Abstract

The focus of this presentation is on the issue of recognition of trade union for workmen. The metaphor 'minefield' refers to mostly employer-initiated actions to defeat the union's effort at gaining recognition from him as the representative union. These actions range from their ruthless measures to denude the union membership after the claim for recognition has been made by the union, disrupting the momentum of the union's effort by repeatedly obstructing the operation of the statutory process of union recognition by raising objections within the parameters of the statutory procedure to relentlessly exploiting the judicial review process to question the sins of omission alleged to have been committed by the administrative authorities including the Minister who is the final arbiter on the union claim for recognition. Understandably, it takes the unions a long time to traverse this minefield and emerge beaten and bruised to secure the reluctant recognition of the employers and commence bargaining with a left-foot forward. No wonder, their attitude and behaviour make a mockery of the philosophy of Industrial Relations Pluralism.

Introduction

The focus of this article is on the issue of recognition of trade union of workmen. Under the Malaysian industrial law, recognition of a union as a representative union (sole bargaining agent for a bargaining unit) is to be accorded to it by the employer. This recognition by the employer gives the union the right of appearance before him to bargain collectively on the terms and conditions of employment on behalf of ALL his employees who are eligible to become members of the union, regardless of whether or not they are currently members of the union claiming recognition. This aspect of union recognition is of great significance in that by according this recognition, the employer implicitly forsakes unitarism and opts for bilateralism in the determination of the terms and conditions of employment of his own employees. Collective bargaining gains legitimacy through the philosophy of pluralism in industrial relations which rang the death knell of unitarism based on the illusion of commonality of interests between the employer and employees in the enterprise in preference to the acceptance of the reality of adversarial relations between the union and the
management and collective bargaining as a desirable method of reaching a satisfactory compromise in a win-lose situation n1.

In developing societies like Malaysia where the tradition of Industrial Relations Pluralism has not taken roots in the psyche of the parties, the employer always looks back nostalgically and endeavours to deliberately avoid or delay union recognition as long as he possibly can so that in the absence of a recognised union, he could continue determining the terms and conditions of employment of his employees unilaterally without any interference from the other party.

Quite ironically, while in the progressive economies, union recognition in the context of Industrial Relations Pluralism is a well established practice, in Malaysia, employers perceive it to be an evil to be avoided, if possible for a prolonged period, sometimes with the tacit consent of the State, which in the interest of placating foreign direct investment in Malaysia, was willing to acquiesce with such an attitude of multinationals. The saga of unionisation of the exploited electronic workers is a case in point n2.

It is in the context of the behaviour manifestations of this negative attitude of the employers that the trade unions of workmen in Malaysia have to walk through a veritable minefield to win recognition for them.

The metaphor 'minefield' refers mostly to the employer-initiated action to defeat union efforts at gaining recognition as the sole bargaining agent. These actions range from ruthless efforts to denude the union membership immediately following its claim for recognition, disrupting the momentum of the union's efforts by repeatedly obstructing the operation of the statutory process of union recognition by raising objections within the parameters of those statutory provisions to relentlessly exploiting the judicial review process to question the sins of omission alleged to have been committed by the administrative authorities including the Minister who is the final decision-maker on the union's claim for recognition. Understandably, it takes sometimes four to six years for a union to traverse this minefield and emerge beaten and bruised to finally obtain a reluctant recognition from the employer n3.

Direct Confrontation With The Union

Brazen action by employers to defeat the trade union claim for recognition certainly reflects their attitude of hostility and animosity towards unions. When such actions are desperately resorted by the employer, sometimes ignoring the law or by exploiting loopholes in law, it makes us wonder whether they are aliens to the civilised world of industrial relations. This is more so when the culprits are multinationals, especially from the United States of America, which is supposed to be a bulwark of progressive labour relations.

KFC Strategy To Deny Union Recognition

The Union served the Company with a claim for recognition stating that the majority of the bargainable staff of the Company (19 out of 29 employees) was its members. Notwithstanding the Director-General of the Trade Unions' ('the DGTU') opinion, communicated by the Director-General of the Industrial Relations ('the DGIR') to the KFC that the Union was competent to represent the workmen in respect of whom recognition was claimed, the employer retrenched all the 19 union members.

Consequent on the complaint lodged by the Union with the Industrial Relations Department that the company had contravened s 10 of the Industrial Relations Act 1967 ('the 'IRA') which forbids dismissal of workmen once a trade union has claimed recognition and the issue is pending, the Company and its Directors, probably to avoid prosecution and possible fine and imprisonment, accepted the Department's advise to reinstate the retrenched union members n4. But when the union members reported for work on 1 December 1986, they were not given their jobs back but granted 'special leave until further notice'. On 29 December 1986, the Company also granted recognition to the Union with immediate effect.

However, this did not end the unfortunate saga. Less than two months later (24 February 1987), KFC closed the
entire Division on the excuse that it was no longer economical to run the Division. It is noteworthy that workers who were not union members were given jobs in other related companies.

The Company, KFC Technical Services, attempted to combat unionism on the pretext of restructuring of the enterprise. It was clearly evident that union members were discriminated. The Industrial Court eventually held that the workers were dismissed without just cause or excuse, a decision which was confirmed by the High Court.

Since the Industrial Court ordered only payment of punitive compensation (two months' salary for every completed year of service) to the unfairly dismissed union members, not reinstatement, KFC, in effect, succeeded in getting rid of the union members along with the Union itself. It is indeed a shameful episode in the annals of Malaysian labour relations.

**Harris Corporation Strategy To Root Out Union**

After the Government lifted the 15 year-old ban on unionization in the electronic industry, the first in-house union was registered in the R.C.A. Electronics Factory. Assured of majority support from the employees, the Union claimed recognition from the employer.

However, in a move to disrupt the momentum of the union, RCA asked the DGIR to ascertain whether or not the Union represented a majority of its employees. Without waiting for his response, RCA changed its name to Harris Solid State Malaysia (HSSM) after its take-over by Harris Corporation. This change of name of the company dealt a severe blow to the nascent union for it has to change its name also accordingly.

Despite the hitch, the Union was able to obtain the necessary numbers to change its name to HSSM Workers Union. Subsequently, when the DGIR confirmed that the HSSM Workers Union did comprise the majority of the workers in the company, the Minister ordered HSSM to recognise the Union within 14 days.

This was when Harris pulled another trick out of the hat: on the eve of the 14-day deadline, the workers were asked to sign a letter agreeing to their transfer to a much smaller sister company (barely with 150 employees), namely, Harris Advanced Technology (‘HAT’). Thus, 2680 workers were transferred to HAT, leaving behind Pereira, the President of HSSM Workers Union and 20 other union activists in the abandoned building of HSSM for six months. They were paid their salary but not given any work. But to comply with the Minister's orders, HSSM recognised the Union, and the Union, undaunted, tried to commence collective bargaining.

Parallel to their collective bargaining effort, the Union, to pre-empt any further change in the HSSM name, applied to the DGTU for a change in its name to 'Harris Malaysia Workers Union' but the inevitable happened. Harris announced that HSSM had ceased operation and therefore Pereira and 20 union members were terminated. Gone with them was the country's first electronics workers union.

Their termination was, however, referred to the Industrial Court by the Minister. After an agonising period of four years, the Industrial Court finally handed down a decision which jolted the entire Trade Union movement. The Industrial Court Chairman dismissed the Harris workers' claim for reinstatement on the ground that 'it had no merit whatever'. Specifically, he said that 'it is a company's prerogative (under s 13(3) of the Industrial Relations Act 1967) to consolidate and reorganise and therefore what Harris had done was perfectly in order and no law could stop it, and no union could interfere with its management prerogative.'

Pereira and the others took their case to the High Court and the High Court ruled in their favour and ordered that the matter be re-heard in the Industrial Court. However, before re-hearing began, Harris Inc appealed to the Court of Appeal, and the Court of Appeal's decision to reinstate Pereira and 20 others without any loss of benefits, monetary or otherwise is the end of the six-year epic battle in Malaysian Industrial Relations. More significantly, the ruling of the Court is remembered for the stinging rebuke Gopal Sri Ram, JCA administered to the Industrial Court and its Chairman.
**Harris Solid State** case is a lesson for all since obstruction to union recognition could come not only from the audacious and impudent action of the employer but also the questionable attitude of the Industrial Court Chairman.

**Other Episodes Of Unfair Labour Practices**

Apart from the two cases of blatant victimisation aforementioned, there are many episodes of undisguised unfair labour practices engaged by the employers to defeat the unions' effort to gain recognition from them.

Upon presentation of a claim for recognition, some employers take upon themselves the task of ascertaining the extent of union support or the level of union membership. Wu Min Aun is of the opinion that there is no legal prohibition against such investigation. But it may lead to charges of victimisation and unfair labour practice. The classic example is that of *United Traction Company Sdn Bhd v Transport Workers Union* (Award No 23 of 1971). In this case, the employer was guilty of pursuing anti-union behaviour such as:

(a) Summoning its employees under threat of dismissal of union members to declare whether they were members of the union;
(b) Transferring employees who were union members;
(c) Dismissing and retrenching union members and
(d) Obtaining statutory declaration from employees under duress etc.

This kind of behaviour is certainly 'a demonstration of the length to which some employers are prepared to go in order to undermine unionism in an enterprise.'

How true this observation is became evident to the author when he gathered the experiences of union leaders in several Japanese companies also in recent years.

Senju (M) Sdn Bhd is one such Japanese company. The Metal Industries Employees Union ('MIEU') claimed recognition from the Company. Since the Company claimed that it was in the category of electronic industry, it raised the issue of MIEU's competence to represent its workers.

After raising the issue with the DGIR, the Company was alleged to have intimidated the union members, forcing them to resign their union membership. The Company seemed to think that the union was not necessary since it was setting up a joint management council.

In the meantime, the Director-General communicated to the parties that MIEU was the competent union to represent the Senju workers. However, the Company thwarted the departmental efforts to verify union membership by refusing to give the employment record of its employees; the Company insisted on secret ballot to decide the issue.

Notwithstanding its preference, membership of the union was verified and 59.65% of the company workers were found to be members of the MIEU. When the Director-General advised the Company to accord recognition to MIEU, it refused on the ground that secret ballot was not the basis as desired by the Company for determining the MIEU's following in the Company.

