fixed term contract or otherwise. Only if the Industrial Court made a finding that it was not a genuine fixed term contract but a contract of employment, would the Industrial Court then be required to ask whether there was a dismissal or not and if so, whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was a genuine fixed term contract, the question of there being a dismissal or not did not arise. Once it was established that there was a genuine fixed term contract, the worker's tenure with the relevant company ended upon the expiry of the fixed term (see pp 274H–275A). D E

[Bahasa Malaysia summary

Melalui sepucuk surat bertarikh 15 April 1993, responden pertama telah menawarkan pemohon pekerjaan sebagai setiausaha eksekutifnya untuk tempoh satu tahun bermula daripada 15 April 1993. Dalam mesyuarat jawatankuasa responden pertama yang diadakan pada 8 Januari 1994, responden pertama membuat resolusi untuk melanjutkan kontrak pekerjaan pemohon untuk tempoh satu tahun lagi daripada 15 April 1994 hingga 15 April 1995. Pemohon tidak dirujuk tentang lanjutan tersebut dan tiada surat telah diberikan kepada responden pertama kepada pemohon yang mengesahkan lanjutan kontrak pekerjaan beliau. Pemohon terus bekerja untuk responden pertama selepas kontrak pekerjaan beliau tamat pada 15 April 1994. Melalui sepucuk surat bertarikh 17 April 1995, responden pertama memaklumkan kepada pemohon bahawa ia telah membuat keputusan untuk memperbaharui kontrak pekerjaan pemohon apabila ia tamat pada 15 April 1996. Tiada apa-apa sebab diberikan dalam surat tersebut tentang kenapa kontrak pekerjaan pemohon tidak diperbaharui. Berasa tidak puas hati dengan penamatan beliau daripada perkhidmatan, pemohon telah membuat bantahan kepada Jabatan Perhubungan Perusahaan untuk memohon remedi bagi pengembalian kedudukan jawatan di bawah s 20 Akta Perhubungan F G H I

Perusahaan 1967. Oleh kerana pertikaian pemohon dengan responden pertama tidak boleh diselesaikan, Menteri Sumber Manusia telah merujuk pertikaian pemohon dengan responden pertama kepada Mahkamah Perusahaan (responden kedua) untuk diadili. Aduan pemohon di Mahkamah Perusahaan adalah bahawa keputusan responden pertama untuk tidak memperbaharui kontrak pemohon secara prosedurnya adalah salah dan bahawa keputusan tersebut telah dibuat menyalahi undang-undang. Mahkamah Perusahaan telah tiba kepada satu kesimpulan di mana jikapun terdapat satu luar aturan, persoalan utama untuk ditentukan adalah sama ada kontrak tersebut merupakan satu kontrak bertempoh tetap yang asli dan responden pertama mempunyai hak untuk tidak memperbaharui kontrak tersebut selepas ia tamat. Mahkamah Perusahaan sewajarnya telah menolak tindakan pemohon. Ini adalah permohonan pemohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan.

Diputuskan, menolak permohonan tersebut:

(1) Mahkamah berpendapat bahawa ia sepatutnya tidak cepat untuk campur tangan dalam penemuan Mahkamah Perusahaan yang dibuat dari fakta-fakta kes berdasarkan kebolehpercayaan saksi-saksi. Dalam kes semasa, hujah pemohon bahawa Mahkamah Perusahaan telah terkhilaf dari segi undang-undang bila mana ia meragui testimoni seorang saksi pemohon adalah tidak bertempat di dalam suatu permohonan kajian semula kehakiman. Ia adalah undang-undang tetap bahawa penemuan fakta berdasarkan kebolehpercayaan saksi-saksi tidak boleh dicabar. Pemohon oleh itu tidak sepatutnya mencabar penemuan fakta Mahkamah Perusahaan, yang berdasarkan kebolehpercayaan saksi-saksi (lihat ms 272B–D).

(2) Pemohon telah gagal menunjukkan bagaimana Mahkamah Perusahaan melakukan kesilapan undang-undang dalam membuat keputusan berhubung persoalan sama ada terdapat satu kontrak bertempoh tetap yang asli. Hujah pemohon adalah oleh kerana sifat tugas beliau adalah sebagai seorang setiausaha eksekutif, kontrak pekerjaan beliau bukanlah satu kontrak bertempoh tetap yang asli. Ini adalah satu contoh jelas di mana pemohon mencabar satu penemuan fakta untuk membatalkan award Mahkamah Perusahaan dalam bentuk satu permohonan untuk kajian semula kehakiman (lihat ms 272E–G); *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v National Union of Teachers in Independent Schools, W Malaysia* (1988) 1 ILR 611 dibeza.

