July 6 2021

Court of Appeal sets aside decision in US embassy employee dismissal case

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In *The United States of America v Menteri Sumber Manusia Malaysia*,[1] the high court judge ruled in favour of the United States (for further details please see "Embassy dismisses employee: exercise of *jure imperii* or act of *jure gestionis*?"). However, this decision has now been set aside by the Court of Appeal.

Facts

The United States filed a judicial review application at the high court to, among other things, quash the minister of human resources' reference to the representation of the United States' embassy's former employee to the Industrial Court. The judicial review application was primarily premised on the ground that the United States and its embassy are immune from the Industrial Court's jurisdiction.

The high court ruled in favour of the United States and quashed the minister's reference. Consequently, the dismissal case could not proceed to the Industrial Court.

New development

Dissatisfied, the minister and the employee filed separate appeals to the Court of Appeal, which were heard together.

Upon hearing the appeals, the Court of Appeal set aside the high court's decision.[2]

Issues

The following issues were canvassed before the Court of Appeal:

- Were there any undue delays on the part of the minister in making the reference such that it had caused serious prejudice to the United States?
- Was the employee's dismissal governmental or diplomatic in nature?
- Was the minister's reference illegal, irrational or tainted with procedural impropriety?

Decision

First issue

The Court of Appeal looked into the time interval from the employee's dismissal to the date of reference to examine whether there was an undue delay in relation to making the minister's reference:

- On 4 April 2008 the employee was verbally informed of the termination of his employment.
- On 23 May 2008 the employee filed a representation for reinstatement.
- Over 10 years later, on 28 September 2019, the director-general of industrial relations called for a conciliation meeting.
- On 22 April 2019 the minister referred the matter to the Industrial Court.

Based on the above, the Court of Appeal acknowledged that there had been an inordinate and inexcusable delay. Moving on to the issue of prejudice, the Court of Appeal asked a hypothetical question: would the United States have raised delay and prejudice had the minister decided not to refer the dispute to the Industrial Court? It was apparent to the Court of Appeal that the answer was obviously no.

Accordingly, the Court of Appeal held that, since neither side had taken any positive step throughout the 10 years of waiting, the issue of delay could not be raised now as a ground to quash the minister's reference.

Second issue

At the high court, it was concluded that the employee, who had been a security guard employed by the United States, had been carrying out duties that were integral to the sovereign activity of the state and its embassy to maintain the inviolability of the embassy's premises. Thus, the employee's dismissal had been sovereign or governmental in nature and, as such, the doctrine of restrictive immunity applied. The Industrial Court was prohibited from determining the issue of whether the dismissal was without just cause and excuse.

In this regard, the Court of Appeal held that before a conclusion could be made on the application of the doctrine of restrictive immunity, it was necessary to consider and determine the exact nature of the employee's job. In this case, there were two contradictory versions of the employee's job function with the employee asserting that his duties were purely menial in nature, bereft of any handling of state secrets, and the Unites States denying this to be true.

In light of this, the question of whether the doctrine of restriction immunity applied was a mixed question of fact and law which fell within the purview and scope of the Industrial Court's jurisdiction. This issue could well be dealt with as a preliminary issue before the Industrial

Court.

With that, the Court of Appeal refrained from answering the second issue as to whether the employee's dismissal was a decision that the Unites States had made in its governmental function or whether it had been private and commercial in nature.

Third issue

The Court of Appeal held that the only consideration of the minister under the former section 20(3) of the Industrial Relations Act 1967 was whether the representation raised a serious issue of fact or law to be adjudicated by the Industrial Court.

As discussed above, the conflicting stance taken by the employee and the United States evidently prompted issues of fact and law, which the minister was not tasked to inquire into. The duty to adjudicate belonged to the Industrial Court.

As such, the more proper recourse would be to allow the Industrial Court to first hear and determine the question of sovereign immunity and thereafter either party which was aggrieved by the decision could apply for judicial review.

Therefore, the Court of Appeal held that the reference to the minister was not tainted with illegality, irrationality or procedural impropriety.

Comment

It is still a matter open to argument before the courts as to whether a dismissal of an employee by a state amounts to a sovereign act (*jure imperii*) or private act (*jure gestionis*) and subsequently attracts protection under sovereign immunity. More importantly, it will be a significant development in industrial law jurisprudence to see what the factors are for and against finding the employee's dismissal to be sovereign in nature.

For further information on this topic please contact Gan Khong Aik or Lee Sze Ching (Ashley) at Gan Partnership by telephone (+603 7931 7060) or email (khongaik@ganlaw.my or szeching@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2020] 7 CLJ 210.

(2) *Subramaniam a/l Letchimanan v The United States of America* (W-01(A)-66-01/2020), heard together with *Menteri Sumber Manusia Malaysia v The United States of America* (W-01(A)-59-01/2020).