The Minister's orders on recognition came almost two years after MIEU's claim for recognition. The Company challenged the Minister's orders and obtained a stay order so that it won't be obliged to negotiate with the union.

MIEU feels that the dispute could take three to five years to be heard by which time even a favourable ruling will have no beneficial effect.

**Statutory Procedure For Union Recognition**
The statutory procedure governing union recognition in Malaysian Industrial Relations is embodied in ss 9-12 of the IRA 1967 n14. A claim for recognition by the union may run foul of this statutory process:

(a) If the union of workmen is alleged to have included in its membership, workmen who are employed in the managerial, executive, confidential or security capacity;

(b) If it is disputed by the employer that the union claiming recognition may not have a simple majority of workmen in his employment excluding the aforementioned proscribed categories of workmen; and

(c) If the union is not competent to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded.

In other words, when the proscribed categories of workmen are included in the union membership or when the union does not command the support of a simple majority of the employees in the employment of the employer or when it is not the right union to represent his employees, it is perfectly right to conclude that the union is not 'competent' in the generic sense of the term, to claim recognition from the employer.

Moreover, it should be made clear that disputes arising due to any or all of the three grounds are amenable to be resolved by the DGIR with the assistance of the DGTU, if need be, at the discretion of the DGIR.

For example, in Pahang South Union Omnibus Co v Minister of Labour and Manpower [1981] 2 MLJ 199, the Federal Court justified the DGIR seeking the DGTU's assistance (under s 4(B)(b)) for membership verification; in Menteri Sumber Manusia v Association of Bank Officers [1999] 2 CLJ 471, the Federal Court approved of the DGIR directing the DGTU to decide on the eligibility of workmen to be members of the union. In fact in this case the Federal Court directed the Minister by mandamus to seek the expertise and the experience of the DGTU in deciding whether the relevant officers were within the meaning of 'internal officers' as recognised by the employer. Finally, in Tanjong Jaga v Minister of Labour and Manpower [1987] 1 MLJ 124, the Federal Court approved of the role of the DGIR in requesting the DGTU to decide whether the union claiming recognition is the 'right union' to represent the workmen of the concerned employer in respect of whom recognition is sought to be accorded.

However, when the union recognition is not resolved by the DGIR, he notifies the Minister. Upon receipt of the notification, the Minister gives his decision. If he decides that recognition is to be awarded, such recognition shall be deemed to have been accorded by the employer.

Finally, the statutory procedure for union recognition ends with a 'privative clause' which stipulates that the Minister's decision is final and shall not be questioned in any court. Of course, as it is well-known, the finality clause is ineffective to prevent judicial review of the Minister's decision. In fact Eusoffe Abdoolcader SCJ in the Supreme Court case of Tanjong Jaga confirmed that 'this clause is of course ineffective as regards jurisdictional review n15.'

In addition to the foregoing basic provisions under s 9 of the IRA, Section 10 prohibits industrial action and termination of the services of the employees during the pendency of the recognition proceedings; s 11 states that once a union has been accorded recognition, no other union can make any claim for recognition unless a period of three years has elapsed after such recognition has been accorded and s 12 stipulates that when a union fails to get recognition, it cannot make a further claim for recognition unless a period of six months has elapsed.

Eligibility Issue

Section 9(1) of the IRA 1967 stipulates that 'no trade union of workmen, the majority of whose membership consists of workmen who are not employed in managerial, executive, confidential or security capacity may seek recognition from the employer.' Under s 9(1A), the employer may raise two types of disputes stalling the otherwise smooth functioning of the statutory procedure for union recognition: (1) the majority issue and (2) the eligibility issue.
Before the eligibility issue is referred to the Minister by the DGIR for his decision, it would have been referred to the DGTU to see if he could resolve the matter.

The question how both the DGIR and the Minister would discharge their statutory functions of resolving the eligibility issue in the absence of statutory definitions of these categories of workers under s 2(2) of the IRA 1967 need not present any insurmountable difficulty because earlier to the current procedure under s 9 of the Act, the resolution of the recognition issues, including the eligibility issue, was entrusted to the Industrial Court for final resolution.

Wu Min Aun noted that ‘for the purpose of recognition of trade unions, the Minister who has now assumed the role previously assigned to the Industrial Court will no doubt be guided by precedents set by the Industrial Court, although they are not legally binding on him.’ He further adds that the general principle that has evolved from precedents appear to favour actual duties and responsibilities of these positions rather than designations as criteria for determination n16.

The author, unfortunately, has not come across any noteworthy reviewing court case in which the employer attempted to obstruct the process of union recognition by raising any eligibility issue under s 9(1A) of the Act.

Nevertheless, the eligibility issue raised in the dispute between two unions, namely, Association of Bank Officers (‘ABOM’) and National Union of Bank Employees (‘NUBE’) throws light on the process of resolving the eligibility issue under the law n17.

The ABOM and the NUBE were rivals in this case in claiming to represent the employees who have been promoted by the Bank from tellers and receptionists to the status of 'internal officers'. The Bank had approved of these relevant officers joining the ABOM. The NUBE, however, challenged their status as 'executives'.

The DGIR, having failed to resolve the rival claims of the two trade unions, notified the Minister of his failure and on the basis of the material made available by the DGIR to him, the Minister ruled in favour of the NUBE.

In resorting to resolve the matter, the DGIR did interview representatives of the NUBE, the Bank and the ABOM and also did collect evidence which included the list of duties carried out by the concerned employees. But the DGIR in carrying out his functions under s 9(4A) of the Act did not seek the assistance of the DGTU as to whether the relevant officers came under the scope of the one or the other of the rival unions.

It is true that under s 9(4B)(b) of the Act, the DGIR has a discretion whether or not to seek the DGTU’s assistance. However, the Federal Court in this case felt that in view of the rival claims of the ABOM and the NUBE, the experience and expertise of the DGTU in determining the scope of representations of unions, at least the DGIR should have by affidavit stated why he did not seek the view of the DGTU on the matter.

In view of the failure of the DGIR to consult the DGTU, the briefing on the issue by the DGIR to the Minister was considered factually inadequate. The Federal Court averred that ‘in our view, the omission of the Director-General of Industrial Relations to exercise his powers under s 9(4B)(b) of the Act by referring to the Director-General of Trade Unions for the latter's decision at hand resulted in the Minister not being adequately informed or briefed on the issue n18.’

Incidentally, the enquiries the DGIR made disclosed that the internal officer's job is multi-skilled unlike that of the NUBE members. However, since a minority of the NUBE members promoted as internal officers did not perform the multi-skilled job of the internal officers (while a majority of them did), to conclude that all the relevant officers did not belong to the category of internal officers is a flaw in the Minister's decision-making process. This finding also weighed with the Federal Court in arriving at its decision.

Be that as it may, the tactics of the employers promoting employees who are non-executives to the doubtful executive level is not uncommon. For example, Sivarasa R drew our attention n19 to the Shell Engineering episode as
illustrative of the abuse of management power under the sanction of s 9 (1) of the IRA 1967. In this case, the Company seems to have arbitrarily re-designated a large number of employees, including many clerks as 'junior executives' in order to denude the union of its membership. *Sivarasa* reports that according to the concerned union, these promotions involved no changes in job functions or transfers n20.

**The Competence Issue**

As the law stands today, when a union makes a claim for recognition and the employer (under s 9(3)(b)) disputes the competence of the concerned union to represent the workmen or class of workmen in respect of whom recognition is sought to be awarded, then it is the responsibility of the Registrar of Trade Unions (under the direction of the DGIR) to resolve the issue. In effect, it means that the Registrar had to decide whether the workmen of the concerned union come within the scope of its representation, spelt out under r 3 of the Union Constitution. This r 3 of the trade union of workmen is the one approved by the Registrar while *registering* the union.

The rule governing the scope of the union's representation and the power given to the Registrar to ensure that only workers who fall within the r 3 of the union constitution can be included into its membership is in conformity with the definition of trade union in the Trade Unions Act 1959 (hereinafter referred to as 'TUA'). In other words, only workmen in the same or similar industries, trades or occupations can be admitted as members of the concerned union. The power of the Registrar to decide on this similarity issue is more or less unfettered because s 2(2) of the TUA1959 stipulates that 'similar means, similar in the opinion of the Registrar n21."

It is worth emphasising that the role of the Registrar described above was originally confined to his statutory duty of registering a union. The statutory procedure governing union recognition in the IRA 1967 initially was silent on whether the role of the Registrar under the statutory registration procedure of the TUA 1959 could be extended to union recognition procedure under the IRA 1967.

The following two cases clearly illustrate how resourceful were the employers in fully exploiting this lacuna in the law to avoid or evade union recognition.

Under the IRA 1967, the power to decide a dispute over union recognition was entrusted to the Industrial Court. The role of the Registrar of Industrial relations under that scheme was confined to conciliation to resolve the dispute between the parties failing which he notified his failure to the Minister who in turn reported the dispute to the Industrial Court for adjudication.

While this was the state of the law the employer, in the following two cases, challenged the validity of the attempt by the Registrar of Industrial Relations to seek the opinion of the Registrar of Trade Unions as to the competency of the unions concerned to represent their workmen in support of its claim for recognition.

*Attorney-General of Malaysia v Chemical Workers Union of Malaysia* [1971] 1 MLJ 38 was the earliest case in which the Registrar's well-considered ruling on the competence of the union to represent workers in the 'animal feed' industry was held irrelevant in the context of union recognition procedure.

Rule 3 of the constitution of the Chemical Workers' Union expressly limits its membership to a certain class or category of workers, the relevant part of which reads: 'membership of the union shall be open to all workers ... who are employed by companies manufacturing chemical and pharmaceutical products, such as industrial chemicals including fertilisers, acids and plastics, paints and varnishing stains and shellac, lacquers and enamels; toiletry products such as face and hair creams and industrial, medical and chemical gases ...'