(3) Aduan pemohon adalah bahawa keputusan responden pertama untuk tidak memperbaharui kontrak pemohon adalah mengikut prosedur yang salah dan bahawa keputusan tersebut telah dibuat

menyalahi undang-undang. Kesalahan tidak mengikut prosedur hanya boleh menjadi satu alasan untuk kajian semula kehakiman jika mana kesilapan prosedur tersebut telah dilakukan oleh Mahkamah Perusahaan dalam membuat award. Oleh itu, proses membuat keputusan responden pertama tidak boleh dipersoalkan dalam satu permohonan untuk kajian semula kehakiman di hadapan Mahkamah Tinggi. Hanya keputusan Mahkamah Perusahaan yang boleh dicabar dalam permohonan sedemikian (lihat ms 273A–D).

(4) Responden pertama tidak mempunyai sebarang obligasi untuk menyatakan sebab-sebab kontrak bertempoh tetap tidak diperbaharui kerana ia adalah jelas kepada kedua-dua pihak bahawa kontrak bertempoh tetap tersebut akan tamat pada tarikh yang ditetapkan. Hakikat bahawa satu penemuan telah dibuat di mana terdapat satu kontrak bertempoh tetap yang asli antara responden pertama dan pemohon, isu sama ada atau tidak terdapat sebab-sebab kukuh untuk tidak memperbaharui kontrak tersebut adalah tidak relevan (lihat ms 273H–274B).

(5) Beban terletak atas pemohon untuk membuktikan bahawa presiden responden pertama mempunyai motif lain atau mempunyai niat jahat terhadap beliau, yang menyebabkan kontrak beliau tidak diperbaharui. Oleh itu, ia bukan untuk responden pertama untuk mengemukakan presidennya sebagai saksi di Mahkamah Perusahaan. Beban yang terletak atas responden pertama terbatas hanya untuk membuktikan di hadapan Mahkamah Perusahaan bahawa kontrak yang dipersoalkan adalah satu kontrak bertempoh tetap yang asli dan penamatan kontrak tersebut bukanlah satu penamatan perkhidmatan pemohon tanpa sebab atau alasan yang adil (lihat ms 274D–G).

(6) Mahkamah Perusahaan telah dengan betul mengutarakan persoalan dalam kes ini dengan pertamanya menentukan sama ada kontrak yang dipersoalkan adalah satu kontrak bertempoh tetap yang asli atau sebaliknya. Hanya jika Mahkamah Perusahaan membuat satu penemuan bahawa ia bukan satu kontrak bertempoh tetap yang asli tetapi satu kontrak pekerjaan, barulah Mahkamah Perusahaan akan dikehendaki untuk bertanya sama ada terdapat satu pemecatan atau tidak dan jika ada, sama ada pemecatan tersebut dilakukan dengan sebab atau alasan yang adil. Di dalam kes semasa, satu penemuan telah dibuat bahawa kontrak berkaitan adalah satu kontrak bertempoh tetap yang asli, persoalan wujudnya pemecatan atau tidak, tidak timbul. Setelah dibuktikan bahawa terdapat satu kontrak bertempoh tetap yang asli, pemegangan jawatan pekerja dengan syarikat yang relevan tamat dengan luputnya tempoh yang ditetapkan (lihat ms 274H–275A).]

Notes

For cases on award of Industrial Court, see 8 *Mallal's Digest* (4th Ed, 2001Reissue) paras 1178–1214.

For cases on contract of employment, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 765–781.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 76–83.

Cases referred to

Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v National Union of Teachers in Independent Schools, W Malaysia (1988) 1 ILR 611 (distd)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 143) (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), 103

Industrial Relations Act 1967 ss 20, 33B(1)

P Jayasingam (*Zul Rafique & Partners*) for the applicant.

A Ramadass (*Ramadass & Assoc*) for the respondent.

