BERJAYA LANGKAWI BEACH RESORT SDN BHD

v.

KESATUAN KEBANGSAAN PEKERJA-PEKERJA HOTEL, BAR DAN RESTORAN, SEMENANJUNG MALAYSIA

Industrial Court, Kuala Lumpur
Anna Ng Fui Choo
Award No: 1325 of 2016 [Case No: 3(13)/3-276/14]
25 November 2016

Trade Dispute: *Section 26(2), Industrial Relations Act 1967 — Restructuring of wages — Service charge — Whether service charge element can be included in employee's salary to comply with Minimum Wages Order 2012 — Guidelines on Implementation of Minimum Wages Order 2012 — Whether merely advisory — Whether any legal binding effect — Whether company unilaterally topped up wages of employees with service charge — Whether company had infringed Collective Agreement — Whether utilised service charge to be refunded to employees — Whether company's implementation of minimum wages by utilising service charge of employees allowable*

This was a trade dispute reference made under s 26(2) of the Industrial Relations Act 1967 ('the IRA') between the company and the union. Pursuant to the Minimum Wages Order 2012 ('MWO 2012'), the company had a meeting with the union on restructuring of wages by converting part of the service charge as well as for the proposal of the introduction of the Clean Wage System. Under the system, the service charge element was to be included in the employee's salary so it would not be distributed to the employee. However, the union rejected both the restructuring of wages and the introduction of the Clean Wage System. Hence, the company raised this trade dispute. The union had disagreed with the company's proposal as it alleged, the company was using the employees' service charges which were paid by the customers to top up the minimum wages and that was unfavourable to the employees. Nevertheless, the company had unilaterally implemented the top up of the minimum wages with the employees' service charge. In reality, that had made it composite wages and not minimum wages, the union alleged. The union argued that the company was not supposed to resort to that action. The company, however, claimed that it had elected to seek recourse from the "Guidelines on the Implementation of the Minimum Wages Order 2012" (Guidelines), to top up the minimum wages with the service charge.

Held:

(1) Though the court is aware that it is merely advisory and it has no legal binding effect, the Guidelines remain an important feature of the minimum wages or they would not have been drafted in the first place. In fact, it should not be disregarded without any justification when the Industrial Court decides on a trade dispute matter. It is expressly provided under s 30(4) of the IRA that

the court must have regard to the public interest, financial implications and the effect of the award on the economy of the country, the hotel sector (the industry concerned) and other related industries. The IRA, MWO 2012 and the Guidelines should be read harmoniously. (para 29)

(2) This court was bound by the decision of the High Court in Permohonan Semakan Kehakiman No: R2-25-163-09-2014 in the case of *Crystal Crown Hotel & Resort Sdn. Bhd. (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* and the judgment in that Federal Court case in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd*, in that it could not use the service charge to top up the minimum wages of the employees. (para 30)

(3) The parties had a binding Collective Agreement (CA) between them (art 12 on the service charge) and the service charge could only be utilised if both parties consented to vary the terms and agree to use the service charge to top up the difference in the minimum wages. The company did not obtain the consent of the union to vary the terms of the CA but it had unilaterally topped up the wages of the employees with the service charge. Hence, the company had infringed art 2(b) of the Collective Agreement. (paras 31 & 34)

(4) It was the court's majority decision to dismiss the company's implementation of the minimum wages by utilising the service charge of the employees. The court further ordered: (a) The company to pay the minimum wages to the employees with its own funds without recourse to its service charge; and (c) The utilised service charge be refunded to the employees. (para 35)

[Ordered accordingly.]

Case(s) referred to:

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [Permohonan Semakan Kehakiman No: R2-25-163-09-2014] (unreported) (folld)

Decor Wood Industries (Trengganu) Sdn Bhd v. Timber Employees' Union [1990] 3 MELR 422 (refd)

Georgetown City Hotel Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia [2016] MELRU 1326 (refd)

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 1 MLRA 666 (folld)

National Union Of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. Ayer Keroh Resort Sdn Bhd (Mahkota Hotel Melaka) [2015] 2 MELR 477 (refd)

OYL Condair Industries Sdn Bhd v. Razuan Arshad & Ors [1993] 2 MLRH 408 (refd)

Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1986] 1 WLR 448 (refd)

Legislation referred to:

Employment Act 1955, s 2

Industrial Relations Act 1967, ss 17(2), 26(2), 30(4), (5)