When the Chemical Workers Union wrote to the Registrar on its competence to enrol workers in the 'animal feed' industry, the Registrar, after corresponding with the company, ruled that the company's workers were *similar* to those enumerated in r 3 of the constitution of the Chemical Workers Union.
Knowing fully well that the validity of the Registrar's ruling on similarity of industries cannot be questioned because 'similar means similar in the opinion of the Registrar' under s 2(2) of the TUA 1959, the employer very cleverly challenged the ruling of the Registrar on the ground that the Registrar's powers to declare similarity of trades, occupations or industries is for the purpose of registering a trade union under the TUA 1959 and it could not be extended to a dispute on the question of recognition of a union under the IRA 1967. The High Court upheld the employer's contention which in effect killed the chemical workers' union right to represent the workers in the 'animal feed' industry even though it was competent to do so.\(^n22\).

*Minister of Labour and Manpower v Patterson Candy (M) Sdn Bhd [1980] 2 MLJ 122* is worth considering in all its details because it enables the students of Industrial Relations to become aware of the ingenious tactics of the employer, who was averse to having a union in his company, to evade granting recognition claim by the union to the date of the Federal Court decision (7 November 1973 to 4 April 1980). Actually it had taken more than six years to see the end of the dispute.

Reverting to the facts of the case, it was on 7 November 1973 that the National Union of Commercial Workers ('NUCW') claimed recognition from the Company. The Company in response, did not act under s 9(3) of the IRA 1967 either to recognise the union or refuse it with its grounds for doing so but instead wrote to the DGIR for advice whether to grant recognition or not. By a letter dated 28 November 1973, the DGIR informed the Company that the NUCW was not the right union. The DGIR refused to reconsider the decision after a protest had been lodged by the Company.

For the 27 months thereafter, nothing was done to give the workmen of the Company the protection and privileges of belonging to a union. Then, on 3 March 1976, another trade union, namely, Machinery Manufacturing Employees Union ('MMEU') claimed recognition from the Company. Again the Company did not decide for itself but sought the advice of the DGIR as to the competence of the MMEU to represent the workmen of the Company. The DGIR stated that MMEU was entitled to represent its workers.

Instead of acting on the advice of the DGIR, the Company informed the DGIR that it could not recognise the MMEU since in its view it did not consist of members of similar trades etc. The DGIR, through the Registrar of Trade Unions refused to reconsider his decision. But despite the firm decision of the DGIR and despite the finding by the Registrar that some 62.5% of the workmen now belonged to MMEU, the Company refused to recognise MMEU. The DGIR, nevertheless reported the matter to the Minister under s 9(4)(c) of the Act.

Before the Minister could make known his decision, the workmen out of frustration, joined the NUCW once again, and the NUCW claimed recognition. For the third time, the Company enacted the drama of seeking the advice of the DGIR to recognise it. Despite the DGIR's confirmation of his earlier ruling that the NUCW was not the competent union to represent its workers, the Company accorded recognition to it.

In the meantime, the Minister, acting on the DGIR's report ordered under s 9(5) that the MMEU was to be granted recognition. The Company now challenged the decision of the Minister and applied to the High Court for a writ of *certiorari* to quash his decision that the MMEU was competent to represent its workers. This was on the 13 September 1977. The High Court quashed the decision of the Minister on that ground that under the law as it stood then, the DGIR could direct the Registrar of Trade Unions to decide on the competence issue only for the purpose of registration, not for that of recognition, and as such the Registrar's opinion is irrelevant in a dispute concerning recognition under s 9(5) of the Act.

As we will presently see, this ruling of the High Court blindly following that of the High Court in the Chemicals Workers Union was a serious mistake in that it did not pay heed to the fact that the statutory process for recognition was fundamentally altered by the amendment to s 9 of the Act whereby the jurisdiction for recognition was taken away from the Industrial Court and conferred on the Minister with an enabling provision that the Minister 'may cause any step to be taken or enquiry made by or under the direction of the Director-General of Industrial Relations n23'.
Therefore, the Federal Court, disagreeing with the High Court contended that 'on this statutory provision, any enquiry may now properly be made by or under the direction of the Director-General of Industrial Relations for the purpose of a claim for recognition under S.9 of the Act. There is no reason which we can see, either under the law or as a matter of common sense, why the Director-General of Industrial Relations cannot direct the Registrar of Trade Unions to make the relevant enquiry n24.'

Therefore the Federal Court ruled that the High Court was in error in holding, as it did, that the Registrar's opinion is irrelevant in a dispute concerning recognition under s 9(5) of the Act.

Incidentally, the Federal Court noted that the decision of the Company, Patterson Candy, to recognise NUCW before the decision of the Minister reached it, was a deliberate pre-emption in defiance of what it most reasonably expected to be coming from the Minister.

However, it is the author's view that there could not be any reasonable excuse for the delay in issuing the Minister's order, a delay the duration of which was so long that members could leave MMEU and become members of NUCW and enable the latter union to make a claim for recognition and the employer to recognise it.

Be that as it may, the Federal Court ruling in Patterson Candy was translated into statutory law governing union recognition. In other words, under the 15 September 1980 amendment to s 9 of the Act, it found confirmation under s 9(4B)(b) of the Act concomitant with the enactment of the Industrial Relations Regulations 1980.

Specifically, in carrying out his functions under s 9(4B)(b) of the Act, the DGIR is empowered to refer to the Director-General of Trade Unions for his decision, any question on the competence of the trade union of workmen in respect of recognition is sought to be accorded. It is significant that s 9 (4B)(b) provides that 'the performance of duties and functions by the Director-General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.'

This comprehensive enactment of s 9(4) in 1989 put an end to the employer's strategy to pursue their unholy mission of avoiding recognising a union on this ground.

Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 2 CLJ 119 (SC), case comes under the law governing union recognition as it stands today. In this case, the employer disputed the competency of the union to represent the employees of 'Tanjung Jaga Nite-Club'. The motive of the employer seemed to be to delay according recognition since he was relentlessly pursuing his case to the Supreme Court instead of complying with the ruling of the DGIR that the National Union of Hotel, Bar and Restaurant Workers was competent to represent the workers of the nightclub.

In fact, the DGTU after visiting the 'nite-club' came to the conclusion that the national union was the competent union because he was satisfied that the major business of 'Tanjong Jaga Nite-Club' was the operation of the bar and therefore came within the scope of r 3 of the constitution of the National Union of Hotel, Bar and Restaurant Workers.

Since the employer disputed the DGTU's finding, Abdoolcader SCJ, hearing the appeal, categorically stated that the objection raised by the employer was wholly devoid of any merit or substance whatever. To come to this conclusion, he relied on an English precedent in Garter v Bradbeer [1975] 1 WLR 1204 in which the House of Lords ruled that 'although a club holding licence for music, dancing and provision of food in its premises, so long as the main activity took place at the club was the consumption of intoxicating liquor, it comes under the scope of a bar.'

Membership Check Issue

In order to obtain recognition, the union has to demonstrate that it represented a majority of the workmen in the employment of the concerned employer from whom recognition is sought by it. The expression 'majority' in this
context, in accordance with the settled practice refers to 50% and one more of the relevant workers of the employer.

Until the 1989 amendment to the TUA 1959, the law was silent on the manner in which membership of the union was to be ascertained for the purpose of recognition. However, the majority issue was settled by the Registrar of Trade Unions by verifying the claimed membership after checking into union records, minutes of meetings, membership subscriptions etc n25.

The enactment of s 26(3) of the TUA 1959 in 1989 and regulations governing this section n26 empowered the DGTU, at the request of the DGIR to carry out the membership check by secret ballot as an alternative to the prevailing practice of membership verification to determine the strength of the union's following n27.

The essential difference between these two methods is that unlike the verification method, a secret ballot ascertains the support the union commands from both the union and non-union members of the bargaining unit. The governing criterion for deciding the representative character of a union is the extent of support it can muster in the company rather than the actual strength of the union’s membership. This is especially helpful in cases where workmen are afraid to become members of the union for fear of reprisal or intimidation from the employer.

It is needless to say that there is ample room for the employers who are hostile to workers' union to resort to victimisation and unfair labour practices when the unions apply to them for recognition. The conduct of the employer in the case of United Traction Company v Transport Workers’ Union (Award No 27 of 1971) bears evidence to this kind of unfair labour practices not infrequently resorted to by employers n28. The cases such as KFC Technical Services, Harris Solid State and Enesly Sdn Bhd reported in this article give us a vivid picture of employers resorting to vicious victimisation of unionists and undisguised unfair labour practices to denude the unions of their membership n29.

With a view to minimise the scope for victimisation and unfair labour practice, the Industrial Court in Lower Perak Motor Service v Transportation Workers Union (Award No 4 of 1968) ruled that in a claim for recognition, the relevant date for ascertaining the representative position of the union should be the date on which the claim for recognition is made. This prevents, to a large extent, the possibility of the employer, on the receipt of a claim for recognition, resorting to intimidation and wholesale dismissal on some pretext or another so as to denude the union of its membership. Furthermore, since 1980, termination of the services of workmen pending recognition proceedings has been outlawed under s10 of the IRA 1967 n30. It is needless to say that the aforementioned developments ensure protection of workmen from victimisation and unfair labour practices.

Employer's challenge of the verification method until 1989, verification of membership was the settled practice of determining the strength of union membership. The strategy of the employers to obstruct the union recognition process was either to challenge the result of the membership check carried out by the Registrar or to repeatedly challenge the Registrar’s investigation on the ground that it was in violation of the rules of natural justice.

Foh Hup Omnibus v Minister of Labour and Manpower [1978] 2 MLJ 38, Pahang South Union Omnibus Co v Minister of Labour and Manpower [1981] 2 MLJ 199 and Tanjung Jaga v Minister of Labour [1987] 1 MLJ 124 very vividly illustrate the employers' strategy to obstruct the process of union recognition by tirelessly repeating the challenge on the ground of natural justice despite the clear decision by the apex court in each one of these three cases.

(a) In the Foh Hup Omnibus case, the employer wished to be represented during the membership check so that he could go through union records or documents to satisfy himself whether or not the union, in enlisting members, had acted in accordance with its constitution.

His argument, later in the Federal Court, was that there was a breach of the rule of natural justice since the Minister n31 failed to give the employer the opportunity to present arguments or produce evidence to resist the union claim for recognition. The Federal Court stated that the membership check was carried out by an impartial third
party viz the Registrar of Trade Unions who could not possibly have any interest in the dispute. ‘If the employer had any doubt as to the genuineness of the union’s claim for recognition, nothing could be more fair than to have an impartial party to resolve the dispute.’