Faiza Tamby Chik J: The brief facts of the case are as follows. The applicant was a former employee of Harrisons Malaysian Plantations Bhd until his retirement from service on 31 December 1990. After his retirement from Harrisons Malaysian Plantations Bhd, the applicant was employed by Tan Chong Motors & Sons Sdn Bhd as a public relations coordinator from 2 January 1991 to 30 September 1992. Whilst the applicant was employed with Harrisons Malaysian Plantations Bhd and Tan Chong Motors & Sons Sdn Bhd, the applicant held the position of Honorary General Secretary of the National Union of Commercial Workers from 23 January 1972 to 30 July 1992. Sometime in January or February 1993, the applicant was offered employment as Industrial Relations Manager of Cold Storage (M) Sdn Bhd at a salary of RM4,500 per month. At about the same time, the applicant was approached by the president and honorary secretary of the first respondent, to take up employment with the first respondent as its executive secretary at a salary of RM1,500 per month. The applicant chose to accept the offer of employment by the first respondent. By a letter dated

15 April 1993, the first respondent offered the applicant employment as its executive secretary with effect from 15 April 1993 for a period of one year at a salary of RM1,500 per month. Pursuant to the terms of the applicant's contract of employment, the applicant was entitled to a meal allowance of RM100 per month together with a contractual bonus of two months salary. The applicant was further informed that his terms and conditions of employment with the first respondent would be in line with the collective agreement between the first respondent and Resorts World Bhd together with any Industrial Court award governing the terms and conditions of employment. The duration of the applicant's employment with the first respondent was expressly stated as follows:

> Duration of employment
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> This appointment is for a period of one (1) year and subject to renewal at the discretion of the Resorts World Employees Union.

(See exh 'V-1' attached to the affidavit affirmed by the applicant on 25 March 1999.)

It is observed that at the first respondent's council meeting held on 8 January 1994, without consulting the applicant, the first respondent resolved to extend the applicant's contract of employment for a further one year period from 15 April 1994 to 15 April 1995. The applicant was not given any letter by the first respondent confirming the extension of his contract of employment from 15 April 1994 to 15 April 1995 and the applicant continued working for the first respondent after his contract of employment expired on 15 April 1994. By a letter dated 23 April 1994, the applicant was informed by the first respondent that he was given an annual increment of RM140 and that his salary would be adjusted to RM1,650 per month (see exh 'V-2' attached to the affidavit affirmed by the applicant on 25 March 1999). As the applicant's contract of employment was due to expire on 15 April 1995, the first respondent without consulting the applicant, informed the applicant vide a letter dated 17 April 1995 that it had decided to renew the applicant's contract for a further year from 15 April 1995 to 15 April 1996 (see exh 'V-3' attached to the applicant's affidavit affirmed on 25 March 1999). By a further letter dated 17 April 1995, the first respondent informed the applicant that it was not able to give the applicant an increment this time, but will consider giving the applicant the increase in food allowance of RM40 per month which was given to the staff of Resorts World Bhd under the new collective agreement (see exh 'V-4' attached to the applicant's affidavit affirmed on 25 March 1999). Despite the fact that the applicant's terms and conditions of service were in line with the collective agreement between the first respondent and Resorts World Bhd the first respondent failed to give the applicant a salary increase of RM100 and food allowance increase of RM40 which was payable to the staff of Resorts World Bhd under the terms of the collective agreement between the first respondent and Resorts World Bhd which came into force on 1 August 1994. Without any warning or notice, the secretary of the first respondent informed the applicant vide a letter dated 14 April 1996 that it was not renewing the applicant's contract of employment upon its expiry on

15 April 1996. No reasons were given in the said letter as to why the first respondent did not renew the applicant's contract of employment other than that the applicant's contract would expire on 15 April 1996 (see exh 'V-5' attached to the applicant's affidavit affirmed on 15 March 1999). By a letter dated 24 April 1996, addressed to the honorary acting secretary of the first respondent, six out of the ten council members who attended the executive council meeting of the first respondent held on 13 April 1996, said that they did not make any decision to not extending the applicant's contract at the meeting held on 13 April 1996 (see exh 'V-6' attached to the applicant's affidavit affirmed on 25 March 1999). Despite this letter dated 24 April 1996, signed by six out of the ten council members who attended the meeting on 13 April 1996, the honorary acting secretary of the first respondent did not withdraw his letter dated 14 April 1996 to the applicant. On the contrary, the honorary acting secretary of the first respondent forwarded the applicant a cheque for three months salary in lieu of notice together with the applicant's half-month's salary for April 1996 vide a letter dated 24 April 1996 (see exh 'V-7' attached to the applicant's affidavit affirmed on 25 March 1999). By a letter dated 30 April 1996, the applicant informed the first respondent that he was accepting the payment to him without prejudice to his rights to claim that he had been unfairly dismissed from service (see exh 'V-8' attached to the applicant's affidavit affirmed on 25 March 1999). Vide a circular resolution dated 22 July 1996, circulated by the honorary acting secretary of the first respondent, the executive council of the first respondent was required to signify their acceptance or rejection of the following:

