SECTION 59 INDUSTRIAL RELATIONS ACT 1967 - THE FORGOTTEN REMEDY

Section 8(b) of the Employment Act, 1955 provides that nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract to participate in the activities of a registered trade union, whether as an officer of such union or otherwise. This is further reinforced by section 7, which provides that any term or condition in a contract of service which is less favourable to an employee governed by the Employment Act than a term or condition prescribed by the Act itself shall be void and of no effect to that extent, and the more favourable provision of the Act is to be substituted therefor. The underlying objective of these provisions is the protection of employee rights with regard to unionisation and participation in the activities of trade unions, as required, for example, under the ILO's Freedom of Association and Protection of the Right to Organise and Collective Bargaining Convention 1948.[1]

The above protection receives further fortification under the Industrial Relations Act 1967, when under section 4(1) it is provided 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.

1 Malaysia is a signatory to Convention No 98, on the Right to Organize and Collective Bargaining.

In theory therefore, it would appear that Malaysian workmen who are members or officers of trade unions are protected against employer acts of hostility towards their involvement with trade unions. The main statutory provision which seeks to punish acts of victimisation and unfair labour practice is section 59(1) of the Industrial Relations Act, 1967 (hereinafter referred to as the 'IRA'), which makes it an offence for an employer 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 following circumstances, *inter alia:*

i) that the workman is, or proposes to become, an officer or member of a trade union or of an association that has applied to be registered as a trade union;

ii) that the workman is entitled to the benefit of a collective agreement or award;

iii) that he has appeared or proposes to appear as a witness, or has given or proposes to give evidence in any proceeding under the Act;

iv) that, being a member of a trade union which is seeking to improve working conditions, he is dissatisfied with such working conditions;

v) that the workman is a member of a trade union which has served an invitation upon the employer to enter into collective bargaining; or

vi) that he has absented himself from work without leave for the purpose of carrying out his duties or exercising his rights as an officer of a trade union, where he had applied for leave previously before he absented himself, but leave was unreasonably deferred or withheld.

Subsection (2) to section 59 then states that an employer who contravenes any of the provisions of subsection (1) above 'shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding 2000 ringgit or to both'.

The above provision bears marked similarity with the current section 334(1) of the Industrial Relations Act 1988 (Commonwealth) of Australia, where it is stated, *inter alia:*

> An employer shall not dismiss an employee, injure an employee in his or her employment, or alter the position of an employee to the employee's prejudice, because the employee:

i) is or has been, or proposed, or has at any time proposed, to become an officer, delegate or member of an organisation or an association that has applied to be registered as an organisation;

ii) has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an organisation of which the employee is a member would be a party;

iii) is entitled to the benefit of an award or an order of the Commission;

iv) has appeared or proposes to appear as a witness, or has given or proposes to give evidence in a proceeding under the Act;

v) being a member of an organisation that is seeking better industrial conditions, is dissatisfied with his or her conditions; or

vi) has absented himself or herself from work without leave if the absence was for the purpose of carrying out duties or exercising rights as an officer or delegate of an organisation, and the employee applied for leave before absenting himself or herself and leave was unreasonably refused or withheld.

Section 334 in its current form was enacted to replace the former section 5 of the Conciliation and Arbitration Act 1904, which had applied immediately prior to the 1988 legislation.[2] The Malaysian provision has obviously been borrowed from the Conciliation and Arbitration Act of 1904, but it will be shown that in spite of the similarities in the method of protection, judicial application of the law in Australia and Malaysia differs markedly. In fact, in Malaysia, the court as well as industrial lawyers seem to have overlooked the very existence of section 59 when they are faced with cases of victimisation or unfair labour practice, so much so that in practice, it might be argued that there is little protection against acts of victimisation against Malaysian employees who are members or officers of trade unions. This paper will focus only on one form of victimisation, namely, dismissal.

A. Dismissal on account of being a member or officer of a trade union

As a form of victimisation, dismissal is the gravest, but the most difficult to substantiate. Unlike forced resignations from trade unions or the contracting out of unionised services which, arguably represent relatively clear instances of an employer's attitude towards unionisation, dismissal of an