(b) In the Pahang Omnibus case, there were two claims from the union for recognition. The first claim was not successful since the Registrar’s membership check disclosed that the union had only 42% of the employees of the company as members of the union. When the union made a second claim, the Registrar’s membership check on the request of the DGIR disclosed that 62.7% of the employees were members of the union. When the DGIR directed the Registrar to carry out the membership check under the union’s first as well as the second claim, the employer wanted to be present at the check along with the union. But the Director-General of Trade Unions carried out the membership claim without either the employer or the union being present. When the second membership check disclosed that 62.7% of the employees were members of the union, the employer conducted his own survey and found that the corresponding percentage was only 42.

When the DGIR wrote to the employer to accord recognition, the employer complained that the membership check carried out by the DGTU was improper and wrong, primarily and basically on the premise that the Director-General of Trade Unions made no verification of the signatures of the employees in the application forms for union membership in the presence of the parties as requested. Since the High Court dismissed the employer’s application to quash the Minister’s decision to accord recognition to the union, the case went on appeal to the Federal Court.

It is important to note that in Pahang South Omnibus, both the Minister and the DGTU filed their affidavits stating the steps they had taken under the law. In view of this, the Federal Court clearly stated that, ‘There is no material to indicate the method of membership survey carried out by the employer or the reason why it should replace or over-ride and be considered more reliable and acceptable than the investigation and check made by the impartial third person of the Registrar of the Trade Unions.’

Furthermore, the Federal Court argued that the Minister is not required in law to ‘verify the signatures of the Company’s employees as the employer contends, and any such exercise would in any event be impractical and virtually impossible and only results in exacerbating the process of inquiry to the extent of negating the discretion vested in the Minister even to the point of requiring or necessitating verification by handwriting experts.’

Finally, relying on the Federal Court ruling in the Foh Hup Omnibus case, Abdoocader FCJ ruled that ‘there was no breach of the rules of natural justice when the Minister did not accede to the request of the employer for a further membership check in the presence of representatives of both parties’.

In the Tanjong Jaga case, the employer did not respond to the union’s claim for recognition, but when the DGTU carried out the membership check at the request of the DGIR, he was dissatisfied with the DGTU’s finding that the 65.8% of the employees were members of the union claiming representation. Like in Pahang’s case, the employer carried out his own survey which showed that the union did not represent a majority of his employees.

The DGIR rejected the employer’s survey, reaffirmed the DGTU’s finding and stated that if recognition was not accorded within 10 days, he would notify the Minister and accordingly, the Minister, under s 9(5) ordered recognition.

Once again, the employer’s attempt to get the Minister’s order quashed in the High Court was not successful. The employer appealed to the Federal Court, again raising the natural justice bogey, notwithstanding their earlier futile
attempts to exploit the same issue in Foh Hup Omnibus and Pahang South Omnibus cases.

Abdoolcader FCJ who was the judge in the Pahang case was also the Federal Court Judge in the Tanjung Jaga case. Perhaps annoyed with the employers for raising the same natural justice issue again and again, Abdoolcader FCJ launched an extensive survey of the English precedents to put an end to this kind of strategy to defeat the legitimate aspirations of the trade unions.

Space limitation constrains the author to restrict citing only one or two of these precedents that lent support to his ruling that natural justice cannot be a scapegoat for justifying the employer's sinister move to stall the smooth operation of the statutory procedure for recognition of unions.

First, the rules of natural justice are not inflexible principles and may vary in their content in the circumstances of the case and in their ambit in the context of their application. Commenting on the undesirability of any precise statement of the rules of natural justice, the House of Lords observed that 'it is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate the activities of those engaged in investigations or otherwise dealing with matters that fall within their proper sphere ...

Abdoolcader FCR argued that 'modern concept to act fairly (not the constraining principles of natural justice) controls the exercise of discretion by executives and administrative authorities for another reason also: in making his inquiries, the Registrar is not conducting an adversarial inquiry in which two sides lay out before him all the evidence they wished to take into account. (On the other hand), the Registrar is engaged in an inquisitorial, not adversarial process .

Besides, in reviewing the decision of the Registrar, it should be borne in mind, observed Abdoolcader FCJ, that there is no provision or requirement for due inquiry and as such, all that was necessary was a fair and reasonable decision arrived at by the Registrar in the exercise of his discretion .

Finally, the role of the Registrar, the DGIR or the Minister is one of fact-finding. They cannot be called upon to justify their findings of facts by evidence. In exercising his function in this regard, the Registrar had an unfettered discretion which is subject only to a duty to act reasonably in the Wednesbury sense . This Wednesbury principle, according to Lord Diplock , refers to decisions that 'looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.' I cannot see, in the matter before us,' said Abdoolcader FCJ, 'that the Registrar had failed to exercise his discretion within this constraint .

In sum, in view of the painstaking analysis by Abdoolcader FCJ, the unions have been liberated from the employers' attempt to raise the natural justice issue in one way or another to delay or defeat the operation of the statutory procedure for union recognition. Understandably, this had driven the employers to seek other avenues to frustrate the union's efforts to gain recognition!

Employers' challenge of the choice of the method of membership check as noted earlier, subsequent to the enactment of s 26(3) of the TUA 1959, the DGTU seems to have gained the discretion to choose between the membership verification exercise and vote by secret ballot when there is no joint request for any one of them by the parties. Obviously, the employers' strategy to obstruct the statutory union recognition process was to challenge the exercise of DGTU's discretion in choosing between the two methods.

In Menteri Sumber Manusia v National Union of Hotel, Bar and Restaurant Workers [1998] 1 CLJ 215 ('Hotel Regent' case), the union requested for membership verification exercise but the DGTU chose vote by secret ballot whereas in Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ 193 ('Perak' case) while the employer requested for secret ballot, the DGTU opted for membership verification exercise. Thus the DGTU really seemed to have exercised his discretion since in one case, he chose vote by secret ballot while in the other,
verification of union membership. Furthermore, he did not give any reasons for the exercise of discretion in both the cases. It is needless to say that the employer's strategy was aimed at invalidating the DGTU's exercise of his discretion on the ground that he failed to give reasons for his choice of the method.

When in the Hotel Regent case, the DGTU in this case opted for secret ballot when the union requested for membership verification exercise, the DGTU conducted the secret ballot within the hotel premises in the presence of representatives of both parties. The percentage produced by the secret ballot in support of the union was 37:48. When the DGIR notified the Minister the result of the ballot under s 9(4)(c) of the Act, the Minister, acting under s 9(5) of the Act rejected the union's claim for recognition.

Dissatisfied with the Minister's decision, the union applied to the High Court for an order of certiorari to quash the decision of the Minister and for mandamus directing him to conduct membership verification under Regulation No 65(1) of the Trade Union Regulations n43.

The High Court quashed the decision of the Minister principally on the ground that the DGTU had not given any reasons for selecting the secret ballot method and absence of reasons meant that the DGTU had no good reasons to give for his choice of secret ballot method for determining membership strength of the union and directed the Minister to conduct membership verification exercise n43.

When the employer went to the Court of Appeal, Gopal Sri Ram JCA set aside the High Court orders of certiorari and mandamus on the ground that 'absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point out overwhelmingly in favour of a different decision, the decision maker cannot complain if the court draws the inference that he had no rational reason for his decision n44.'

Pursuing this logic, Gopal Sri Ram FCJ set out to find whether on all known facts and circumstances of the Hotel Regent case, the exercise of the DGTU's discretion was unreasonable. Since determining the union membership strength by secret ballot is the most democratic way, he concluded that the DGTU's choice of secret ballot was not unreasonable and as such absence of reasons does not suggest any irrationality on the part of the DGTU n45.

In the Perak case, the employer requested for a vote of secret ballot whereas the DGTU chose membership verification exercise to determine the strength of union membership. The employer challenged the choice of the DGTU, for ignoring his request for secret ballot. The High Court failed to take up the case on a technical ground n46.

When the case went up to the Court of Appeal, it set aside the decision of the DGTU while upholding secret ballot as the appropriate method to determine the strength of the union.

In analysing the case, the Court of Appeal rightly considered the 'legal repercussions' that ensue from the order of the Minister to accord recognition to the union as the sole bargaining agent of the bargaining unit. Specifically, once a trade union is accorded recognition, it contracts on behalf of all the employees within its scope of representation in the bargaining unit. The order of recognition would have the effect of taking away individual rights of non-union members and future employees to contract and bargain on their terms and conditions of employment. The contracting rights are, therefore, transferred from the employees to the trade union. The collective agreement would subsequently bind all employees who fall within the scope of its representation irrespective of whether or not they are its members.

It is hardly necessary to emphasise that the implications or repercussions of union recognition as the sole bargaining agent are the same regardless of whether the union is so recognised either through vote by secret ballot or by membership verification exercise. Nevertheless, in view of the aforementioned legal implications of union recognition, it is understandable that the employees should be very much concerned about the right method of determining their representative union.
However, without advancing any new argument in support of the secret ballot method, the Court of Appeal in the Perak case more or less totally relied on Gopal Sri Ram JCA's prescription in the Hotel Regent case that secret ballot is the appropriate method since, in his opinion, it is the most democratic way of determining the union membership strength.

Furthermore, the Court of Appeal advanced the 'legitimate expectation' argument in support of this decision. It seems since the Court of Appeal in the Hotel Regent case ruled in favour of vote by secret ballot as the most democratic way, the employer legitimately expected that secret ballot would be accepted as the appropriate method in the Perak case also.

In addition, the following allegations made by the employer in a letter to the DGTU seemed to have influenced the ruling of the Court of Appeal in the Perak case:
(a) That most of their employees that had signed the membership forms did not know what they had signed;
(b) Those that had signed the forms initially did not wish to join the union;
(c) There could be some false signatures; and
(d) Some of the employees had been coerced to sign the application forms.

In other words, the court was inclined to agree that the vote by secret ballot is free from suspicion of the authenticity and voluntariness of the signatures of the membership verification exercise.

If these allegations are credible enough to tilt the balance in favour of the vote by secret ballot, it is the author's understanding that there are equally or more serious allegations by the unions against the employers' manipulations to make sure that the union does not get the required majority in the vote by secret ballot.