> *Re: Mr M Vasagam's Position*
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> In accordance to Rule 12(5) of the Union Constitution, all Executive Council members are required to make a decision as to whether it is agreeable not to extend Mr Vasagam's fixed term contract due to the current financial constraints and current EXCO is capable to manage and run this Union independently and more effectively.

(See exh 'V-9' attached to the applicant's affidavit affirmed on 25 March 1999.)

Even the decision made pursuant to the circular resolution was illegal because the said circular resolution was not reported by the secretary to the executive council meeting and recorded in the minutes thereof, in clear breach of r 12(6) of the Rules and Regulations of the first respondent. None of these decisions which were made subsequent to the first respondent's letter dated 14 April 1996 dismissing the applicant from service, were communicated to the applicant. Being dissatisfied with his termination from service, the applicant lodged representations at the Industrial Relations Department to seek the remedy of reinstatement under s 20 of the Industrial Relations Act 1967. As the applicant's dispute with the first respondent could not be resolved, the honorable Minister of Human Resources referred the applicant's dispute with the first respondent to the second respondent for adjudication. The matter was registered as Industrial Court Case No 7/4-541/96. As required the applicant filed his statement of

case dated 3 February 1997 (see exh 'V-10' attached to the applicant's affidavit affirmed on 25 March 1999). In response, the first respondent filed its statement in reply dated 6 March 1997 (see exh 'V-11' attached to the applicant's affidavit affirmed on 25 March 1999). The first respondent subsequently filed an amended statement in reply dated 24 September 1997 wherein at para 13 the first respondent for the first time furnished a reason for the non-renewal of the applicant's contract of employment as follows:

> The Union refers to para 4 of the statement of case and denies the averments contained therein and puts the claimant to strict proof thereof. The Union avers and will so submit at the hearing that it did not renew the claimant's contract of employment as provided for in the contract of service entered into between the claimant and the Union in view of the fact that it felt that it was able to carry out its functions without the services of an executive secretary and in order to reduce its operating expenses and therefore the question of dismissal without just cause or excuse does not arise. The Union avers will so submit at the hearing that it exercised its right under the contract entered into with the claimant not to renew the contract, the facts and circumstances leading to which are as follows:

(See exh 'V-12' attached to the applicant's affidavit affirmed on 25 March 1999.)

The matter came up for hearing on 29 and 30 September 1997, 18 and 19 August 1998, 30 September 1998, 17 December 1998, 27 January 1999 and 8 February 1999. During the course of the proceedings before the second respondent, both parties produced exhibits (see exh 'V-13' attached to the applicant's affidavit affirmed on 25 March 1999). The first respondent's solicitors produced an outline of their submissions in support of their oral submissions (see exh 'V-14' attached to the applicant's affidavit affirmed on 25 March 1999). Vide Award No 91 of 1999 dated 1 March 1999, the second respondent handed down a decision against the applicant and dismissed the applicant's action (see exh 'V-15' attached to the applicant's affidavit affirmed on 25 March 1999).

In handing down his award, the learned chairman held that the applicant's contract of employment was a genuine fixed term contract of employment and therefore the first respondent has a right to not renew the said contract upon expiry. Section 33B(1) of the Industrial Relations Act 1967 has enacted a privative clause precluding certiorari in respect of any award, decision or order of the Industrial Court under the Act. However, it was held by the Supreme Court in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 that a privative clause of this nature is not operative in the face of jurisdictional defect or fraud and has no effect at all as regards judicial review. A decision of the Industrial Court could be subjected to certiorari proceedings. It will be proper to treat a decision-maker's task of fact finding and the drawing of factual inferences from established facts as falling within the jurisdiction of the decision-maker unless the decision-maker has reached absurd results or reached results absurdly or the decision-maker had acted upon an incorrect basis of fact. Their decisions are susceptible to judicial review not only on ground of procedural impropriety, illegality and irrationally but that the

courts are permitted to scrutinize such decisions not only for process but also for substance (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 143). In *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363, it was held that (at p 371):