Minimum Wages Order 2012, O 6

National Wages Consultative Council Act 2011, ss 2, 3, 4(2)

Other(s) referred to:

OP Malhotra, *The Law of Industrial Disputes*, p 84

Counsel:

For the union: Lim Chooi Phoe (Rusli Affandi with him); National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia

For the company: Vijayan Venugopal (Nadia Abu Bakar with him); M/s Shearn Delamore & Co

AWARD

Anna Ng Fui Choo:

[1] This is a Ministerial reference made under s 26(2) of the IRA dated 14 March 2014 arising out of the trade dispute in respect of "Implementation of the Minimum Wages Order" between Berjaya Langkawi Beach Resort Sdn Bhd (the company) and Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia (the union).

Background Facts

[2] On 16 July 2012, the Government of Malaysia gazetted the Minimum Wages Order 2012 (the MWO 2012) which subsequently came into effect on 1 January 2013. On 26 November 2012, the company had a meeting with the union on the restructuring of wages by converting part of the service charge as well as for the proposal of the introduction of the Clean Wage System. Under the system, the service charge element was to be included in the employee's salary so the service charge element would not be distributed to the employee. However, the union rejected both the restructuring of wages and the introduction of the Clean Wage System in a letter dated 31 December 2012 (p 15 of the company's Bundle of Documents 1 (COB1)). Other than that, the company averred it had also made attempts to discuss and negotiate the proposal to restructure the wages with the union though the discussions were mostly unofficial discussions with the in-house union committees.

[3] In a letter dated 23 September 2013, the company addressed its employees who earned a basic salary below RM900.00. The company also conducted a general briefing on 26 and 27 September 2013 to explain about the partial service charge top up system. Most of the employees who attended the briefing earned less than RM900.00. Pages 16 to 18 of COB1 are some of the sample

letters dated 23 September 2013 issued by the company to the employees. The company averred that it did not receive any response from the union and/or its employees concerned.

[4] Taking into consideration that the deadline to implement the MWO 2012 was to take effect on 1 October 2013, the company raised a trade dispute vide a letter dated 26 September 2013 to the Director General of the Trade Unions and to the union to report that a trade dispute had arisen from the implementation of the MWO 2012 (pp 19 and 20 of COB1). A copy of the company's letter was referred to the Director General of Industrial Relations Department by way of a letter dated 30 September 2013 found at pp 21 and 22 of COB1. The company then received a letter dated 7 November 2013 from the Industrial Relations Department notifying it of a conciliation to be held on 26 November 2013. As the parties could not reach an amicable settlement at the conciliation stage, the Honourable Minister of Human Resources referred the trade dispute to the Industrial Court on 14 March 2014.

The Hearing

[5] This case was heard together with *Georgetown City Hotel Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia* [2016] MELRU 1326 with the consent of the company's learned counsel and the union. The two hotels involved belong to the same group and the union's witness was the same person in both cases. Moreover, the trade dispute referred to the Industrial Court is similar.

[6] Two witnesses gave their testimony in this hearing, comprising a witness from each party. Kok Seong Khim (COW1) is the Senior Human Resource Manager of the company, which is managed by Berjaya Hotels & Resorts. He is responsible for the full spectrum of human resource functions which include manpower planning, training and development, employee relations, payroll administration and other HR related support services. COW1 told the court that when this trade dispute arose, the applicable Collective Agreement (CA) for the parties was the 4th Collective Agreement (for the period from 1 September 2010 to 31 August 2013).

[7] COW1 referred to p 14 of COB1 which is a letter dated 26 December 2012 from the National Wages Consultative Council (NWCC) to the Malaysian Association of Hotels (MAH), of which the company is a member, informing them that a deferment had been granted to the hotel industry until 1 October 2013 for the implementation of the MWO 2012. COW1 explained that pursuant to the implementation of the MWO 2012, the company decided to restructure its employees' wages by incorporating the service charge value into the employees' wages to ensure that the employees received the minimum wages of RM900.00. However, the union had objected to such an implementation so the company had to raise this trade dispute.