The following are some of the arguments against vote by secret ballot:
(a) One of the reasons is the inordinate delay to conduct the secret ballot. Often balloting is carried out 1 to 3 years after the date of the recognition claim. This delay suits the employer's interest. Moreover, workers who were in the employment of the company at the time of the recognition claim would no longer be working at the time of the secret ballot. But the procedure requires them to vote and an absent vote is deemed to be a 'no union' vote. The author learns that the Malaysian Trade Union Congress (MTUC) had proposed that if balloting is made compulsory, then it should be done within 90 days of the claim.
(b) There are many instances of the company intimidating workers not to cast their ballot in favour of the union. This will have very serious consequences if there is a high proportion of temporary workers. Temporary workers are more susceptible to employers' intimidation and coercion than permanent workers. In the Perak case considered above, out of 541 workmen only 88 were permanent workers.
(c) It is alleged that in employment contracts of foreign workers, there is a condition that they will not participate in any activities connected with trade unions in Malaysia. It is an unfair labour practice, a direct violation of s 8 of the Employment Act 1955 and yet it merrily goes on. The extent to which this will adversely affect the interest of the Union in the secret ballot is directly dependent on the proportion of foreign workers to local workers.
Finally, it is not unknown that some employers desist from sending company transport to pick up workers on the day of secret ballot or arrange a bus trip to whisk them away from the company on the day of the ballot and thus denying them the right to vote.

**Employer Initiated Obstructions under ss 10, 11 12 of the Industrial Relations Act 1967**

(a) *Enesty's Strategy to Avoid Recognition* *Enesty case* n50 is interesting in that the employer, having retrenched, due to his aversion to the union, 38 of his employees during the pendency of the recognition proceedings in violation of s 10 of the IRA tried to escape the consequences of this unlawful action by his audacity and ingenuity in turning the tables on the union by somehow changing its pleadings to retrenchment due to redundancy.

The Industrial Court in its award stated that 'it is clear from the sequence of events above, the series of correspondence and the evidence in the court that the company was responsible for dragging the issue of recognition. When the claim for recognition was made by the union, the company found ways and means of avoiding the issue. The company completely refused to take the view of the Registrar of Trade Unions that the union was competent to represent the workers of the company n51. '

The membership check carried out by the Registrar of Trade Unions disclosed that 53.8% of the total workforce of the employer were members of the union. The company was accordingly requested by the DGIR to accord recognition to the union. This request was ignored but the company instead asked for a recheck upon a fresh list of workers supplied to the DGIR. The DGIR for the second time advised the company to accord recognition to the union on the ground that 66.6% of the total workforce were members of the union. The Company again ignored the request of the DGIR to recognise the union n52.

Understandably, the union issued the 'strike notice' after it had in its several attempts failed to achieve recognition. A period of more than 13 months had elapsed and the union felt that a strike notice was the only solution n53.

It is the view of the Court, observed the Chairman of the Industrial Court[cedill] that the company was never interested in according recognition to the union to avoid violating s 10 of the Act. The company’s failure to accord recognition leads only to one conclusion that they were not in favour of their workers joining the union as they were not prepared to enter into negotiation for wage claims or other terms and conditions of service with the union n54.

It is an irrefutable fact that while the employer dismissed 38 of his employees, he specifically gave 'redundancy' as the ground for dismissal in his letter to the union. However, the Industrial Court noted that Enesty somehow managed to transform it by way of 'preliminary objection' before the Industrial Court 'to the issuance of the notice of strike' by the Union as the actual ground for dismissal of workers n55.

However, both in the Industrial Court and in the High Court, the arguments advanced by Enesty could not hold water since these courts as well as the Supreme Court refused to agree with Enesty that 'issuance of a notice of strike constitutes a strike' within the meaning of s 10(1) of the Act. Therefore, the Supreme Court ruled that 'it cannot render the issuance of strike notice as equivalent to an illegal strike, nor can it constitute a disciplinary ground under the proviso of s 10 (2) of the Act n56.' So the Supreme Court upheld the Industrial Court decision that the dismissal of the 38 workers by Enesty was unjust.

It is, however, the author's view that since the Industrial Court after all its eloquent rhetoric did not order reinstatement but payment of compensation instead, the real intention of Enesty to avoid recognising the union was realised. The fact that reinstatement has become a lost remedy is responsible for this attitude of our Industrial Courts. In
order to counter this tendency, Gopal Sri Ram, JCA in the *Harris Solid State* case rightly stated that: n57

> We have before us a case of an employer who has chosen to dismiss his
> workmen purely because of their trade union activities. There can, in
> our judgment, be no clearer case of victimisation and unfair labour
> practice. In the circumstances of the case, we do not consider that
> compensation is the proper remedy. For otherwise, employers will be
> encouraged to expectation that all that they have to face is an award
> of compensation, a small price to pay for being rid of trade unions.
> The remedy of reinstatement is therefore the only just and proper
> remedy that is appropriate to meet the facts and circumstances of the
> present case.' How appropriate is this comment to meet the facts and
> circumstances of the Enesty Case, where the employer's unfair labour
> practice and victimisation failed to evoke the court's sense of justice
to order reinstatement instead of payment of compensation.

(b) *Section 11 Case: Kesatuan Sekerja Pembuatan Barangan Bukan Logam v Director-General of Trade Unions & Ors [1996] 2 CLJ 405*

Section 11 of the IRA 1967 stipulates that 'Where a trade union has been accorded recognition in respect of any
workmen or class of workmen whether by a decision of the Minister or otherwise, no other trade union shall have any
claim for recognition in respect if the same workmen or class of workmen unless a period of three years has elapsed
after such recognition has been accorded or the trade union which has been accorded recognition is no longer in
existence.'

Having obtained the DGTU's decision that it was competent to represent the workers in Franklin Porcelain Sdn Bhd
('Factory A'), the National Union of Non-Metallic Mineral Products Manufacturing Workers claimed that it was also
competent to represent the workers in the second establishment, namely Franklin Mint Porcelain Manufacturing Sdn
Bhd ('Factory B') when it came into operation in 1989 and some of the processes carried out by the Factory A were
transferred to Factory B.

When the National Union first submitted its claim for recognition, it had to withdraw its claim on the advice of the
DGTU since during the membership check, it was discovered that the membership forms were not signed by the
members. Subsequently, the National Union engaged itself in the process of receiving applications from the workers of
Factory B to become members of the union.

On 20 March 1989, some 2000 workers from Factory A staged a walkout because they were dissatisfied, among
others, with low wages and forced overtime. In May 1989, therefore, the National Union submitted a claim for
recognition to both the factories and was awaiting their replies.

In the meantime, the National Union was shocked to learn that the DGTU registered an in-house union under the
TUA 1959. On 18 May 1989, the in-house union served on Factory A and Factory B claims for recognition, and on the
very next day both the employers accorded recognition to the in-house union n58.

This had the effect of preventing the National Union from seeking recognition unless a period of three years elapses
from the date of such recognition as stipulated *under s 11 of the IRA 1967*. Furthermore, the two employers induced and
coeered their employees not to join the National Union.

The National Union alleged that the registration of the in-house union by the DGTU was a nullity and it was an
abuse of power on the part of the DGTU to do so especially when he himself ruled that the National Union was
competent to represent these workmen. Secondly, by their interference in their organising effort, the in-house union was
injuring the interest of the National Union.
Furthermore, it was a blatant violation of natural justice to register the in-house without giving the National Union an opportunity of being heard, while the National Union, having submitted its claim for recognition was organising the workers in the factories concerned.

Finally, there was an allegation of conspiracy involving the employers of both the factories with the connivance of the DGTU to pre-empt the National union from obtaining recognition.

The High Court issued the interlocutory injunction whose purpose was to immobilise the in-house union and restore status quo until the National Union's claims are adjudicated upon by the court.

(c) Section 12 Cases

Section 12 of the IRA 1967 stipulated the time requirement of waiting period before a union could make a second claim for recognition. Earlier the law required a waiting period of three months which was later amended to six months. Consistent with their policy of relentlessly exploiting any perceived loophole in the law, the employers challenged the second claim of the union on the ground that it was not in accordance with the waiting period requirement under s 12 of the Act and jealously pursued it to the Federal Court in the following two cases, one alleged to have breached the three month waiting period and the other to have violated the six month waiting period.

An Earlier s 12 Case

*Pahang South Union Omnibus Co Bhd v Minister for Labour and Manpower & Anor* [1981] 2 MLJ 199 (FC) illustrates another episode in which the employer tried to stall the recognition process by attempting to raise a frivolous objection. Section 12 of the IRA 1967 as it stood them, prohibited any further claim for recognition where the Minister had decided against according recognition to a trade union until three months have elapsed after the Minister's decision.

In this case, the union's claim for recognition was refused by the employer on the ground that a majority of his employees were not members of the union and suggested a membership check by the DGIR. The DGIR on 2 September 1976 informed the employer that the membership check carried out by the Registrar of Trade Unions showed that only 43.2% of its employees were members of the concerned union. Therefore the employer on 24 September 1976 informed the union that it was not prepared to accord recognition to it. The union on 8 January 1977 made a second claim for recognition.

Though the second claim for recognition was made three months after the refusal by the employer not to accord recognition and it was well within the stipulated waiting period requirement under s 12 as it stood then, the employer tried to avoid recognising the union on a technical ground. Specifically, under s 12 of the Act, as it stood then, it was the Minister who had to decide to accord or not to accord recognition to the union. Since there was no Minister's decision, but only the employer's decision not to recognise the union, whether the submission of the union's second claim conformed to the waiting period requirement under ss12 of the Act became an issue jealously pursued by the employer to the end of the judicial review process. In other words, on this technical ground, the employer contended that the union's claim was precluded and accordingly invalid.

The Federal Court dismissed this contention by arguing that in the union's first claim for recognition, there was no need for the Minister's decision under s 9(5) of the Act because 'not only the union did not dispute the result of the membership check but also accepted the employer's decision not to accord recognition to it. Therefore s 12 of the Act does not, in the circumstance, have any application in the present proceedings.'