> In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

In *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600, the Court of Appeal has once again emphasized the role of the High Court in judicial proceedings, in relation to findings of facts, as follows (at pp 612–613):

> Appellate inference
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> Mr Sivabalah in supporting the learned judge's judgment has relied on two decisions of this court. The first of these is *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 where we upheld the decision of the High Court quashing an award on the ground the Industrial Court had failed to take into account certain documents that were relevant and material to the decision-making process. The second is *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372 also a case of constructive dismissal, being a resignation under duress. It was held in that case that the High Court had not exceeded its jurisdiction by reviewing an award for substance.
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> Our response to counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that neither *Amanah Butler* and *Swedish Motor Assemblies* were cases that turned upon credibility of evidence. Such findings are in our judgment immunized from judicial review: *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 2 AMR 235). Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for certiorari inquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witness. As was observed by Mohd Azmi FJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 757:
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> > 'In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100).'

> It is ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon this court. Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise.

I am of the opinion that this court should be slow to interfere with the findings of the Industrial Court made on the facts of the case based on the credibility of witnesses. It would be pertinent to note that the applicant's entire submission is based on an attack of the findings of facts made by the Industrial Court based on the credibility of witnesses. The applicant contends that the Industrial Court erred in law when it doubted the testimony of Mr Ong Hock Lee (who was a witness for the applicant) who stated in court that he informed the applicant that he 'could work for as long as he liked' with the first respondent. I think such a contention has no place in an application for judicial review, where it is trite law that findings of facts based on the credibility of witnesses cannot be challenged. The Industrial Court expressly stated that the testimony by the abovesaid witness was doubted and therefore his version of the facts were rejected. The applicant therefore should not challenge the Industrial Court's findings of facts which were based on credibility of witnesses.

The applicant also submitted by making a bare assertion that his contract was 'not a genuine fixed term contract as a result of the nature of his duties as an Executive Secretary'. However, the applicant failed to show how the Industrial Court committed an error of law in its decision-making process on the issue whether there was a genuine fixed term contract. The applicant failed to show under which head of grounds for judicial review the Industrial Court's alleged error of law falls under, ie whether in the category of procedural impropriety, illegality or irrationality. The applicant instead contends that on the facts of the case, due to the nature of the applicant's duties as an executive secretary, his contract was therefore not a genuine fixed term contract. I am of the view that this contention is a clear example where the applicant banks on challenging a finding of fact to quash the Industrial Court's award in the guise of an application for judicial review. It is observed that the Industrial Court had examined at length on the facts of this dispute on whether the contract concerned was a genuine fixed term contract. The applicant relied on the case of *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v National Union of Teachers in Independent Schools, W Malaysia* [1988] 1 ILR 611 ('the *Han Chiang*'s case'). It is noted that this case was also relied on at the Industrial Court and in fact mentioned in its award. It is observed that in the *Han Chiang*'s case the Industrial Court made a finding that the system of fixed term contracts in the school was employed not out of a genuine necessity but as a means of control of the teachers concerned. The intention of the school was to rid itself of the union, which was why the school relied on the fixed term contracts to flush out the teachers who were members of the union. The *Han Chiang*'s case therefore can be distinguished from the instant case as in the instant case, the Industrial Court upon examining the facts of the case found that there was a genuine fixed term contract.

