EMPLOYMENT LAW

THE VOICES OF THE EXPLOITED: UNDOCUMENTED MIGRANT WORKERS' RIGHT TO FILE A CLAIM IN LABOUR COURT

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INTRODUCTION

Recently, the Court of Appeal has affirmed the High Court's decision of ***Fice Fransina Nenobais v. Lee Hee Chooi***[1] which ruled in favour of an undocumented migrant worker to file a claim for unpaid wages in the Labour Court. This decision recognized, once and for all, the right of all migrant workers, documented or otherwise, to file a claim in Malaysian Labour Courts.

BACKGROUND FACTS

The complainant (affectionately nicknamed Nona) was a domestic worker who had been employed by the respondent employer for a period of 5 years. She also worked as a store assistant at the respondent employer's shop in Klang. Throughout the period of her employment, Nona did not receive any of her salaries. She was also victim to various forms of abuse by the respondent employer.

Eventually, Nona fled from employment. In 2018, Nona filed a claim in the Labour Court against the respondent employer for her unpaid salaries from 2012 to 2017 amounting to more than RM30,000.

DECISION OF THE LABOUR COURT

In the Labour Court, before the commencement of the trial, the presiding labour officer had raised the preliminary issue of whether the Labour Court had the jurisdiction to hear the claim as Nona did not possess a work permit. This issue was raised in light of Section 5(1)(a) of the Employment (Restriction) Act 1968 (the "**ERA**") which states that no non-citizen shall be employed in Malaysia unless he/she possesses a valid employment permit.

After considering the parties' submissions, the Labour Court found that Nona did not possess a valid employment permit. Therefore, any work done by Nona in the period 2012 to 2017 was carried out illegally. Consequently, Nona lost her right to file any claims against the respondent employer. The Labour Court ruled that it did not have jurisdiction to hear the case and Nona's claim was dismissed. Dissatisfied, Nona appealed to the High Court.

[1] [2020] 3 ILR 440 (HC)

DECISION OF THE HIGH COURT

In the High Court, Justice Azizah Nawawi delivered justice to Nona. The Learned Judge analysed the following issues:

A. The Labour Court had jurisdiction under Sections 69 & 70 of the Employment Act 1955 (the "**EA**") to hear Nona's case

Firstly, the High Court highlighted Section 69 of the EA which enables the Labour Court to make an inquiry between "an *employee* and his *employer* in respect of wages or any other payment in cash due to such employee".

For Section 69 of the EA to apply, the High Court had to determine whether Nona was an employee and the respondent was an employer as defined under Section 2 and the First Schedule of the EA.

The High Court considered the following facts and circumstances: (i) Nona was employed by the Defendant between 2012 to 2017 as a **domestic worker** at the Defendant's house and as a **store assistant** at the Defendant's shop in Klang; (ii) There was no written contract of employment between the parties but it was established that there was an **oral agreement** between the parties that Nona would be paid a salary of **RM600** per month.

Therefore, premised on Section 2 of the EA, the High Court found that Nona fell within the definition of an employee who was being paid wages below RM2,000[2] by the respondent employer. As such, Nona's complaint fell within Section 69 of the EA and it was the duty of the Labour Court to make the due inquiry under Section 70 of the Act. Thus, the Labour Court had jurisdiction to hear Nona's complaint.

B. Section 5(3) of the ERA

Further, the High Court held that the Labour Court failed to ascertain whether sub-section 5(3) of the ERA had been satisfied. Briefly, sub-section 5(3) of the ERA provides that where the appellant had worked as an employee at the respondent's place, then she is deemed to be employed by the respondent. The High Court took into consideration the material fact that Nona was staying at the respondent's house during the period of 2012 to 2017 while she was employed as a domestic worker and a shop assistant.

C. The Labour Court's action was premature

The High Court also held that it was premature for the Labour Court to only consider the valid permit issue without ascertaining whether there was any employment relationship entered between Nona and the respondent. The High Court asserted that if there was no employment relationship between Nona and the respondent employer, the case would have ended there and there was no necessity for the Labour Court to ascertain the issue of the employment permit.