A Later s 12 Case

*National Union of Employees in Companies Manufacturing Rubber Products v Director-General of Industrial Relations* [1990] 3 MLJ 112 is another case in which the employer sought to thwart the legitimate right of the union to
claim recognition. Here again s 12 of the IRA 1967 provided that the lever to the employer to deny recognition to the union on the ground that the union had not fulfilled the requirement of the stipulated waiting period before making a second claim for recognition.

Specifically, s 12 of the Act stipulates that 'where a claim for recognition under s 9(2) is resolved under s 9(1A) or whether a decision thereon has been made by the Minister under s 9(5), resulting in the trade union of the workmen concerned not being accorded recognition, such trade union shall not make any further claim for recognition until six months have elapsed from the date of such resolution or decision.'

It is worth noting that the law under s 12 of the Act distinguishes between 'resolution' and 'decision'. The former refers to the resolution by the DGIR under s 9(4A) of Act, whereas the latter refers to the decision of the Minister under s 9(5) of the Act. The earlier Pahang case revolved around the absence of the Minister's decision and in the present case, the issue involved was 'what is meant by the 'resolution' of the dispute by the DGIR?'

Reverting to the case, the union served a claim on the employer for recognition. Since there was no response from the employer, the union reported the matter to the DGIR under s 9(4) and the DGIR started 'taking steps and making enquiries' to resolve the matter. While the enquiries were in progress, the union for some reason withdrew its claim for recognition.

Hardly a month after the said withdrawal, the union served a second claim for recognition on the employer with a copy to the DGIR. The union was told by the employer that its claim could not be entertained by reason of s 12 of the Act.

The Union served its first claim on 1 April 1988; withdrew its claim on 18th May 1988; served the second claim on 5 June 1989. The union contended that since the first claim was withdrawn, the recognition issue was not resolved; and since it was not resolved, it could serve the second claim at any time without any need for meeting the requirement of the waiting period stipulated under s 12 of the Act.

When the union went to the High Court, the Court viewed the union's first claim on 1st April 1988 was in fact resolved under s 9(4A) on the ground that withdrawal of the claim tantamounts to resolution of the claim.

In order to substantiate this equation, the High Court, after consulting various English dictionaries chose 'to become void' or 'to lapse' as the meaning of the phrase 'to resolve' under s 9(4A). In pursuing this line of thinking, the High Court stated that 'a matter becomes resolved when the obligation of the DGIR to resolve has been brought to an end.'

Therefore, with the union withdrawing its application for recognition after the DGIR had 'started to take steps and make enquiries' pursuant to s 9(4A), the matter of application for recognition must be considered to have been resolved, for with its withdrawal, the obligation of the DGIR to resolve has been brought to an end. Therefore the date of withdrawal of the claim for union recognition by the union is the date of its resolution. Since there was hardly a month between the withdrawal and serving of the second claim by the union, it is a clear violation of the s 12 requirement of six-month waiting period between 'resolution' of the first claim and the serving of the second claim.

This interpretation of the phrase 'to resolve' will go down in the history of judicial decisions as a remarkable one. The obligation of the DGIR 'to resolve' the dispute arises upon receipt by him of either an application under s 9(3)(c) or a report under s 9(4). Again s 9(4A) states that the DGIR 'may take such steps and make such enquiries' to resolve the matter. The steps taken and enquiries made by the DGIR should be viewed as 'means to' or 'instrumental to' resolving the matter. They are means to an end, not an end by itself.

Secondly, the High Court refused to consider the argument that the explanatory statement to the Bill of Parliament to amend s 12 of the IRA 1967 says that 'Clause 4 seeks to amend S.12 of the Act to extend the waiting period from
three months to six months before a trade union will be allowed to submit a fresh claim for recognition after an earlier claim for recognition has been rejected. This stand by the court may not be correct because Hansard can be used as an aid to construction of a statutory provision 63.

Be that as it may, it is learnt that by an oral verdict, the Supreme Court ruled in favour of the union, notwithstanding the quibbling of words and phrases in the High Court.

An Extraordinary Case

Kennesion Brothers Sdn Bhd v Construction Workers Union [1980] 2 MLJ 410 is very appropriate to conclude this presentation with an extraordinary episode where the employer initiated obstruction to union recognition has reached its climax in the recognition drama. In this case, the employer did accord recognition to the union, commenced bargaining with it on terms and conditions of employment and half-way through the negotiations, sprung a surprise by unilaterally withdrawing the recognition he accorded to the union. The proximate reason for this extraordinary action was his annoyance at the union seeking conciliation to facilitate the conclusion of the collective agreement 64. This act of desperation bears testimony to the extent to which the employer can go to dispense with unions and collective bargaining in Malaysian industrial relations.

Reverting to the case, the Construction Workers Union served a claim for recognition on Kennesion Brothers Sdn Bhd to represent all workmen employed by the employer, not only in quarries but also workers in the civil engineering and building contractor business. The employer sought and obtained the ruling by the Registrar of Trade Unions that the Construction Workers Union was not competent to represent all its workers. Though the Registrar did not give his reasons for his blanket ruling, the Union seemed to have accepted the ruling of the DGTU for it did not refer the matter to the Minister for final decision under s 9(4)(c).

More than six months later (not to violate s 12 of the Act), the Union submitted the second claim for recognition. This time it was not in respect of all categories of workers employed by the employer, but it was limited to the employer's workers in the quarry at the Batu Caves worksite.

The employer generously accorded recognition to the union not only in respect of quarry workmen at Batu Caves worksite, but also those at its Hulu Langat quarries, and invited the union for collective bargaining.

After commencement of collective bargaining, negotiations deadlocked on certain matters and the union in a conciliatory move withdrew all the claims on which the employer could not agree in order to facilitate the signing of the agreement. But the employer found the union concessions insufficient and refused to sign the agreement.

The union applied to the DGIR and the DGIR invited the parties for conciliation. To the surprise of the union, the employer took the unusual step of unilaterally revoking the recognition accorded to the union on the ground that the recognition originally made was a mistake since it was contrary to the Registrar's earlier ruling on the union's incompetency to represent his workmen when the union made its first claim.

When the case went on appeal to the Supreme Court, it was established by the court that the second claim for recognition was totally a different claim and the earlier ruling of the Registrar on the competence of the union to represent all the workers of the company could not be relied upon by the employer to justify his action of withdrawing the recognition it accorded to the union to represent the quarry workers. Since the second claim was a distinctly different claim, the employer should have carefully considered the options open to him under s 9(3) of the Act; because he did not resort to this action under s 9(3)(c) seeking the DGTU's opinion on the competence of the union to represent the quarry workers, he is deemed to have voluntarily accorded recognition to the union under s 9(3)(a) of the Act.
Once it was established that the employer's recognition of the union to represent the quarry workers was valid, the Supreme Court ruled that 'once the employer has accorded the recognition, there is no provision in the Act enabling the employer to act unilaterally in withdrawing or revoking recognition'.

Conclusion

At the end of this presentation, the author could not but be amazed at the audacity and ingenuity of Malaysian employers in finding ways and means to exploit the loopholes in every provision in the statutory procedure for union recognition to avoid or at least delay according recognition to the trade union of workmen as the sole bargaining agent for the concerned bargaining unit. While this analysis vindicates the title the author has chosen for this article, it points to some much needed reform in the statutory procedure for union recognition.

Reverting to the three basic requirements for union recognition, namely eligibility, competence and membership strength, it is the author's considered opinion that a satisfactory finality has been reached regarding the right method of determining the strength of the union, viz. vote by secret ballot. The author also favours this method not because Gopal Sri Ram JCA in Hotel Regent Case closed the options open to the DGTU on the ground that vote by secret ballot is the most democratic way of determining the union's strength but because of the possibility of the trade union movement voluntarily accepting it as the right method to serve the mutual interests of both labour and management, when some irksome features of this method are rectified.

One of the irksome issues is who are eligible to vote in secret ballot. The author is confident that this nagging issue would be resolved in the near future in view of the interest the Government has taken in the issues of part-time workers as well as foreign workers. It is suggested that in the interest of good industrial relations, only local workers, temporary or permanent, should be allowed to vote on who should represent them, not the foreign workers as it is so in our general elections. It is good that, for many reasons, the Government is contemplating to make the Home Ministry responsible for taking care of them. Whether or not they should be bound by the collective agreement is a different question to be settled between the Home and Labour Ministries. Like the professional expatriates, there is nothing wrong in allowing them the privileges of collective agreement without the right to vote.

Once it is settled who are eligible to vote in secret ballot, the next irritant to be addressed is the criterion of simple majority. Currently, it is a simple majority of all the members of the bargaining unit. It is no doubt a democratic criterion but it is not congruent with the requirement under our political democracy.

In Singapore, it is learnt that they have decreed in vote by secret ballot, all workmen who are eligible to vote must compulsorily vote. Compulsory voting is the rule in their general elections also. Of course, this authoritarian way of ensuring democracy may not be acceptable to the Malaysian Government. But it cannot duck this responsibility any more to allow a simple majority of those present and voting among the eligible voters in the bargaining unit to determine its bargaining agent. If it sounds a little radical, Malaysia may, during the transitory period, opt for a compromise, namely, a simple majority of those present and voting subject to 30 percent of eligible voters voting.

The author is convinced that the two reforms he suggested are the first steps in assuring the labour movement that the Government is not merely paying lip service to their 'Malaysia Incorporated' concept. The author is also aware that real and genuine incorporation has to await 2020 when as a fully developed nation it will willingly quit the 'Rogues Gallery' in the International Labour Organisation and ratify Convention No 87 and liberate our trade union movement to become an equal partner with the State and the Management, to sustain the growth achieved in the emerging context of globalisation.

Notes On Law Governing Union Recognition

1. Electrical Industry Workers Union v Registrar of Trade Unions [1976] 1 MLJ 177 (FC)

1. In this landmark case, the Federal Court ruled that the power of the
Registrar of Trade Unions in deciding the issue of similarity of trades, industry and occupation is more or less unfettered under s 2(2) of the TUA 1959 which stipulates that 'similar means similar in the opinion of the Registrar'.