[8] COW1 made reference to p 3 of COB2 which is a table indicating the service charge point value for the years of 2013, 2014, 2015 and part of 2016. The applicable service charge for September 2013 when the company raised the trade dispute was 393. As to how the restructuring was done, COW1 referred to p 21 of COB2 which is the salary slip of one of the employees, Muhammad Taufik Hidayatt Ismail for the months of September and October 2013. At the top of the page was the salary slip issued before the implementation of the wage restructuring wherein the employee's basic salary was RM530.00. At the bottom of the page was the salary slip issued after the implementation of the wage restructuring. Based on the salary slip at the bottom, the basic salary of the employee was increased by RM370.00 to meet the minimum wage of RM900.00 by utilising part of the service charge.

[9] COW1 claimed that the employee would be enjoying increased benefits in the following areas, calculated based on the restructured wages of RM900.00:

(a) Higher contribution to the Employees' Provident Fund (EPF);

(b) Higher overtime rate per hour;

(c) Higher public holidays' pay; and

(d) Higher bonus.

[10] COW1 made reference to p 20 of COB2 and confirmed that the table titled "Minimum Wage Impact" showed the impact of the minimum wage implementation on the company. Based on the current cost and the projected cost, there will be an increase in total cost in respect of the gross salary from RM555,573.98 to RM665,277.88, whereby the variance per month is RM109,703.90. Further, there will be an increase in the company's contribution to SOCSO from RM8,894.60 to RM10,760.50. The company would have to bear the increase of RM109,703.90 if it did not implement the restructuring of wages by incorporating the service charge value into the employees' wages.

[11] The union's witness was Abu Mohamed Abu Baidah (UW1), the Penang Branch Secretary. He confirmed that there was a meeting with the company and the company's proposal was to include part of the service charge to make up the wages to RM900.00 and if it was still less than RM900.00, the company would top up with its own funds. The union had disagreed with the company's proposal as it alleged the company was using the employees' service charges which were paid by the customers to top up the minimum wages and that was unfavourable to the employees. Therefore, the union informed the company to use its own funds to pay the minimum wages of RM900.00 and to comply with the MWO 2012 and art 12, the relevant article on service charge of the Collective Agreement. There was a follow up regarding this issue with the union's letter dated 31 December 2012 to the company.

[12] Nevertheless, in October 2013, UW1 said the Hotel had unilaterally implemented the top up of the minimum wages with the employees' service

charge. He alleged that in reality, that had made it composite wages and not minimum wages. UW1 was adamant that the company was not supposed to resort to that action. However, the company had elected to seek recourse from the "Guidelines on the Implementation of the Minimum Wages Order 2012" (the Guidelines) to top up the minimum wages with the service charge. UW1 asserted that the Guidelines have no force of law.

[13] By making reference to the Collective Agreement and art 12 on the service charge, UW1 said it is abundantly clear that the 90% service charge shall be fully distributed to all employees within the scope of the Collective Agreement as listed in Appendix C on the entitlement of a point system. Moreover, art 12 is a contractual term in the Collective Agreement (pp 13 to 42 of the Union's Bundle of Documents (UBD)). By topping up with a portion of the service charge to RM900.00, UW1 alleged that it would not benefit the employees. In fact, he explained that it would reduce the service charge by the same corresponding amount, resulting in a situation that is less favourable than the employee's existing wages. In addition, the employee would also lose out in the service charge under the Collective Agreement as employees earning RM900.00 and above will still receive the full service charge. As an illustration, the union referred to p 11 of UBD in which the company had used the topping up from the service charge and it had resulted in the employee receiving RM181.00 less in October 2013.

The Arguments

[14] The MWO 2012 came into force on 1 January 2013 for an employment establishment with at least five employees. Paragraph 3(v) of the Guidelines states that:

> "Subject to negotiation between the employer and employee, the method of restructuring of wages is based on the following conditions:
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> (v) for the hotel sector where the service charge collection is implemented, the employer may convert all or part of the service charge meant for distribution to the employee, to form part of the minimum wages."

[15] It is not disputed that there were discussions between the company and the union. The union had objected to the proposed restructuring by the company but the company had, with the view to comply with the MWO 2012, proceeded with the implementation of the wage restructuring with effect from 1 October 2013. It is the company's case that the company had adhered to the Guidelines which provide that an employer may restructure part of the service charge to form part of the minimum wages. Reference was made to para 4, illustration 6 of the Guidelines. It is not disputed that the provisions of the MWO 2012 were not within the contemplation of both parties when the 4th Collective Agreement was signed between them.

