KESATUAN SEKERJA PEMBUATAN BARANG GALIAN BUKAN LOGAM
v.
MALEX INDUSTRIES BHD. & ANOR

High Court, Kuala Lumpur
Abdul Kadir Sulaiman J
[Originating Motion No. R1-25-131-95]
05 August 1998

JUDGMENT

This is an application for an order of certiorari to quash part of Award No. 292 of 1996 handed down by the Industrial Court, the Second Respondent, on 20th July 1995 which is termed as the First Issue before the Court which relates to the holding that the employees of the First Respondent whom the Applicant represents were not considered to have worked in excess of their normal working hours and therefore, the question of overtime pay did not arise. By this same application the Applicant also sought an order of mandamus directing another division of the Industrial Court to rehear the dispute which was the subject matter of the impugned award.

A dispute arose between the Applicant and the First Respondent over the working hours of the members of the Applicant working with the First Respondent. According to the Collective Agreement entered into between the Applicant and the First Respondent, the normal working hours per week of clerical and office staff are 39 hours and those in the factory despatch section and those directly associated with production are 44 hours. Any work done in excess of these hours would be overtime work which qualifies the employees for overtime pay. In the course of their daily work, the First Respondent provides its workers with tea breaks of 15 minutes for the office staff and 10 minutes for the factory staff and also meal breaks. The Collective Agreement is silent on the matter of meal and tea breaks. It happened as a matter of practice only on the part of the First Respondent in providing for these breaks. In determining the normal working hours the time spent by the employees for these breaks were not taken into consideration by the First Respondent. However, in the current Collective Agreement, which is not in issue here, it is specifically provided that the normal working hours include the meal and tea breaks. The consequence is that the actual working hours are shorter than before. It is the findings of the Industrial Court that without reckoning the meal and tea breaks, in the present dispute, the employees of the First Respondent actually worked their normal working hours of 39 and 44 respectively. All the

workers involved are covered by the Employment Act 1955 (hereinafter referred to as "the 1955 Act"). The relevant provisions of section 60A (1)(a) of the 1955 Act states as follows:

> (a) more than five consecutive hours without a period of leisure of not less than thirty minutes duration;".

Subsection (1A) thereof allows the Director General, on the written application of the employer, to grant permission to the employer to enter into a contract of service with his employees, to work in excess of the limit of hours prescribed under the said subsection (1) (a). In the present case, there was nothing in evidence to suggest that the said subsection (1A) applies. It is also not in evidence that subsection (2) thereof applies wherein under the circumstances stated therein, an employee may be required by his employer to exceed the limit of hours prescribed in subsection (1) which includes sub-subsection (a). By sub-section (3) any number of hours carried out in excess of the normal hours of work per day is considered as overtime work which an employee is entitled to be separately paid for the overtime work done. Subsection (9) defines "hours of work" to mean the time during which an employee is at the disposal of the employer and is not free to dispose off his own time and movement.

Reverting back to the present case, the Applicant claims that the time allowed for the tea breaks should be counted as working hours as it falls short of thirty minutes given by section 60A (1) (a) of the 1955 Act. If the Applicant is correct in its contention, the working hours would have exceeded the hours of normal work agreed and so are entitled for overtime pay in respect of the excess period. However, at page 5 of the impugned award the learned Chairman said:

> "In the case before the Court the parties have accepted that the time for tea breaks were not counted as working hours. Therefore it must be the intention of the parties that time for tea breaks was not to be counted as working hours."

As to the operation of section 60A of the 1955 Act the learned Chairman said the following:

> "In the Court's opinion it is the intention of the legislature that workers must not be made to work for more than five hours without a break for leisure of not less than half an hour. Therefore period of leisure of less than thirty minutes does not satisfy this requirement. Does it therefore mean that if it is not a period of leisure it is part of working hours? If the Company allows only a fifteen or ten minutes break for tea then it does not satisfy this condition. However in this case the Company allows lunch break of one hour for office staff and thirty minutes for production staff in addition to the tea breaks.