A The applicant submitted that the decision of the first respondent to not renew the applicant's contract of employment was procedurally wrong and hence in the circumstances, the said decision was made unlawfully. I think the question that arise is whether such a ground is valid in the first place in seeking judicial review over the decision of the Industrial Court? If the 'procedural impropriety' complained of, is attributed to the Industrial B Court, then it is accepted that it is a valid ground to consider in the instant application. However, this is not the case here. The applicant complains of procedural error not on the part of the Industrial Court but of the first respondent. Procedural impropriety can only be a ground for judicial review, where the procedural error was committed by the Industrial Court C in making the award. It is the decision-making process of the Industrial Court which is to be focused on in an application for judicial review for the purpose of quashing its award. In *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351 ('*Aliran*'s case'), the three categories of grounds on which judicial review may be applied for are illegality, irrationally and procedural impropriety. It is clear from the *Aliran*'s case, D that it is the administrative actions of an administrative tribunal which is subject to judicial review under the abovesaid grounds. Therefore the first respondent's decision-making process cannot be called into question in an application for judicial review before a High Court. It is only the Industrial Court's decision which can be challenged in such an application. I think this ground is therefore misconceived and is hereby struck off. The first E respondent did not commit any procedural error in its decision to not renew the applicant's contract of employment as alleged. This complaint was also raised by the applicant at the hearing before the Industrial Court and the Industrial Court reached the conclusion that even if there were such an irregularity, the ultimate issue remains whether or not the contract was a F genuine fixed term contract, and that since there was a genuine fixed term contract, whatever irregularities complained of has no bearing on the question of the claimant's contract coming to an end. As there being a valid and genuine fixed term contract, the facts remains that the said contract would expire once it comes to an end.

G The applicant's third ground is that the learned chairman appeared to have accepted the first respondent's reason of terminating the applicant's contract of service as a valid reason for the non-renewal of the applicant's contract of employment despite admission by the first respondent that the first respondent was not alleging that the applicant's job was redundant. The applicant also contended that the learned chairman failed to appreciate H that the reason given by the first respondent for terminating the applicant's contract was an unlawful reason. It is observed that the first respondent is not disputing the fact that in the first respondent's letter of non-renewal of contract dated 14 April 1996, the first respondent did not state any reason for the said non-renewal of the applicant's contract. In the first place, I think the first respondent is under no obligation to state any reasons for the non- I renewal of a fixed term contract as it was clear to both parties that the fixed term contract was to expire by a specified date. The reason for the non-renewal was nevertheless minuted in the meeting held by the first

respondent on 13 April 1996. It is noted that the first respondent's reason for not renewing the said contract was because it was able to carry on its functions without the services of the executive secretary, having had the benefit of the first respondent's expertise in union matters. The Industrial Court was of the view that this reason was good enough for not renewing the applicant's contract. It is also noted that the applicant's contention that the reason advanced by the first respondent for the non-renewal of the applicant's contract implied redundancy was rejected by the Industrial Court itself. I come to the conclusion that the fact that a finding was reached and that there was a genuine fixed term contract between the first respondent and the applicant would make the whole issue of whether or not there were good reasons to not renew the said contract irrelevant.

The applicant's fourth ground is that the Industrial Court had erred in law when it held that the failure of the first respondent to call the president of the first respondent as a witness to rebut the applicant's testimony. This was of little consequence in light of the finding of fact that the applicant's contract of employment was a genuine fixed term contract. The applicant contended that the first respondent's president harbored ill-will towards him and that therefore he had ulterior motives for non-renewal of his contract. The burden was therefore on the applicant to prove the same. The burden on the first respondent was limited to only establishing before the court that the contract in question was a genuine fixed term contract and that therefore the expiry of the same is not a termination of the applicant's services without just cause or excuse. Section 101(1) of the Evidence Act 1950 states that:

> (1) Whosoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Section 103 of the Evidence Act 1950 also states that the burden of proving any particular fact lies on the person who wishes the court to believe in its existence. Hence, the burden is clearly on the applicant to prove that the president of the first respondent had ulterior motive or harbored ill-will against him resulting in the non-renewal of his contract. Therefore it is not for the first respondent to produce the said president as a witness at the Industrial Court. The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. I am of the opinion that the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was a genuine fixed term contract (see pp 3 and 4 of the said award). If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once

A it established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company.

The applicant's fifth ground is that the second respondent failed to award the applicant contractual benefits due to the applicant which the first B respondent failed to pay upon the termination of the applicant from service. As I stated earlier, this ground does not even qualify as a ground to be raised in an application for judicial review. The Industrial Court have made its decision correctly upon having examined the facts of the case and applying the right approach by first determining the nature of the contract between the applicant and the first respondent. Having found the contract to be a C genuine fixed term contract, the Industrial Court rightly disposed of the dispute without going into the irrelevant question whether there was a dismissal and whether it was with just cause or excuse.

For these reasons the application is dismissed with costs.

Application dismissed.

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Reported by Lim Lee Na

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