[16] Despite the contention of the union, Vijayan, the learned counsel of the company has argued that service charge has not replaced the tipping system. He submitted that contrary to tipping which was/is discretionary in nature

whereby the customer has the option either to provide tipping or otherwise, service charge is not discretionary in nature but it is imposed on the customers. Even UW1 confirmed this under cross-examination.

[17] Nevertheless, the union has relied on the case of *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* [1986] 1 WLR 448 in which the Privy Council stated at p 451:

> "The following matters of fact are agreed. Service charges are demanded by the employer from its customers who have to pay them since they form part of the bill. The object of the service charge is to replace tipping which only benefited those who had personal contact with the customers like waiters and waitresses."

and at p 455, the Privy Council explained that the judge and the Federal Court had concluded that service charge was not 'wages' because:

> "... the service charge is money collected from the customers for distribution according to the points system and therefore, so ran the reasoning, was never the employer's money but was money paid by the customers for the employees and passed to them through the employer. Even if this be a correct analysis of the position, it is plain that the employee's entitlement to his share of the service charge collected by the employer arises under his contract of service with the employer and therefore, even if the employer in terms of that contract is acting as his agent to collect for him and the other employees from the hotel's customers, the service charges which they pay to the employer, that money is due to them by the employer under their contracts of service as a reward for the service which the employees render under their contracts of service to the employer itself."

[18] Vijayan has rightly replied that the union's contention that the service charge money belongs to the employees, is misleading. It is clear that the Privy Council had taken the view that the service charge was due to the employee under the contract of service. Therefore, the service charge does not belong to the employees, but rather, it is due to the employees under the contract of service.

[19] It was the testimony of COW1 that the company is justified in implementing the wage restructuring based on the following grounds:

(a) The impact on the company's financial position if it has to bear the immediate increase in the salary cost without making corresponding adjustment to the service charge allocation;

(b) The restructuring of wages is not to the detriment of the employees;

(c) It would be unfair for a supervisor and a subordinate to receive the same amount of minimum wages of RM900.00 considering the different ranks between the two positions; and

(d) The employees would be enjoying double benefits if they were allowed to receive an upward revision of RM900.00 in their salary without making corresponding adjustment to the service charge allocation.

[20] Undoubtedly, the restructuring of wages implemented by the company was for the purpose of increasing the employees' wages to the minimum basic salary of RM900.00, in accordance with the specified minimum wages rate under the MWO 2012. It was argued by the company that with the restructured wages, the employees would receive the same amount of service charge entitlement and by virtue of the increased basic salary, the employees benefits would also be enhanced. Hence, it was submitted that the employees' restructured wages are not less favourable than the employees' wages prior to the implementation of the restructuring of wages.

[21] On the other hand, the union has contended that the Guidelines have produced an absurd and unjust result which does not promote the purpose or object of the National Wages Consultative Council Act 2011 (the Act). It was alleged that the Guidelines were inconsistent and repugnant to the Act. The company has replied that the true mischief the said Act and the MWO 2012 are trying to address is ensuring that the employees would, on an overall basis, take home a minimum amount of wages. Thus, as it is in this case, although the basic salaries of the employees were less than RM900.00, their overall remuneration far exceeded RM900.00 due to the service charge. Therefore, the company remains steadfast in its argument that the restructuring of the employees' wages by the company had not changed the situation in that the employees' overall remuneration still exceed the minimum wages rate of RM900.00.

Decision

[22] This is a majority decision of the court. The Honourable employers' panel member opines that the union should not maintain its demand of having both the minimum wage and service points. He said that service points was formulated in the past to assist employees at the lower income level. He believes that the minimum wage was created with the understanding of bringing the income to a targeted level and both are done to assist the targeted employees to achieve a certain level of income. However, the union by insisting on both the service charge and minimum wages would render the entire industry less competitive and if the industry becomes unsustainable, some employees may even end up losing jobs. His advice is for the union to relook at the service point system (whether it is still necessary) and if it is, to rework the calculation in view of the new minimum wage regulation in Malaysia.

[23] The Honourable employees' panel member referred to both the Industrial Court and High Court decisions in the case of *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* and is of the view that fundamental

terms and conditions cannot be unilaterally altered by the company. He also took into consideration art 12 of the CA between the company and the union and para 3(v) of the Guidelines and decided that the CA cannot be unilaterally altered by the company, which the company has done so by using the service charge of the employees to make up the minimum wages of the employees.

