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Employment Law: Service Charge And Computation Of Wages In The Hotel Industry

Contact Persons:

Datuk D P Naban
Senior Partner
+603 6209 5405
naban@rdslawpartners.com

Nagarajah Muttiah
Partner
+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner
+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
+603 6209 5400
kenny@rdslawpartners.com

Shaun Tan Cheng Hong
Senior Associate
+603 6209 5400
shaun@rdslawpartners.com

It has been a long battle between hoteliers, its employees and the National Union of Hotel, Bar and Restaurant Workers (the Union) regarding the utilisation of service charges to satisfy the hoteliers' statutory obligations to pay minimum wage. The Saga began ten years ago and had finally reached its finalé in March 2021 with the Federal Court's decision in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restaurant Semenanjung Malaysia* [2021] 3 MLJ 466.

Time-Line

The hotel begun operations in January 1995. Its employees were under individual contracts of employment comprising a basic salary and remuneration of service charge, whereas the Union gained recognition in 1999.

The hotel rejected the Union's invitation to negotiate terms and conditions of employment in the parties first collective agreement. The dispute was referred to the Industrial Court for adjudication under Section 26(2) of the Industrial Relations Act 1967 (IRA) in February 2012. Further, in 2012, the Minimum Wages Order (MWO) was enacted as a subsidiary legislation under the National Wages Council Consultative Act 2011 (NWCCA). The monthly minimum wages rate at that time in Peninsular Malaysia was RM 900 in whereas in Sabah, Sarawak and the Federal Territory of Labuan the rate was RM 800.

The Union had proposed retention of the service charge system and a 10% salary adjustment. On the other hand, the hotel recommended introducing a 'clean wage system' to replace service charge or a 'top-up structure' if the service charge was to be maintained, utilising it to pay the minimum wage.

The Industrial Court decided that:

(a) The employee's minimum salary to be increased from RM 900 to RM 1300.

(b) Retainment of the service charge system, which is limited only to employees covered under the scope of the first collective agreement.

(c) The first collective agreement to be effective 1 October 2011.

It was reasoned that premised on the existing contract of employment, the salary and service charge was fundamental terms of the contract which could not be unilaterally varied by the hotel. Thus, the hotel was bound to pay the minimum statutory wage and the contracted service charge to its employees.

The hotel applied for judicial review in the High Court to challenge the award by the Industrial Court on the grounds that the Industrial Court:

(a) Fundamentally mistaken to recognise its 'power' to resolve the trade issue at hand.

(b) Failed to take into account Section 26 of the IRA that would enable the Industrial Court to order the implementation of the clean wage system.

(c) Erred in its statutory duty under Section 30(4) of the IRA to consider the public interest, financial interest and the effect of its award on the industry and the country's economy.

The High Court upheld all the findings of the Industrial Court and dismissed the hotel's for judicial review application on 19 August 2015. The hotel then appealed to the Court of Appeal, where the appeal was dismissed on the following grounds:

(a) The implementation of minimum wage could not result in employees being remunerated with less favourable sum.

(b) The service charge is from the customers and that the MWO did not prevent the employees from receiving it.

(c) The service charge is a part of the contractual terms and conditions of service.

(d) The hotel's obligation to comply with the statutory requirement to pay minimum wage is separate from its obligation to adhere to its contractual agreement.

(e) The clean wage system would deprive its employees' remuneration as part of the contractual entitlement.

(f) The utilisation of service charge to meet such financial responsibility would nonetheless defeat the purpose and object of MWO 2012.

Decision Of The Federal Court

The hotel was firm on its stance that the Industrial Court and the courts hearing its appeal had failed to recognise that the Industrial Court had erred in not utilising its powers and obligations under Section 26(2) of the IRA "to create new rights and obligations between parties". Reliance was placed on the case of *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, where it was observed that the Industrial Court should endeavour to keep "industrial peace". It was argued that the Courts did not place actual regard to Section 30(4) of the IRA as the award would result in the hotel facing financial hardship. The Union responded that financial hardship or incapacity was irrelevant as employers must comply with the statutory minimum wage.

The Federal Court dismissed the appeal and held that:

(a) The IRA, NWCCA and MWO are social legislations introduced by Parliament to curb the plight of workmen and the working poor, and these legislations are to be read harmoniously. Further, the minimum wage requirement was prescribed by law without derogation from other entitlements or benefits enjoyed by the employees.

(b) Service charge is a remuneration to the employees payable in cash for work done under a contract of service. Hence, it does not fall within the definition of 'basic wages' under NWCCA and Section 2 of Employment Act 1955.

(c) The service charge was an express and established term of the contract of service. It would be wrong to unilaterally remove or vary the contractual terms of service without the employees' consent.

(d) The service charge, which the patrons paid in monies, did not belong to the hotel but was held on trust for the benefit of its employees. The hotel must not misappropriate those monies to meet its statutory obligation.

Authored by Rachel Tham Xi Wen, an associate from the firm's Dispute Resolution practice.

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Datuk D P Naban
Senior Partner
+603 6209 5405
naban@rdslawpartners.com

Nagarajah Muttiah
Partner
+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner
+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
+603 6209 5400
kenny@rdslawpartners.com

Shaun Tan Cheng Hong
Senior Associate
+603 6209 5400
shaun@rdslawpartners.com

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