The Court therefore feels that this Section of the Employment Act. i.e. Section 60A (1) (a) is not about whether working hours should include meal breaks and tea breaks. It is an injunction to employers to provide time for meal and tea breaks (as period of leisure) of not less than thirty minutes after working for a period of five consecutive hours. It is for the parties to negotiate and agree between themselves if the meal and tea breaks are to be considered as working hours as they did in the present Collective Agreement.

> In the circumstances the award of the Court on the First Issue is that the employees of the Company were not considered to have worked in excess of their normal working hours during their tea-breaks and the question of overtime pay did not arise."

It is against this part of the findings of the Industrial Court which becomes the subject matter of challenge by the Applicant by this proceedings for certiorari and mandamus. It hinges on the operation of section 7 and 7A of the 1955 Act which provides:

> "7. Subject to section 7A, any term or condition of a contract of service or of an agreement, whether such contract or agreement was entered into before or after the coming into force of this Act, which provides a term or condition of service which is less favourable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be void and of no effect to that extent and the more favourable provisions of this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be substituted therefor.
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> 7A. Subject to any express prohibitions under this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder, nothing in section 7 shall be construed as preventing an employer and an employee from agreeing to any term or condition of service under which an employee is employed, or shall render invalid any term or condition of service stipulated in any collective agreement or in any award of the Industrial Court, which is more favourable to the employee than the provisions of this Act or any regulations, order, or other subsidiary legislation whatsoever made thereunder."

From the relevant Collective Agreement entered into between the Applicant and the First Respondent, it is clear that no provision is made for the tea and the meal breaks. It was in the later Agreement only that the parties thought fit to include them in their Agreement. So, the point to consider is whether by the operation of section 7 of the 1955 Act it is implicit in the relevant Collective Agreement that the

15 or 10 minutes tea breaks as the case may be, ought to be taken as the working hours of the employees of the First Respondent for the reason that those employees were not given "not less than thirty minutes" period of leisure as provided for in section 60A (1) (a). The learned counsel for the Applicant submits that the tea breaks were clearly part of working hours as they do not constitute a break as required by the 1955 Act in section 60A (1) (a) thereof. I cannot accept the contention of the learned counsel because in my view, the answer as to what are the hours of work is clearly provided by section 60A (9) of the 1955 Act. I do not think it can be disputed that during those period of tea breaks the employees are not "at the disposal of the employer and is not free to dispose off his own time and movements". If that be so, the duration of the tea breaks cannot be considered as the hours of work. As to the provisions of section 60A (1) (a) whilst it is true that the intention of Parliament is to provide the employees with leisure period of 30 minutes or more but as there is no evidence that the First Respondent made the employees to work for more than five consecutive hours without a period of leisure of not less than 30 minutes having regard to the meal breaks as well, it cannot be said that any leisure period of less than 30 minutes must be considered as part of working hours for the employees. In the present case, the employees were provided by the First Respondent with the tea and meal breaks which altogether would add up to not less than thirty minutes in all. The case of Eng Giap Public Motor Bus Co. Ltd. v. Gan Eng Keng & 36 Ors. (1975) 1 MLJ 106 cited by the learned counsel is of no relevance to the issue before the Court. In that case, inter alia, it involves the application of section 60A (8) to the facts of the case. That subsection takes away the operation of section 60A in respect of employees engaged in work which by its nature involves long hours of inactive or stand-by employment. In the present case, there is no dispute that in the course of their daily work of either 39 hours a week or 44 hours a week depending on the category of work they perform being their normal working hours per week, the employees were provided by the First Respondent the respective tea breaks and meal breaks. It was never the decision of the Industrial Court in the impugned award that those breaks were considered as inactive or stand-by employment. All it decided is that those period of breaks were not work done in excess of their normal working hours to meet the claim of the Applicant for overtime pay. In the circumstances, considering all the matters relating to the impugned award, the Industrial Court does not commit any error which necessitates the intervention of this court of judicial review to quash the impugned award and to make a consequential order of mandamus directing it to rehear the dispute between the parties. For that reason this application is dismissed with costs.