2 Butterworth's Federal Industrial Law Service 1995, p 3863.

employee may not be reflective of any attitude regarding unionisation or otherwise. Dismissal may always be effected by an employer in the first instance in his capacity as an employer holding the right to hire and fire. The law has, however, evolved certain limitations on this right in order to ensure that employees are adequately protected from being dismissed arbitrarily. In Malaysia dismissal may be effected only upon proper cause.[3] Further, an employee is given the right to challenge his dismissal if he considers that he has been dismissed 'without just cause or excuse'.[4] The principle of just or proper cause therefore has been enacted purportedly with the interest of the employee in mind. While the efficacy of this principle may be advanced in most cases of dismissal, its value as a protective instrument in cases where an employee has been dismissed for his trade union activities or membership leaves much to be desired. The following cases will tend towards the following conclusions: (i) it is relatively easier for an employer to show or conjure a proper cause for dismissal than it is for a trade union to prove victimisation; and (ii) the employer's case is further assisted by the way in which the court examines the evidence and the burden of proof, that is, it is for the union to prove victimisation and not for the employer to prove its absence.

The Industrial Court has reiterated the general principle applicable in cases of dismissal in *Chartered Bank, Kuching* v *Kuching Bank Employees Union*,[5] where the court affirmed that dismissal is a managerial function with the *bona fide* exercise of which a tribunal will not interfere. Where, however the dismissal is challenged the tribunal could always intervene if it is shown that there has been want of good faith, victimisation, unfair labour practice, a violation of the principles of natural justice or where the decision to dismiss is baseless or perverse. In the above case, the employee concerned was dismissed by the Bank for being habitually late for work and this conduct of his had persisted in spite of two written warnings given to him by the Bank. This, together with other acts of misconduct which the case did not specify rendered the employee in breach of his 'implied duties to be diligent in his attendance at office and to give satisfaction to his employers'. The union alleged that the employee had been singled out for dismissal due to his active involvement in organising the union. The court dismissed the union's allegations of victimisation and upheld the dismissal based on the uncontroverted evidence that the dismissal was a *bona fide* exercise of the function of management. Counsel for the union had suggested that the Bank was withholding or suppressing

3 IRA, s 5(2)(a).
4 S 20(1).
5 [1965-1967] MLLR 28.

information which was vital to the employee's case, but the court expressed its 'extreme displeasure' at such a suggestion. The union, therefore, had failed to prove that victimisation had positively occurred. It is not an organisation of equal standing with the Bank, who are the employers. The Bank had all the information regarding its employees which it could classify as confidential and which it could choose not to disclose. In most cases therefore, the union is left with the proof of victimisation based on a gathering of facts in its favour and from which it hopes the court would draw an inference of victimisation.

Thus, in *Syarikat Securicor (M) Sdn Bhd* v *Kesatuan Pekerja-Pekerja Securicor (M) Ltd*,[6] two employees of the company were dismissed on the ground of gross misconduct, in that they were guilty of gross negligence while in the performance of their duties as security guards, which led to the theft of articles in the building which they were supposed to guard. The union alleged that the dismissals were part and parcel of a scheme to get rid of active trade union members, and that the dismissals were predesigned by the employer or his agents because the incidents which led to their dismissals were similar in character and happened at short intervals. The court noted that the implication of this plea was that the company had pre-designed the theft in order to secure a ground for the dismissal of the employees for their trade union activities. The court noted the seriousness of the allegation and put the union to strict proof thereof. The union, of course, was not able to prove that the employer had predesigned the thefts as an act of victimisation against the employees who were active trade union members. This *lacuna*, therefore, left the court with no other fact to consider other than the employees' supposed negligence in guarding the articles concerned. The court recognised that the employer might well be motivated by a desire to dismiss a servant because of his trade union activities, but in this case the court refused to question the employer's right to dismiss due to the presence of an apparent reason which justified the dismissal. The court's decision was based on the presence of an immediate cause for the dismissal, that is, an act of gross misconduct in the discharge of duty.[7]

In *Kesatuan Pekerja-Pekerja Alat Pengangkutan dan Sekutu* v *Kilang Pembinaan Kereta-Kereta Sdn Bhd, Johore Bahru*,[8] the employee was dismissed for insubordination in that he had shown total disrespect to his superior officer when, in anger, he had banged the table with his right

6 [1970-1972] MLLR 107.

7 See also, *TWU Fed of Malaya* v *Sri Jaya Transport Co (PTM) Bhd* [1968-1969] MLLR 185, where the court also refused to hold that the claimant was dismissed on a trumped-up charge.

8 Award No 54 of 1980, p 139.

hand in front of his superior. The employee was the chairman of the house committee of the union in the company. In this capacity the employee used to bring work problems affecting union members to the departmental head orally and on an ad-hoc basis. On one occasion the employee and the union treasurer went to see the departmental head regarding the problem of a fellow workman. It was at this meeting that the employee was alleged to have lost his temper and committed the act of insubordination towards his superior, for which the grave punishment of dismissal was meted out after an inquiry. The union of course alleged that the dismissal was an act of victimisation for his trade union activities.