1. In this case, the Electrical Industry Workers Union wanted to absorb into its membership the workmen employed by Mosanto Electronics Sdn Bhd. The Executive Council of the Electrical Industry Workers Union decided that the workers of Mosanto Electronics came within Rule 3 of its constitution governing the scope of its membership. On the other hand, the Registrar of Trade Unions ruled that a worker employed in the electronic industry did not come within the definition of workmen in the rules of Electrical Industry Workers Union.

1. Claiming that they had the exclusive power to decide whether workers are within the scope of their membership under the rules of the trade union and the Registrar of Trade Unions had no power to rule on the eligibility of the workers to join the trade union or forbid the trade union from taking the said workers as its members, the National Union took the case to the Federal Court for endorsement of its interpretation of Rule 3(1) of its constitution.

1. The Federal Court in disapproving the union's contention ruled that the union had no power to construe the union rules in such a manner as to make members out of those in a different industry. Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions.

1. If a particular union can say that it is for the union to decide whether those in another industry might be absorbed as members of the union, a dangerous situation would develop whereby each and every union in the country would do the same. This could produce disastrous results for the country. Generally speaking, it is for the union to satisfy the Registrar of Trade Unions that the Mosanto electronic workers belong to the workers of the same or similar industry as the electrical industry.

1. The Federal Court, therefore, ruled that it does not desire to limit the discretion of the Registrar under s 2(2) of the TUA 1959 nor to draw up any guidelines for him as to his functions under the Act. Thus the decision whether workmen in two industries are similar is left entirely to the discretion of the Registrar.

2. Incidentally, the Federal Court in Attorney-General Malaysia v Chemical Workers Union stated that 'Once a trade union is registered it is bound by the rules of its constitution. It can only represent that category or class of workmen as is specified in its rules. If a trade union desires to extend its membership clause to include workmen engaged in another industry, it should first amend its rules.'

3. In a write-up in the New Straits Times, 22 September 1994 under the title 'Harris Union Saga: A Lesson to All' the following information was made available: Unlike trade unions, in-house unions go by the names of the companies whose workers they represent. An electronic company may change the name and the in-house union had to follow suit. However, changing a union's name requires a secret ballot and a two-thirds majority from its members.
4. Should the employer necessarily go through the DGIR to seek the opinion of the DGTU on whether or not the union claiming to represent his employees is competent to do so or could he directly seek the opinion of the DGTU on this competence issue?

4. The Federal Court ruling in *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2000] 3 MLJ 689 answers this question. There was nothing in the Trade Unions Act 1959 that prevented anyone (including a union) from seeking a ruling from the DGTU and similarly there was no provision in the Act that disallowed the DGTU from entertaining such a query. The power of the DGTU when faced with such a query must come from S. 4(A) of the Trade Unions Act 1959.

4. Section 4(A) of the Trade Unions Act 1959 stipulates that 'in addition to the power, duties and functions conferred on the DGTU by this Act and any regulations, the DGTU shall have and may exercise all such powers, discharge all such duties and perform all such functions as may be necessary for the purpose of giving effect to and carrying out the provisions of the Act.

5. In *Pahang South Union Omnibus Sdn Bhd v Minister of Labour and Manpower* [1991] 2 MLJ 199, the Registrar in his affidavit clearly spelt out what he did to decide on the issue of membership verification exercise. According to his affidavit, he examined the following documents when he carried out membership check:
   (a) application forms for membership signed by the employee;
   (b) Membership/subscription register kept by the union;
   (c) Receipt books for entrance fees and subscription;
   (d) Minutes Book of the union executive council wherein approval of membership was recorded; and
   (e) List of employees submitted by the employer.

5. Examination of these records would satisfy the Registrar that the union had complied with the requirements of the constitution relating to membership.


6. Since the employer contended that the decision of the DGTU and the DGIR were wrong, he sued the Minister. The High Court dismissed the case on the ground that the employer sued the wrong party; DGIR and DGTU should have been made parties. The case was dismissed on this ground. However, the Court of Appeal stated that the DGTU and the DGIR had no power to accord recognition to the union and hence it would be erroneous to name them as parties. Since the Minister's decision is premised on the decisions of the DGTU and the DGIR, and is based on the material submitted by them, if the decision-making process was flawed, it was the decision of the Minister that was subject to challenge.

7. Trade Unions Regulations 65

7. It is to be noted that under the Trade Unions Regulations 1989 a membership check may be carried out by two methods, that is by way of secret ballot and verification exercise. Under reg 65 the terms 'secret ballot' and 'membership verification exercise' are defined as follows:
Secret ballot' means a secret ballot taken under these Regulations for the purpose of determining the percentage of workmen or any class of workmen in respect of whom a claim for recognition is being sought, who are members of the union making the claim.

'membership verification exercise' means an exercise for the verification of membership through checking membership application forms and other relevant records kept by a trade union of workmen which has made a claim for recognition.

7. Regulation 65 also gives the formula to ascertain the percentage of membership:

**Formula to ascertain percentage of membership:**

1. In the case of a membership verification exercise, the percentage of membership shall be calculated according to the following formula:

   \[
   \frac{\text{total number of valid members as at the date of claim}}{\text{total number of workmen in respect of whom recognition is being sought as at the date of claim}} \times 100\%
   \]

2. In the case of a secret ballot, the percentage of membership shall be calculated according to the following formula:

   \[
   \frac{\text{number of votes indicating membership}}{\text{number of workmen entitled to vote}} \times 100\%
   \]

8. **Menteri Sumber Manusia v Association of Bank Officers** [1999] 2 MLJ 317 (Federal Court)

8. Threshold jurisdiction point: what sort of dispute is envisaged by s 9(1A) of the Industrial Relations Act? Must it be a dispute between employer and employees only?

8. The question was answered by the Federal Court in this case. The Court of Appeal in the same case held that the dispute envisaged by s 9(1A) of the Act must necessarily be between the employer and employee only.

8. Edgar Joseph Jr FCJ, however, in the aforementioned case stated that 'to do so would be to do violence to the plain language of the statute which expressly authorises a trade union of workmen or an employer of a trade union of employers to refer the dispute concerned to the DGIR.' Furthermore, the Federal Court argued that 'the practical consequences of so holding would be destructive of industrial peace and harmony as in the event of the dispute between two trade unions of this sort which occurred in this case. The only remedy would be to proceed by way of an ordinary action bearing in mind the courts of law would be ill equipped to resolve such issues.'

8. The Federal Court concluded that it is inescapable to hold that the Minister did have the necessary threshold jurisdiction to entertain the notification under the Act from the DGIR pursuant to s 9(4C).

9. **Tanjung Jaga Sdn Bhd v The Minister of Labour and Manpower & Anor** [1987] 2 CLJ 119 (Supreme Court)
9. In this case, Abdoolcader FCJ stated 'In my opinion, before the Minister had jurisdiction to make a decision or order under s 9(5) of the Act, he must, first of all, be satisfied that the union was competent to represent the class of workmen in the employment of the employer, that is to say, that the particular class of workmen were eligible to apply and to become members under r 3 of the Constitution of the union. Until this important question has been properly resolved, in my opinion, any membership check pursuant to reg 4(1)(c) of the Industrial Relations Regulations 1980 would be an exercise in futility. It would be like putting the cart before the horse.'

10. The Wednesbury principle of unreasonableness, refers in effect, in the words of Lord Diplock in Bromley London Borough Council v Greater London Council & Anor [1983] AC 768 at p 821 to a decision that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.

11. Tanjong Jaga Sdn Bhd v the Minister of Labour and Manpower & Anor [1987] 2 CLJ 119


11. The Minister in his affidavit stated that in arriving at his decision he had taken into consideration all the relevant facts, the employer’s request to be present during the membership check, the union’s rejection of the request to be present during the membership check and the Registrar of Trade Union’s impartiality in the matter.

11. The Registrar of Trade Unions made an affidavit narrating in some depth the procedure he adopted in carrying out the membership check in connection with the union’s first claim for recognition in December 1985 and specifying the several documents and records utilised and resorted to for this purpose, and again on the same lines in relation to second claim for recognition in January 1977 which culminated in the first respondent’s decision according recognition to the union which is in question in this appeal. He gave details as to how he arrived at the conclusion that 62.76 per cent of the employees of the company were bona fide members of the union and categorically stated that there was no reason to doubt the validity and the genuineness of the documents and records he examined and the signatures in the application forms for membership in the union and that he had received no complaints in respect thereof.


12. The High Court in the Hotel Regent case heavily relied on Gopal Sri Ram JCA’s ruling in the Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1996] 1 MLJ 481 and applied it in order to quash the decision of the DGTU. It is true that Gopal Sri Ram JCA ruled in this case that the Minister when exercising his discretion should give reasons and when he does not give reasons, when there is a duty to give reasons, it means that he had no good reasons to give for what he did.

12. But the context in which the Minister exercised his discretion in the Hong Leong Equipment case is totally different from the context in
which the DGTU exercised his discretion in the *Hotel Regent* case. Specifically in the *Hotel Regent* case the union pursuing its claim for recognition requested for membership check by verification exercise, but the DGTU exercised his discretion to choose vote by secret ballot and in addition he did not give reasons for his decision. On the other hand, in the *Hong Leong Equipment* case, the Minister exercised his discretion not to refer the representation of the workmen for reinstatement to the Industrial Court when the workman considered himself dismissed without just cause or excuse.

12. In what way was the exercise of executive discretion in both the cases different? To Gopal Sri Ram the exercise of discretion not to refer the dismissal case came under s 20(3) of the Act may adversely affect the workman's fundamental right to earn a livelihood. Therefore Gopal Sri Ram ruled that 'as a general rule, procedural fairness which includes giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Constitution is adversely affected in consequence of a decision taken by a public decision maker.' He followed it and said that since the Minister had a duty to give reasons in such cases, and yet he did not give reasons it means that he had no good reasons to give for what he did. Then it is amenable to be quashed by certiorari.

12. When we read his judgement carefully, we will know that Gopal Sri Ram was aware of not only Lord Keith of Kinkel's observation that 'absence of reasons for a decision where there is no duty to give reasons cannot of itself provide any support for the suggested irrationality of the decision....' But more importantly, he was aware of the Supreme Court ruling in the *Sanjiv Oberoi* n69 case that the Minister is not under any statutory obligation to give reasons nor can he be compelled to give reasons when his decision is challenged.