As Nona's claim was for unpaid wages, it was incumbent for the Labour Court to ascertain whether Nona and the respondent employer had entered into a contract of service. Once this was established, the Labour Court would then be clothed with the jurisdiction to hear the inquiry under sections 69 and 70 of the EA. It was not correct for the Labour Officer to decide on the issue of the legal work permit and pronounced that he lacked the jurisdiction to inquire into the complaint. Therefore, the labour officer had clearly abandoned his jurisdiction.

[2] Please take note that the EA has been amended to cover all employees under a contract of service regardless of salary with some exceptions of provisions which only applies to employees earning RM4,000 and below.

Further, the High Court stated that whether or not an employer wants to invoke the defence of s. 5(1)(a) of the ERA, despite having benefited from the employee's hard labour, is a matter to be decided at the end of the inquiry. It was not for the Labour Court to raise it as a preliminary issue on its own.

Notwithstanding the above, it is apt to emphasize that as Nona did not possess a valid employment pass to work as either a domestic servant or a shop assistant, she was clearly in breach of section 5(1)(a) of the ERA as mentioned earlier. However, the Labour Court failed to consider section 5(1)(b) of the ERA as well, which provides that an *employer* shall not employ a foreign worker who does not possess a valid employment pass. As such, the employer himself was also in breach of the ERA due to Nona's undocumented status.

D. Nona's case was a clear case of exploitation

The High Court took a firm stance that Nona's case was a clear exploitation of employee. She was not paid her full salary for almost five years and when she finally filed a case in the Labour Court, her claim was not even heard and was dismissed on the ground that she did not have a work permit. The High Court emphasized that the duty lies with the respondent, as the employer to obtain the work permit for Nona. The respondent employer could not be allowed to profit from Nona's free labour and then go on to abuse sub-section 5(1)(a) of the ERA to defeat Nona's claim for unpaid wages.

Thus, the High Court found in favour of Nona and ruled that the case be remitted to the Labour Court. Upon appeal by the respondent employer, the Court of Appeal affirmed the decision of the High Court and after a lengthy battle for Nona, her case will finally be heard before the Labour Court.

KEY TAKEAWAYS

Following the High Court and Court of Appeal decisions, when hearing a claim by a migrant worker, the Labour Court must first establish whether there was a contract of service between the migrant worker and the employer. Whether the worker is documented or not, is an issue to be raised after an employee-employer relationship has been established by the Labour Court.

Even if the migrant worker is found to be undocumented, the Labour Court still has jurisdiction to hear his/her claim by virtue of Sections 69 and 70 of the EA. As such, this Court of Appeal ruling will give the Labour Court unequivocal mandate to overcome any devious attempts by employers to use the ERA to override a migrant worker's right to their salaries. The issue of the migrant worker's undocumented status is a separate issue that is to be reported to and handled by the Malaysian immigration authority as per section 6(3) of the Immigration Act 1959/63, and not the courts.

Lastly, it is important to highlight the case of ***Ali Salih Khalaf v. Taj Mahal Hotel***[3] where the Industrial Court held that foreign workers are entitled to protection of the EA and the Industrial Relations Act 1967 (the "**IRA**"). The Court held that the EA applies to all workers regardless of whether the person is a local or foreign worker (documented or otherwise) in the country. The IRA also applies to all workers, and all migrant workers, that is, both documented and undocumented workers have a right to pursue their rights if infringed, in the Industrial Court.

[3] Award No 245 of 2014.

In this regard, it is also pertinent to note Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, to which Malaysia is a party, which expressly provides that where laws and regulations which control the movement of migrants for employments - such as the Immigration Act - have not been respected, the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment.[4]

CONCLUSION

The facts of Nona's case are not uncommon amongst migrant domestic workers, documented or otherwise. Therefore, the Court of Appeal decision marks a significant step in ensuring that moving forward, marginalised groups like undocumented migrant workers are able to access justice through the Labour Courts.

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[4] NACAP Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce and Anor [2010] MLJU 1128