At the hearing, the Industrial Court was more concerned with evidence of the employee's acts of insubordination than it was with the fact that the employee could have been victimised for being too involved with his duties as a trade union official. The court suggested that as a trade union official the employee was championing a non-existent cause, only because the employee on whose behalf he was acting did not himself make any complaint to management regarding his work. It would appear that the court had no understanding whatsoever of the purpose of a trade union, for it is only to be expected that employees would not complain directly to management when there is a union to act on their behalf. Secondly, the court seemed to be more deeply affected by the employee's act of banging the table top than the employers themselves. The court examined the evidence relating to this singular act with a certain amount of detail and scrutiny and expressed its dissatisfaction that as the employee was wearing a ring on one of his fingers the effect of the employee's act in banging the table top caused an unexpectedly loud sound, and that there was no necessity for this. This act, according to the court, constituted such an act of insubordination that no lesser punishment may be justified except that of dismissal. In the same breath, the court, as a 'court of equity' expressed its sympathy with the claimant for the predicament that has befallen him 'more as a result of his show of enthusiasm as a trade union official than any shortcomings on his part in his job performance as an employee'. However, the court stated that the employee's enthusiasm was rather misplaced, for -

> An employee who holds office in a trade union must [not] lose sight of the fact that he is an employee first and a union official second. . . insubordination on the part of an employee undermines the ordinary system of conduct and discipline within an undertaking and amounts to a breach of the implied obligations of the employee to be subjected to the system of conduct governing employer/employee relationship and also the *accepted norm* of relationship between an employee and that of his superior officer. Where this implied obligation is breached the supervisory position of the superior officer is undermined and

> this could lead to indiscipline thereby jeopardising the projected result of the undertaking.[9]

The above cases illustrate the shortcomings apparent from an evidentiary perspective in cases of victimisation and unfair labour practice. Where such acts have led to a dismissal of the workman the court's inquiry seems to centre around the cause of the dismissal, that is, whether there was proper cause for the complainant to have been dismissed at the time the employer took action to so dismiss him. If the answer to this is in the affirmative, it would appear that it would be immaterial whether an inference of victimisation could be drawn from surrounding circumstances. The shortcoming here can be partly attributed to a defect in the legislative provisions themselves. While Malaysia has obviously borrowed the substantive provision relating to protection against victimisation and unfair labour practice from Australia, the legislature had omitted from inclusion in the Malaysian Act, an important provision which is found under the Australian Act without which, it is submitted, the entire provision becomes quite meaningless. This provision relates to the onus of proof, where it is provided, under section 334(6) of the Australian IRA, 1988, that in a prosecution for an offence under the provision, 'it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge'.[10] This provision actually casts the burden upon the defendant, or employer against whom a charge of victimisation has been brought, to prove that his action was not motivated, whether in whole or in part, by the employee's trade union activities or the fact that he was an officer or member of a trade union. It is only when the employer manages to do this that he will have a defence to the prosecution. The Australian courts have decided that what this entailed upon a defendant was that he had to establish, on a balance of probabilities, that neither the employee's membership of a trade union nor his attempts to improve the conditions of his employment either actuated, or was a 'substantial and operative reason' for his dismissal.

In *Bowling* v *General Motors-Holdens Pty Ltd*,[11] the employee alleged that he had been dismissed because of his activities as a shop steward, but the official reason given for the dismissal by the employer was the 'unsatisfactory attitude to the job and to supervision'. The employee

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9 At p 144, emphasis added.
10 Previously s 5(4) of the Conciliation and Arbitration Act 1904.
11 (1975) 8 ALR 197.

concerned was known to be regularly late for work, had taken excessive time off, and as an assembly-line worker in an automobile plant, had been guilty of either fitting wrong components into vehicles or not fitting components properly. The Directors of the company were made aware of the employee's various acts of misconduct, but the dismissal was finally made on February 5, 1975. At this time, there was quite considerable industrial activity taking place at Elizabeth, South Australia, where the company was sited.