12. Gopal Sri Ram is misunderstood (including by the Court of Appeal in the *Joseph Puspam* n70 case) because his ruling in the *Hong Leong Equipment* is a sort of a transcendental provision which transcends even the Supreme Court ruling in *Sanjiv Oberoi* because in that case, the workmen's fundamental liberty guaranteed by the Constitution is adversely affected.

12. Understandably, in the *Hotel Regent* case, Gopal Sri Ram clearly applied the Lord Keith of Kinkel observation since he himself stated that as a union recognition case 'this is not a case where the workmen have been deprived of their right to livelihood (as in dismissal case."

12. In *R Ramachandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 Edgar Joseph Jr FCJ had endorsed the interpretation of Gopal Sri Ram when he stated that 'and 'life' in Article 5(1) of the Constitution, as Sri Ram JCA has said in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 AMR 1617, 1654 is wide enough to encompass the right to be engaged in lawful and gainful employment.'

12. Since the Federal Court has approved of Gopal Sri Ram's interpretation that the right to life includes the right of the workman to earn a
livelihood, it is only a question of time that this 'transcendental provision' prescribed by him in the Hong Leong Equipment case that the Minister should give reasons when he exercises his discretion in all cases where a fundamental liberty guaranteed by the Constitution is adversely affected, becomes a law by a ruling of a Federal Court, overriding the licence given to the Minister by the Federal Court in the Sanjiv Oberoi case.

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FOOTNOTES:


n2 The saga of unionisation of electronic industry workers is vividly described by (a) The Sun Magazine (Special Issue) 22 September 1994 under the title 'Death of a Union' and (b) The New Straits Times on the same date under the heading 'Harris Union, A Lesson to All'. The New Straits Times reported that 'in the midst of complaints of sexual harassment, unsafe working conditions, dangerous handling of chemicals, poor accommodations, underage employment and subsistence wages, the electronic workers had to wait for 15 years for the Government to lift ban on their unionization.'

n3 Minister of Labour and Manpower v Patterson Candy (M) Sdn Bhd [1980] 2 MLJ 122.

n4 This narration of KFC Strategy is adopted from Wu Min Aun: The Industrial Relations Law of Malaysia Longmans Malaysia (2nd Ed) p 110.

n5 KFC Technical Services Sdn Bhd v Industrial Court of Malaysia [1992] 1 MLJ 564.

n6 supra, n 2.

n7 notes no 3.

n8 Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489, p 515: The Chairman's comments against the claimants who are unionists left us with the impression that it was quite wrong of the respondents to have sought to save the union from total destruction. Comments which carry such a tenor are wholly inappropriate when they come from the chairman of a tribunal which has been established to ensure the proper protection of the rights of workmen, whether unionized or not. It may lead one to assume, with good reason, that the particular chairman is averse to the carrying out of union activities ...

n9 Pahang South Union Omnibus Co v Minister of Labour and Manpower [1981] 2 MLJ 199 and Tanjong Jaga v Minister of Labour and Manpower [1987] 1 MLJ 124 are two of the cases in which the employers conducted their own surveys of claimed union membership.

n10 supra, n 4 113.

n11 supra, n 4 114.

n13 Supra n.12 op cit pp 28-34.

n14 Invariably in all reviewing court cases dealing with union recognition issues, we find that these statutory provisions spelt out and amplified. The following are a few of them.

a. Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors [1990] 2 CLJ 405 (HC).


c. Chugai (Malaysia) Sdn Bhd v Ketua Pengarah Perhubungan Perusahaan H. C. (2000) 1 LNS 181; and


n15 Tanjong Jaga, op cit p 126.

n16 Wu Min Aun, supra, n 4, pp 55-56.

a. In the Non-Metallic Mineral Products Manufacturing Employees Union v United Asbestos Cement Bhd (Award No 18 of 1969), the Industrial Court in this case limited the 'confidential' staff to those whose duties have material and direct bearing on issues affecting negotiations with the union or staff relations generally. Staff having access to confidential information on other aspects of the employer's activities, such as finance and general policy, were not to be excluded from union representation.

b. Managerial functions included planning of work, organizing and utilizing the workforce efficiently, the direction and control of staff in their respective departments and sections with powers to issue orders and instructions, training and performance rating of such staff with power to recommend their promotions, demotion, transfer, dismissal, etc and also to hear and settle their complaints and grievances. Furthermore, a person acting in a managerial capacity must be able to exercise a certain amount of discretionary power, depending on the nature of a matter that requires his attention. (p 56) (United Asbestos Case (Award 18 of 1969).

n17 Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337.

n18 This is an interesting ground of unreasonableness in the Wednesbury sense. See also notes no 10.


n20 See also V Anantaraman, supra n 12, p 29.

n21 (a) Section 2(1).(a) Trade Union means any association ... within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries...(b) Section 2(2)(b) For the purpose of the definition of trade unions in
subsection 1 ...
similar means similar in the opinion of the Director-General of Trade Unions.

n22 In *Minister of Labour and Manpower v Patterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122, the Federal Court seemed to provide a rationale for this ruling of the High Court in the *Attorney-General Malaysia v Chemical Workers Union of Malaysia* [1971] 1 MLJ 38: ‘What it did decide, in our opinion, was that when the competent authority to decide a claim for recognition was the Industrial Court and no provision existed for an enquiry to be made by the Minister through the DGIR or under his direction, the Registrar’s decision could not override the duties and functions of the Court to come to its decision,’ per 124.

n23 *supra* n 22, 124.

n24 *supra* n 22, 124.

n25 In the *Pahang South Omnibus* case, the Registrar in his affidavit clearly spelt out what he did to decide on the issue of membership verification exercise. notes no 5

n26 Section 26(3) of the Trade Unions Act 1959:
Where a trade union of workmen has served claim for recognition under the Industrial Relations Act 1967, the Director General may, at the request of the Director-General for Industrial Relations, carry out a membership check in such manner as may be prescribed by regulations in order to ascertain the percentage of workmen or any class of workmen, in respect of whom recognition is being sought, who are members of the union making the claim.

n27 Trade Union Regulations 1989, notes no 7.

n28 *supra* n 4.

n29 *supra* n 5, n 8, n 25.

n30 Section 10 of the Industrial Relations Act 1967 stipulates that no workman shall go on strike and no employer shall declare a lockout or terminate the services of workmen during the pendency of the recognition proceedings.

n31 As the law stood then, the power to decide on the union recognition issue was taken away from the Industrial Court and conferred on the Minister.

n32 notes no 11.

n33 It may be noted that Abdoolecader FCJ relied on the Federal Court certificate given to the Registrar as the impartial authority in the *Foh Hup Omnibus Co v Minister of Labour & Manpower & Anor* [1973] 2 MLJ 38.

n34 *Pahang Omnibus* *supra* n 9, 203.

n35 *Pahang Omnibus* *supra* n 9, 202.

n36 *per* Lord Reid in *Wiseman v Borneman* at p 308 cited in *Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower* [1987] 2 CLJ 119 at p 3 of 13.
n37 Tanjung Jaga op cit 124.
n38 Ibid p 124.
n39 Tanjung Jaga case, supra n 36, 125. supra n 11.
n40 Ibid p 125.
n41 Ibid.
n42 notes no 7.
n44 A passage from the speech of Lord Keith of Kinkel in R v Secretary of State for Trade and Industry ex p Lornho [1989] 2 All ER 609.
n45 Supra n.43, 225. See also notes no 12.
n46 The High Court dismissed the application since it was of the view that the employee had sued the wrong party. See also supra n 6.
n47 Kelab Lumba Perak v Minister for Human Resources [2005] 3 CLJ 517.
n48 The author has ascertained that this allegation is true.
n49 It is learnt that in some cases the proportion of local to foreign workers is 60:40.
n51 Sykt Enesty Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan (Award No 180 of 1982) p 10.
n52 supra n 51, p 10.
n53 Ibid p 10.
n54 Ibid p 11.
n55 supra n 50, p 20.
n56 Ibid, 23. The Supreme Court stated that 'It seems to us that the word 'strike' in s 10(1) should not include notice of strike. The context of s 10(1) requires that the prohibition intended must be actual strike and not merely an intention to strike. It would be absurd that the legislature would prohibit mere intention to strike on the part of workmen just as it would be so, if mere intention to dismiss a workman under Section 10(2) would be a prohibition against the employer. The legislative intent must be that what is prohibited pending recognition of a trade union is actual strike by the workmen and actual dismissal of a workman by the employer ...'

n57 Harris Solid State supra n 8, 521.
n58 Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors [1990] 3 MLJ 231, p 234.
n59 Supra n 58, 237.
n60  Pahang Omni Bus Co supra n 9, 201.

n61  Ibid 20.

n62  National Union of Employees in Companies Manufacturing Rubber Products v Director-General of Industrial Relations [1990] 3 MLJ 112, p 114.

n63  In Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 4 MLJ 345, p 359 (FC). In this case, Edgar Joseph FCJ after brilliantly analysing the issues involved in statutory interpretation and construction pointed out that after the landmark decision in Pepper v Hart [1992] WLR 1032, the House of Lords, by a majority of 6 to 1 held that a reference to Parliamentary proceedings or Hansard may be made as an aid to statutory construction.

n64  Kennesion Brothers Sdn Bhd v Construction Workers Union [1980] 2 MLJ 410, p 421. Supreme Court. 'In our view, the employer must have known that the subsequent 1985 claim was distinct from the earlier 1983 claim for recognition. It is significant that the employer withdrew the recognition only after the union had referred the dispute to the Director-General under S.18 of the Act as if in retaliation of the union's attempt to compel the employer to execute the agreed Collective Agreement.'

n65  Supra n 64, 421.

n66  Here again there are undecided questions. For example, since the two methods of determining union strength have been prescribed under the law, who should decide which one could be chosen? If the option open to DGTU was closed, making it more or less compulsory to follow the secret ballot, what is the meaning of providing for two methods? If the DGTU has the discretion, under what circumstances membership verification is justified? All these issues have to be squarely faced by a Federal Court in considering Gopal Sri Ram JCA's ruling in the Court of Appeal sanctifying vote by secret ballot as the only right method. Supra n 43.


n69  Minister of Labour, Malaysia v Sanjiv Oberoi and Anor [1990] 1 MLJ 112.