International Law Office

LITIGATION - MALAYSIA

Embassy dismisses employee: exercise of *jure imperii* or act of *jure gestionis*?

18 August 2020 | Contributed by Gan Partnership

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In *The United States of America v Menteri Sumber Manusia Malaysia*,(1) the high court faced a judicial review application filed by the United States in Malaysia. The facts leading to the application were uncommon and the court considered a novel aspect of industrial law jurisprudence in Malaysia.

Facts

The applicant (the United States) filed the judicial review application. The first respondent was the minister of human resources and the third respondent was an employee of the applicant. The third respondent was employed as a guard at the applicant's embassy in Kuala Lumpur pursuant to an employment contract which was accompanied by a document stating the employment conditions.

The employment contract was duly executed by the third respondent and it was stated that one of the dismissal grounds was the failure to report for duty. The third respondent failed to report for duty and a written warning was given. However, the third respondent failed to report for duty for a third time and was subsequently dismissed.

The third respondent, who was dissatisfied with the dismissal, filed a representation to the director general of industrial relations under Section 20 of the Industrial Relations Act 1967 claiming that his dismissal was without just cause and excuse. He sought to be reinstated to his former position – namely, a guard at the applicant's embassy in Kuala Lumpur. A reconciliation meeting was arranged between the applicant and the third respondent; however, the reconciliation failed to resolve the parties' issue. Subsequently, the minister of human resources exercised his powers accorded under Section 20(3) of the Industrial Relations Act and referred the third respondent's representation to the Industrial Court for adjudication.

The applicant filed a judicial review application before the high court to challenge the minister's decision in referring the representation to the Industrial Court. Section 20 of the Industrial Relations Act reads:

> *(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.*
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> ...
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> *(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.*
>
> *(3) Upon receiving the notification of the Director General under subsection (2),* ***the Minister may, if he thinks fit, refer the representations to the Court for an award.*** (Emphasis added.)

Issue

The main issue was whether the applicant and its embassy were immune from the Industrial Court's

jurisdiction with regard to the reinstatement claim initiated by the applicant due to the application of the restrictive doctrine of state immunity.

Decision

The high court judge stated that it was pertinent to first determine whether the act had been conducted by the state in an exercise of sovereign authority (*jure imperii*) or as an act of a private nature (*jure gestionis)*. The restrictive doctrine of state immunity applies if an act is an exercise of sovereign authority.

In view of the third respondent's duties and functions, the court concluded that the third respondent was involved in the embassy's security in his capacity as a security guard who was directly employed by the applicant. Hence, the third respondent's duties were integral to the sovereign activity of the state and its embassy, to maintain the inviolability of the embassy's premises. Thus, the third respondent's dismissal was an exercise of the applicant's sovereign authority (*jure imperii*) and the restrictive doctrine of state immunity applied. Consequently, the Industrial Court had no jurisdiction to hear the third respondent's claim against the applicant.

While this is not a fit case to be referred to the Industrial Court, the high court judge observed that the issue of sovereign jurisdiction can be resolved at the minister's level given the minister's wide discretionary power accorded pursuant to Section 20(3) of the Industrial Relations Act.

Comment

The high court judge's assessment of the facts in light of the sovereign immunity principle gives a fresh perspective in industrial law jurisprudence. The high court judge's observation in respect of the minister of human resources' wide discretionary power in such cases is worth pondering.

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Endnotes

(1) *The United States of America v Menteri Sumber Manusia Malaysia* ([2020] 7 CLJ 210).