The case was brought under section 5 of the then prevailing Conciliation and Arbitration Act, and the court explained Parliament's rationale behind the enactment of section 5(4), the onus of proof provision, that is, that in dismissing an employee ostensibly for some default in service or some other reason the employer may, in fact, have been actuated solely or partly by the circumstance that the employee was a member, officer or delegate of a union -

> It proceeds upon the basis that the real reason for a dismissal may well be locked up in the employer's breast and impossible, or nearly impossible, of demonstration through ordinary forensic processes. Accordingly, by section 5(4), Parliament made special provision as a result of which, unless, in a case like this one, the employer 'proves' that it was not actuated by the circumstance that the dismissed employee was a shop steward, the employer must be convicted with the consequence that in law there is established against him the allegation that he was so actuated. What is required for the purposes of the defence is a finding that the court is satisfied, as on a balance of probability, that the informant's position as shop steward was not a substantial and operative factor influencing it to dismiss the informant.[12]

At the time, the two Directors who made the decision to dismiss the employee were not called to give evidence, and neither were crucial telexes relating to the employee's dismissal put in evidence. The absence of direct evidence caused the court to draw inferences from surrounding circumstances, that is, that the recommendation for dismissal was only accepted by the Directors on February 5, on the day that broadcasts and news items concerning the employee's alleged statements about sympathy for saboteurs and criticism of the defendant's attitude to its workers were reported to the Head Office. The court stated that:

> It is therefore permissible to contemplate that it was this last item which turned the scale. It was calculated to intensify any anxieties that the Directors might have had about the informant as a shop steward at Elizabeth...also, in the context of the industrial troubles of the period it is not to be ignored that a blow against a shop

12 *Per* Smithers & Evatt JJ, at pp 204 - 205.

> steward would be a blow against the union and the current campaign. It would be unreal to ignore the probability that the defendant was well aware that industrial advantages might well follow the striking down of an active shop steward...This is not to say that the directors did think in this way. But keen, rational businessmen could well have thought along these lines. It is not to be ignored that if they did, then their failure to give evidence would be explained.[13]

Having regard to the above observations, and there being no direct evidence of what actually motivated the Directors to dismiss the employee, the court concluded that it was unable to find, on a balance of probabilities, that in dismissing the informant the defendant was not actuated by reason of the fact that he was a delegate of the union, and the defendant was therefore convicted.[14]

The onus of proof provision has, therefore, been quite correctly attributed to be reflective of Parliament's intention in safeguarding organisations and ensuring their workability and effectiveness.[16] It disallows the employer from establishing a 'real' or sole reason for dismissing an employee because it accepts the fact that there can be more than one 'real' reason for a decision to dismiss an employee. Hence, it requires the employer to distinguish the 'operative' reason for the dismissal through his negativing the possibility of the employee's involvement with a trade union being a substantial and operative factor for the dismissal.[16] If the facts of *Bowling* were to arise in Malaysia, it is doubtful, based on the way in which the Malaysian courts have examined the issue in the cases cited, that the court would hold the employee's dismissal as unfair because of the clear evidence of what the court would have called grave misconduct. The Malaysian courts therefore, were not applying any principle which would protect employees from being victimised as a result of their trade union membership or activities, but on the contrary, they were applying principles which the court would normally apply in cases of dismissal, which is to seek out whether there is 'proper cause' for such dismissal.[17] It is significant to note that in none of those cases cited was there a reference made to section 59 IRA, the main provision which seeks to protect employees from acts of victimisation by the employer. Only general and vague references were

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13 *Per* Smithers & Evatt JJ, at pp 208 - 209.

14 Upheld on appeal, *GMH* v *Bowling* (1976) 12 ALR 605 (HC).

15 *Pearce* v *WD Peacock & Co Ltd* (1917) 23 CLR 199, 205, (Isaacs J); *The Queen* v *Sweeney & Anor, Ex parte Northwest Exports Pty Ltd* (1980 - 1981) 147 CLR 259, 265, (Gibbs CJ).

16 *Lewis Construction Co Pty Ltd* v *Martin* (1986) 70 ALR 135, 139.

17 IRA, s 5(2)(a) - an employer shall not be precluded from 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.

made to what could be identified as the 'concept' or idea of victimisation, rather than the concrete formula with which the issue of victimisation might be addressed. The absence of an onus of proof provision in section 59 would clearly nullify its usefulness as a provision designed to protect employees from acts of victimisation and unfair labour practice. If members and officials of trade unions cannot exercise their function without the threat of dismissal on account of some alleged misconduct or other that could not be easily controverted, it would greatly hamper the proper and efficient functioning of the trade union.