[24] This award will not be complete without making reference to the High Court's decision in the case of Permohonan Semakan Kehakiman No: R2-25-163-09-2014 in the case of *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia*, the appeal of which is pending in the Court of Appeal. At p 11 of the written judgment which was dated 16 June 2016, the learned High Court judge YA Dato' Asmabi Mohamad gave a brief introduction on the concept and rationale for imposing a national minimum wage in Malaysia. She said:

> "16. The National Wages Consultative Council Act 2012 ("NWCC") was introduced to prevent exploitation of labour through payment of unduly low wages. NWCC recognises that wages cannot be left to be determined by market forces and imposes an obligation on an employer to pay a minimum wage, irrespective of the employer's capacity to pay. The minimum wage system had been introduced in Malaysia by way of the Minimum Wages Order 2012 ("MWO"), made pursuant to NWCC.
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> 17. The process for the determination of the minimum wages system had been provided under ss 21 and 22 of NWCC. After the minimum wages rates had been recommended by the National Wages Consultative Council ("Council") to the Government and the same had been agreed by the Government, these minimum wages system would be gazetted pursuant to s 23 of the NWCC.
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> 18. What then is the minimum wage? The International Labour Organization had defined minimum wage as the lowest wage that should be paid to the employees for work or services done. This is to ensure that the bare minimum needs of these employees and their families are met based on the socio-economic conditions of the country. The minimum wage would be set at a level that is reasonable both for the employees and the employers so that it would not be too high as to burden the employer or too low as to exploit the employees. Its purpose is not only to provide for bare subsistence of life but also to take into consideration some measure of education, medical requirements and amenities to enable the worker to preserve his efficiency as a workman (see OP Malhotra's *The Law of Industrial Dispute* 6th edn at pp 594-597)."

[25] After hearing the judicial review application, the Industrial Court's decision involving the same parties was confirmed and the learned High Court judge found favour with the submission of the union. The learned judge said that by examining the definition of "wages" and "minimum wages" provided under s 2 of the NWCC Act, the definition of "wages" has the same meaning assigned to it under s 2 of the Employment Act 1955; and the definition of "minimum wages" means the "basic wages" to be or as determined under s 23. Reliance was placed on an Industrial Court award as to what amounts to

"basic wages" in the case of *Decor Wood Industries (Trengganu) Sdn Bhd v. Timber Employees' Union* [1990] 3 MELR 422 as:

> "... does not include additional emoluments which some workmen may earn on the basis of a system of bonus related to production. Nor does it include any other supplements and allowances, such as housing and cost of living which is not directly related to the work in that category."

From the above, Her Ladyship concluded that it would appear that the concept of "basic wages" under the Act does not include any other additional components. Her Ladyship stated that this concept had been illustrated in OP Malhotra's "*The Law of Industrial Disputes*" at p 84.

[26] The learned judge then proceeded to examine O 6 of the MWO and said:

> "The law had envisaged that the implementation of the minimum wage system must not in any way result in the employee getting anything less favourable than the employee's current wages. Neither could the basis restructured wages be less than the amount of wages earned by the employee pursuant to the contract of service. The concept of service charge had been discussed in the case of *National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v. Masyhur Mutiara Sdn Bhd* [2014] 1 MELR 286. The rationale for the introduction of the service charge in the hotel industry was to replace the practice of tipping."

[27] The learned High Court Judge agreed with the Industrial Court that the applicant (hotel) could not be permitted to meet its obligation to pay the minimum wage as envisaged by the NWCC Act and the MWO 2012 by utilising the service charge paid by its customers. Her Ladyship was of the view that the Industrial Court was justified in rejecting the hotel's proposal for the service charge to be utilised to make up for the minimum wage provided under the law. The same rejection was also applicable to the hotel's proposal for a portion of the service charge to be utilised to supplement the basic wage to meet the RM900.00.

[28] "The MWO Guidelines have no binding effect" has been the thrust in the union's arguments. These MWO Guidelines were made by the National Wages Consultative Council (NWCC), a public body established pursuant to s 3 of the Act to monitor and advise on the minimum wage policy of the country. The NWCC is, *inter alia*, responsible for advising the Government on all matters relating to minimum wages, including its development at the international level and for making recommendations to the Government on the minimum wages rates and coverage according to sectors, types of employment and regional areas, and other matters relating to minimum wages and wages. The NWCC also has the function of consulting the public on the minimum wage rates and coverage, and collecting and analysing data and information, as well as conducting research on wages and the socio-economic indicators. The MWO Guidelines were issued by the NWCC and in the opening paragraph of the MWO Guidelines, it is specifically stated that they were made pursuant to the powers granted to the NWCC under s 4(2) of the Act.

