Union Buster Busted

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Trade unions are often perceived as the bane of employers. This perception is understandable when one recalls the occasions when services and production lines have ground to a halt due to strikes and work-to-rule initiatives led by trade unions.
Added to that, it does not help that the early history of labour relations has occasionally been marred by violence and bloodshed. In 1892, workers led by the leaders of an iron and steel workers union engaged in a gunfight with security guards hired by the Carnegie Steel Company which resulted in the loss of several lives. Some 45 years later, security forces of the Ford Motor Company were alleged to have beaten up representatives of the Union of Auto Workers at the former's River Rouge Plant in Detroit, USA.

It is not in every instance that employers resort to heavy-handed tactics to thwart the activities of trade unions. Sometimes, more subtle tactics are employed. One such instance is the recent case of Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia v Renesas Semiconductor KL Sdn Bhd (Award No: 244 of 2016).

The Beginning
This case started some time in 2009 when the Malaysian Government approved the unionisation of workmen in the electronics industry. The Director-General of Trade Unions approved the registration of workmen in the electronics industry into four regions.

A pro-tem committee was formed for the registration of Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia ("Union") and Wan Noorulazhar b Mohd Hanafiah ("Noorulazhar") was elected as its pro-tem president. Noorulazhar was an employee of Renesas Semiconductor KL Sdn Bhd ("Company"). The Union was registered on 1 December 2009 and submitted its claim for recognition to the Company on 18 January 2010.

The Company vide its letter of 8 February 2010 refused to grant recognition to the Union. What transpired thereafter became the subject matter of a reference pursuant to section 8 of the Industrial Relations Act 1967 ("IRA") arising out of a complaint of "union busting", ie activities undertaken to disrupt or prevent the formation of a trade union.

The Alleged Union Busting Activities
During the proceedings in the Industrial Court, the Union's witnesses gave evidence that the Company had undertaken measures with a view of resisting the formation of the Union. These included:
(1) Arrangements made by the Company for the Joint Consultative Committee ("JCC"), a body which served as a bridge between the employees and the management of the Company, to attend a seminar on the setting up of an in-house union;
(2) Noorulazhar being approached by a representative of the Company and offered the post of president of the in-house union,if he abandons the Union;
(3) Noorulazhar being informed by several representatives of the Company of the risk of being dismissed from employment by the Company;

(4) Noorulazhar being put in cold storage, in that he was assigned tasks which were below his job grade, and being closely monitored by the Company's Human Resources Department;
(5) A representative of the Company advising one of Noorulazhar's peers to disassociate himself from Noorulazhar and the Union;
(6) Requests by representatives of the Company to Noorulazhar and other workers to withdraw the Union's application for recognition; and
(7) Victimisation of active Union members, including Noorulazhar, through non-payment or reduced payment of incentives.

Noorulazhar was dismissed by the Company on 26 August 2011 pursuant to a domestic inquiry.
On the other hand, the witnesses who testified on behalf of the Company denied all the allegations made by the Union's witnesses.

The Industrial Court Award
Having weighed the conflicting evidence led by each party, the Industrial Court Chairman, Dato' Mary Shakila G Azariah ("Chairman"), concluded that:

"... the Company's witnesses, all still serving in the employ of the Company, are not to be believed. To state it slightly differently the Court is satisfied with the veracity of the Union's witnesses and their evidence some of whom are still employed by the Company and have risked their jobs to testify against the Company."

The Court then considered the actions taken by the Company in light of the relevant provisions of the IRA.

Section 4(1)
Section 4(1) of the IRA, inter alia, prohibits a person from interfering with, restraining or coercing a workman in the exercise of his rights to form, or assist in forming, and join a trade union and participate in its lawful activities.

On the evidence before her, Dato' Mary Shakila was satisfied that the Company had through its representatives, indulged in union-avoidance tactics and had violated section 4(1) of the IRA. According to the Court, the Company had embarked on a planned course of action to stop Noorulazhar and other witnesses of the Union from establishing the Union, which was already in the making. This, said the Court, was the reason why the Company refused to grant recognition to the Union when they first submitted a claim for recognition. The Court further opined that the timing of the seminar organised by the Company for the JCC, which included a briefing on the formation of an in-house union, "leaves a lot to be said as to the motives of the Company in organising the same" which included a briefing on the formation of an in-house union, "leaves a lot to be said as to the motives of the Company in organising the same".

Section 4(3)
This provision states that no employer shall, inter alia, support any trade union of workmen by financial or other means with the object of placing the union under its control or influence.

The Court accepted the testimony of the Union's witnesses that some of the attendees at the seminar held for the JCC were members of the pro-tem committee of the in-house union which the Company proposed to be set up. This, coupled with the averment in the Company's Statement in Reply that it already intended to form an in-house union following the announcement that the Malaysian Government had approved the unionisation of the electronics industry on a regional basis, led the Court to conclude that the Company had, at the very least, supported the formation of the in-house union and had violated section 4(3) of the IRA.

According to Dato' Mary Shakila, "The word 'support' encompasses the giving of assistance, encouragement or approval to or to be actively interested in", and the circumstantial evidence point to fact that the Company had supported and encouraged the formation of the in-house union in violation of section 4(3).

Section 5(1)(d)
Section 5(1)(d) of the IRA, inter alia, prohibits an employer and its agents from dismissing or threatening to dismiss a workman, or injuring or threatening to injure him in his employment, or altering his position to his prejudice, on the ground that the workman is or proposes or seeks to become a member of a trade union or participates in the promotion, formation or activities of a trade union. This provision, said the Court, protects union members from termination from employment, disciplinary action and discrimination without just cause.

The learned Chairman said that the evidence bore out that Noorulazhar had been by-passed for promotion and had received a lower incentive payment as compared to other employees. She added that the Company did not lead evidence to show that Noorulazhar was a poor performer or deny the latter's allegations that he had been sidelined. Events culminated in Noorulazhar being dismissed by the Company. On the foregoing evidence, the Court found that the Company had violated section 5(1)(d) in that it had carried out acts to injure or threaten to injure or alter or threaten to alter Noorulazhar's position because he had been active as the President and member of the Union which applied for recognition and had participated in its lawful activities.

The Court's Findings
Based on the evidence, facts and its pleaded case, the Court found that the Company had violated sections 4(1), 4(3) and 5(1)(d) of the IRA.

Dealing with Unions
The reality in industrial relations is that companies dislike unions. From a company's perspective, this dislike may arise from the perception that unions sometimes adopt a militant approach in negotiations for collective agreements and are sometimes unreasonable in their demands.

If a company observes fair labour practices and resolves employees' grievances expeditiously, it may not have to deal with problematic unions, as employees will not see a reason to unionise. Conversely, a company which adopts unfair labour practices may be extending an open invitation to the formation of unions — like a time bomb ticking towards self-destruction.

It is however possible for a company to defeat a recognition process during the secret ballot conducted by the Director General for Industrial Relations under section 9(4A) of the IRA. Although a company may communicate its reasons for disfavouring the union, it must ensure that no illegal tactics are employed to influence the manner in which its employees exercise their vote.
Once a union is recognised, the company must not evade collective bargaining negotiations. The company must undertake research on the benefits accorded to employees within the same scope of employment in comparable establishments and be able to justify to the union that the company's proposals with regard to benefits are fair and reasonable.

As with all complex issues, it is perhaps best for a company to engage a lawyer to provide assistance and guidance through the process of dealing with unions.