There have been cases where allegations of victimisation made by the union have succeeded. However, it may be argued that the only reason why these cases have succeeded is that the evidence which goes to show victimisation is so strong that victimisation becomes an obvious conclusion from the facts, or conversely, that an employer's attempt to cloud his own victimisation tactics have failed. In *KFC Technical Services Sdn Bhd* v *Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan*,[18] the union sought recognition from the company on October 29, 1986 and the company wrote to the Director General of Industrial Relations (DGIR) inquiring whether its workers could be represented by the union. The reply from the DGIR was in the affirmative. On November 28, 1986 the company terminated the services of 19 employees who were members of the union citing retrenchment due to the closure of its maintenance services as the reason. On the advice of the Industrial Relations Department the 19 employees were reinstated on December 15, 1986. On February 24, 1987, the company dismissed all the 29 employees in its employment giving the reason that the company had found it necessary to wind up the maintenance division. Ten employees of the company who were not members of the union continued in employment with a subsidiary of the company. The union contended that there was no *bona fide* winding up or closure of the company, that there was no good or valid business reason for the dismissal and that the retrenchment was a cover for victimisation of the claimants who were union members. Members of the court were of one mind that the whole exercise of the company was tainted by *mala fides* compounded with management ineptitude:

> No reasonable group of persons who have become aware of the series of events (which are undisputed facts), . . . as well as the circumstances elicited as surrounding those facts, would be so naive as to believe that the dismissals of the claimants were based purely on genuine closure and retrenchment for business reasons or that the said dismissals were not coloured by ulterior motives as the company would have it believed.[19]

18 [1989] 1 ILR 535.
19 At p 538.

Similarly, in *Autofilter Industries Sdn Bhd* v *Kesatuan Pekerja-Pekerja Perusahaan Alat-alat Pengangkutan dan Sekutu*,[20] the claimant was dismissed by the company on grounds of unsatisfactory work performance, absenteeism and being late for work. The claimant contended that the dismissal was without just cause or excuse and/or an unfair labour practice. It was established in evidence that the claimant was the most active member of the union, and a significant fact was that the claimant was dismissed on February 28, 1988, four days after the company received the union's claim for recognition. The court began by carefully examining whether or not the employer's allegations regarding the employee's misconduct had been made out, and it was only after satisfying itself that the employer's allegations could not be supported that the court finally appeared to have accepted the fact that the employee's dismissal could amount to an unfair labour practice.

B. Remedies under section 59

Section 59 is principally a penal provision - an employer who contravenes any of its provisions shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand ringgit or to both.[21] However, the court is also empowered to order an employer who has been convicted of an offence under the provision to pay the workman the amount of any wages lost by him and also, where appropriate, to direct the employer to 'reinstate the workman in his former position or a similar position'.[22] The general remedy of reinstatement upon a dismissal effected without just cause or excuse is also available under section 20, but, it is submitted, an employee whose dismissal was in consequence of a victimisation would be better protected, and the employer subject to greater deterrent against such acts, if the case could have been successfully brought under section 59 instead of section 20.

The other procedure which could be invoked by the employee is that under section 8 of the IRA, where a complaint of any contravention of sections 4, 5 or 7 may be lodged in writing with the Director General. The Director General is empowered to take such steps or make such inquiries as he considers necessary or expedient to resolve the complaint, and where the complaint is not resolved, the Director General is to notify the Minister.[23] The Minister may, if he thinks fit, refer the complaint to the court

20 [1992] 1 ILR 34.
21 IRA, s 59(2).
22 S 59(3).
23 S 8(2).

for hearing.[24] In conducting a hearing, the court may 'make such award as may be deemed necessary or appropriate'.[25] The Industrial Court's examination of the burden of proof upon an allegation of victimisation under section 8, however, continues to be orthodox:

> The mere fact that there is a union and that the employee is a member or an office bearer of the union is insufficient to establish a plea of breach of section 5(1) or section 7 of the Act [IRA]. To succeed, the claimant must prove a direct causation between the act prohibited by section 5(1) and section 7 and his membership or post in the Trade Union or his activities in the Trade Union. Allegations of victimisation are easily made but not so easily substantiated...[26]

It is time, therefore, that industrial lawyers and the Industrial Court examined closely the real possibility of invoking section 59 of the Industrial Relations Act to enable it to effectively provide the remedy to employees for which it was intended to provide. The absence of a burden of proof provision in section 59 ought not to be viewed as being prohibitive of its usage; it is a set-back which could be cured by the creativity of lawyers and judges in invoking the correct precedents with which such a *lacuna* in the legislation could be filled.

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24 S 8(2A).
25 S 8(3).
26 *Harris Solid-State (M) Sdn Bhd* v *Muthaiah a/l Nachimuthu*, Award No 317 of 1996.