[29] Therefore, the MWO Guidelines must have been issued upon appropriate research and consultation with various parties affected by the minimum wage rates. It is only appropriate for the court to conclude that the MWO Guidelines represent the views of the body whose main function is to advise the Government on the implementation of the minimum wage. Though the court is aware that it is merely advisory and it has no legal binding effect, the court opines that the Guidelines remain an important feature of the minimum wages or they would not have been drafted in the first place. In fact, it should not be disregarded without any justification when the Industrial Court decides on a trade dispute matter. It is expressly provided under s 30(4) of the IRA that the court must have regard to the public interest, financial implications and the effect of the award on the economy of the country, the hotel sector (the industry concerned) and other related industries. The Act, MWO 2012 and the Guidelines should be read harmoniously.

[30] Nevertheless, it was rightly pointed out by the union that this court is bound by the decision of the High Court in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia supra* – the judgment in the Federal Court case in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 1 MLRA 666 on the doctrine of *stare decisis* is in point. Hence, the company cannot use the service charge to top up the minimum wages of the employees as decided by the High Court.

[31] The court must also add that the parties have a binding CA between them (art 12 on the service charge) and the service charge could only be utilised if both parties consent to vary the terms and agree to use the service charge to top up the difference in the minimum wages. In the case of *OYL Condair Industries Sdn Bhd v. Razuan Arshad & Ors* [1993] 2 MLRH 408 at p 409, the High Court held:

> "As for the view that I hold to begin with, s 17(2) of the IRA provides:
>
> > 17 (2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the court.
>
> In my view, what the section (and equally the article) stipulates is that, after the coming into force of the CA, the provisions of the contract of service relating to the rates of wages to be paid and the conditions of employment to be observed should be in accordance with the provisions of the CA."

[32] The union has submitted that the two issues of losses to the company arising from the implementation of the minimum wages and that it was not within the contemplation of the parties when the collective agreement was executed with regard to the implementation of the minimum wages, had been canvassed before the courts. In the case of *National Union Of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. Ayer Keroh Resort Sdn Bhd (Mahkota*

Hotel Melaka) [2015] 2 MELR 477, the Industrial Court in allowing the reduction of service charge from 10% to 5% had held that based on the two issues, there were special circumstances and said:

> "The said order had not been implemented when the said collective agreement was singed.
>
> The court found by a majority that there were special circumstances to vary the said collective agreement to allow for the reduction of the service charge imposed on bills to 5%. The said hotel had incurred losses after the Minimum Wages Order 2012 was implemented for the said hotel on 1 October 2013 and the order was not within the contemplation of the parties where the said collective agreement was signed.
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> In the circumstances, the application is dismissed."

[33] The union was not satisfied with the aforesaid decision and had filed for judicial review in the High Court (pp 208 to 210 of the union's bundle of authorities). On 17 February 2016, YA Hakim Dato' Hanipah Farikullah allowed the union's application and an order of *certiorari* was issued to quash that part of the award relating to special circumstances and an order of mandamus was issued to compel the Industrial Court to order the respondent (hotel) to comply with art 12 of the Collective Agreement by imposing the 10% service charge from 2 April 2015.

[34] It is clear that the company had not obtained the consent of the union to vary the terms of the CA but it had unilaterally topped up the wages of the employees with the service charge so the company has infringed art 2(b) of the Collective Agreement. COW1 had also admitted that there was no variation made to the binding agreement.

[35] I have considered the evidence before the court, the law and the submissions of all parties. It is the court's majority decision to dismiss the company's implementation of the minimum wages by utilising the service charge of the employees from 1 October 2013. The court hereby:

(a) dismisses the company's implementation of the minimum wages by utilising the service charge of the employees;

(b) orders the company to pay the minimum wages to the employees with their own funds without recourse to their service charge from 1 October 2013; and

(c) that the utilised service charge be refunded to the employees as from 1 October 2013 within one month from the date of this award.

[36] In arriving at this decision, the court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under s 30(5) of the IRA.