EMPLOYMENT LAW

THE MODE TO CHALLENGE AN INDUSTRIAL COURT AWARD: APPEAL OR JUDICIAL REVIEW

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INTRODUCTION

Recently, the High Court of Penang has resolved the confusion on the correct mode to challenge an Industrial Court Award in the High Court by interpreting Sections 33C and 20(3) of the Industrial Relations Act 1967. This decision by Justice Anand Ponnudurai in ***Aneka Retail (M) Sdn Bhd v Industrial Court Malaysia & Ors*** explained the correct mode to challenge an Industrial Court Award in the High Court.

BACKGROUND FACTS

The two Respondents were former employees of the Applicant company. In April and May 2020, they did not receive their salaries at all and accordingly, they contended that they have been constructively dismissed from 8.6.2020. The Respondents made their representations pursuant to Section 20 of the Industrial Relations Act 1967 ("**the IR Act**"). The dispute was then referred to the Industrial Court by the Minister of Human Resources ("**the HR Minister**") by a letter dated 6.1.2021 pursuant to Section 20(3) of the 1967 Act. The Industrial Court held the Respondents were constructively dismissed due to fundamental breaches of their employment contract and awarded back wages and compensation. The Applicant filed an application pursuant to Order 53 of the Rules of Court ("**the ROC**") 2012 for leave to apply for an order of certiorari to quash the Industrial Court Award Nos. 1630 of 2022 and 1631 of 2022, both dated 25.7.2022. The application for leave was met with objection by the Attorney General's Chambers ("**the AGC**") on the grounds that the Applicant should instead file an appeal under Section 33C of the 1967 Act.

ISSUES

Whether the Applicant had correctly utilised judicial review proceedings or ought to have filed an appeal under Section 33C of the IR Act as amended.

Essentially, the Industrial Relations (Amendment) Act 2020 ("**the 2020 Amendment Act**") introduced several amendments to the principal IR Act which took effect on 1.1.2021. The amendments are, amongst others, as follows:

1. The amendment of Section 20(3) of the IR Act removed the HR Minister's discretion to refer any representation for unfair dismissal of a workman to the Industrial Court. Instead, the Director General of Industrial Relations ("the DG") shall refer the representations to the Industrial Court for an award where he is satisfied that there is no likelihood of the representations being settled; and

2. The insertion of Section 33C of the IR Act which allows the party dissatisfied with the Industrial Court Award to appeal to the High Court.

Section 33C of the IR Act (*Appeal against an award to the High Court*) provides as follows:

> *(1) If any person is dissatisfied with an award of the Court made under section 30 such person may appeal to the High Court within fourteen days from the date of receipt of the award.*
>
> *(2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012 [P.U.(A) 205/2012] for an appeal from a Sessions Court with such modifications as the circumstances may require.*
>
> *(3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.*

DECISION OF THE HIGH COURT

The objection taken by the AGC was that Section 33C of the amended IR Act should apply as the HR Minister's reference (dated 6.1.2021) and the Industrial Court Award (dated 25.7.2022) were made after the amendment introduced by the 2020 Amendment Act (effective 1.1.2021).

In dismissing the AGC's objection and granting leave to the Applicant, the High Court held that the Applicant had correctly commenced the proceedings by way of judicial review. Prior to the amendment introduced by the 2020 Amendment Act, any party aggrieved by the Industrial Court Award would utilise judicial review proceedings to quash an Industrial Court Award. Subsequent to the amendment (effective 1.1.2021), Section 33C of the IR Act states that any person dissatisfied with the Industrial Court Award may appeal to the High Court. Further, the 2020 Amendment Act has also amended Section 20 of the IR Act in that the HR Minister's discretion to refer the workman's unfair dismissal representation to the Industrial Court for an award has been removed. Instead, the DG shall refer the representations to the Industrial Court for an award where he is satisfied that there is no likelihood of the representations being settled. Therefore, the High Court opined that if the representation was referred to the Industrial Court by the DG, then an appeal ought to be filed under Section 33C of the IR Act to challenge any Industrial Court Award. On the other hand, if the representation was referred by the HR Minister, then judicial review would be the proper application. In this present case, the date of the HR Minister's letter, i.e. 6.1.2021, is irrelevant as it was the HR Minister who was exercising his discretion in referring the representation. Further, the High Court referred to the saving and transitional provision in Section 35 of the 2020 Amendment Act and held that the Applicant was entitled to utilise judicial review proceedings as if the IR Act has not been amended.

Section 35 of the 2020 Amendment Act (*Saving and transitional provisions*) is reproduced as follows:

> *(1) Complaints made under section 8, disputes referred under subsection 9(1A), claims for recognition made under section 9,* ***representations for reinstatement made under section 20 of the principal act****, and all proceedings commenced or awards made before the Industrial Court in relation to a reference under subsection 8(2A), subsection 20(3) and section 26* ***before the coming into operation of this act shall proceed and have effect as if the principal act had not been amended by this act****.*
>
> *(2) All rules and regulations, forms, directions and letter of authorizations made, issued or granted under the principal act shall, to the extent that the rules and regulations, forms, directions and letter of authorizations are consistent with the principal act as*

amended by this act, continue to be in force until such rules and regulations, forms, directions and letter of authorizations are revoked or amended.

(3) Any investigation, trial or proceedings done, taken or commenced under the principal act immediately before the coming into operation of this act, shall be dealt with as if the principal act had not been amended by this act.

It is undisputed that the representations were made by the Respondents in 2020 prior to the amendments taking effect. Thus, the High Court, in applying Section 35 of the 2020 Amendment Act, opined that the Applicant was entitled to proceed via judicial review proceedings as if the IR Act had not been amended by the 2020 Amendment Act. Accordingly, the High Court dismissed the objection taken by the AGC.

KEY TAKEAWAYS

In determining the proper mode to challenge an Industrial Court Award in the High Court, the relevant factor would be to look at who had referred the representation to the Industrial Court. The fact that the HR Minister's reference was made after the amendment is irrelevant in determining the correct mode of challenge in the High Court. If the reference was made by the HR Minister, this meant that the HR Minister had exercised his powers under Section 20(3), pre-amendment and therefore, the mode of challenge would be by way of judicial review and not by way of appeal (post-amendment).

In any event, Section 35 of the 2020 Amendment Act allows the dissatisfied party to proceed via judicial review proceedings provided the representation was made before the 2020 Amendment Act takes effect.

Authors

Wong Keat Ching
(Partner)
keat_ching@zulrafique.com.my

John Bong Peng Chung
(Pupil-in-Chambers)
john.bong@zulrafique.com.my