

PROVING SPECIAL CIRCUMSTANCES: WHEN COVID 19 TRUMPS COLLECTIVE AGREEMENT?

by Rajeswari Karupiah & Muhamad Sharulnizam Bin Mohd Roni

Recently, our Senior Associate, Muhamad Sharulnizam Mohd Roni, appeared on behalf of the employer in a case pursuant to Section 56(1) of the Industrial Relations Act 1967 filed by a national union representing food industry employees for alleged non-compliance of the Collective Agreement.

The parties to the dispute were Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan (**the Union**) and DCH Contract Manufacturing Sdn Bhd. (**the Company**).

The main issue in the dispute concerned the Company's failure to pay a bonus to employees for the year 2020, which the Union claims is a breach of Article 26 of the 4th Collective Agreement (CA). Whilst the Collective Agreement is binding on the Company, the Company attempted to rely on Section 56(2)(c) of the Act. In the past, where the special circumstances doctrine is invoked, the Industrial Court rarely allowed the variation of the Collective Agreement on grounds of financial distress faced by the employer.

Brief Facts

The dispute arose between the Union and the Company over the non-payment of bonus for 2020, which was allegedly in breach of Article 26 of the 4th Collective Agreement (CA) (Cog. No: 060/2021 dated 3rd May 2021). The Union contended that the Company was obligated to allocate two (2) months' bonuses to all employees, subject to performance adjustments based on a bell curve.

However, due to the financial constraints brought on by the COVID-19 pandemic, the Company did not issue any bonus payments in 2020 to any of its employees. The Company relied on the fact that it faced significant financial losses that year. Despite the losses, the Company prioritized employee welfare by maintaining salaries and, most notably, avoided retrenchment, thereby, ensuring that all employees remained employed without any loss of income.

The Law

Section 56(2)(c) of the Act allows the Industrial Court to make such order as it considers desirable to vary or set aside upon special circumstances any terms of the award or collective agreement.

The law on "special circumstances", is well-established in the case of *National*

Union of Hotel, Bar and Restaurant Workers v. Seasian Hotel Sdn Bhd (Orchard Sun Penang) [1992] 3 CLJ (Rep) 115; [1992] 2 CLJ 865, the High Court quoted with approval the definition of "special circumstances" defined in Banker's Union Clarks of Hove Ltd (1978) ITR 356, wherein it was held as follows:-

"What then is meant by special circumstances?

In so far as that means that the special circumstances must be relevant to the issue then that would apply equally here, viz in these circumstances, the Employment Protection Act 1975. It seems to me that the way the phrase was interpreted by Industrial Tribunal is correct. What they said in effect was this that the insolvency is on its own neither there nor here. It may be special circumstances. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If for example sudden disaster strikes a company making it necessary to close the concern then plainly that would be a matter which was capable of being special circumstances...

In other words, to be special the event must be something out of the ordinary, something uncommon."

In Malaysian industrial jurisprudence, the courts have traditionally exercised caution when entertaining claims under Section 56(2)(c) of the Act. Employers' attempts to invoke "special circumstances" to vary or set aside awards or collective agreements have frequently been unsuccessful. The legal position concerning "special circumstances" under Section 56(1) of the IRA was long considered well-established. This clarity stemmed from the Supreme Court's decision in **Hyatt Kuantan Hotel, Kuantan v. National Union of Hotel, Bar and Restaurant Workers [1987] 1 ILR 557**, where it was held that financial incapacity alone does not constitute special circumstances. This principle became a cornerstone in subsequent industrial disputes, reinforcing the notion that mere financial distress was insufficient to justify the variation of awards or collective agreements.

However, the High Court's decision in **Prestige Ceramics Sdn Bhd v. Kesatuan Pekerja Pembinaan**

Barangan Bukan Logam & Anor [2001] 5 CLJ 354 introduced a shift in perspective. The court in Prestige Ceramics suggested that it is necessary to examine the underlying causes of a company's financial difficulties rather than dismissing financial incapacity outright. Notably, this decision diverged from the precedent set in **Hyatt Kuantan Hotel (supra)**, as the learned judge did not consider the Supreme Court's position or the multitude of cases that consistently rejected financial incapacity as a special circumstance.

The Prestige Ceramics judgment marks an interesting development in the interpretation of "special circumstances," potentially broadening the scope for employers to seek variations based on financial challenges, provided that the root causes are sufficiently compelling. This shift underscores the evolving landscape of industrial relations in Malaysia, hinting at a more nuanced consideration of employers' financial conditions in the context of collective agreements.

In addition, in the case of **Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn Bhd [2017] 2 ILR 260**, the High Court held as follows:-

"Simply put, in the absence of "special circumstances" this court will not exercise its power to vary or set aside the articles of a Collective Agreement.

*This court is mindful that the phrase "special circumstances" must be special under the circumstances as distinguished from ordinary circumstances. **It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.** There are countless situations that could constitute special circumstances with each case depending on its own facts. And **the list of factors constituting special circumstances is infinite and could grow with time.**"*

Legal Arguments in the Case

In Court, the Union raised, amongst others, the following legal arguments, which can be summarized as follows:-

- **Contractual Interpretation of Article 26**

The Union argued that Article 26 contains two limbs: (a) an obligation to allocate two (2) months bonus to all employees, and (b) discretion only regarding the amount based on performance. The Union too contended that the bell curve distribution method mentioned in Article 26 means employees might receive more or less than two (2) months based on performance, but all must at the very least, receive something, and that if bonus payment were truly discretionary, there would be no need for Article 26 in the Collective Agreement at all.

- **Timing and Retention of Article 26**

The Union emphasized that the 4th CA was signed on 24.2.2021, after COVID-19 had emerged and after the alleged losses in 2020. Hence, the Union argued that despite knowledge of the pandemic's impact, the Company retained Article 26 without amendments to include any reservations about bonus payments. This demonstrated the Company's continuing commitment to honour the bonus provision.

- **Performance-Based Obligation**

The Union maintained that the bonus was contractual and linked to employee performance rather than Company profits and that employees had worked as directed by the Company throughout 2020 and contributed to revenue generation of RM72 million. As such, the Union contended that the contractual obligation remains regardless of the Company's financial performance.

The Company, on the other hand, raised the following legal arguments, which include:-

- **Interpretation of "Will Allocate"**

A significant point of contention lies in the interpretation of the phrase "The Company will allocate." The Company argued that this phrasing does not impose a mandatory obligation. Unlike stronger contractual terms such as "shall be paid" or "must be paid," the wording "will allocate" is argued to allow for flexibility, particularly in extraordinary situations. This interpretation suggests that the Company retains discretion under specific circumstances, challenging the Union's position that the provision is absolute and enforceable without exception.

- **Force Majeure and Special Circumstances**

The Company further invoked the concept of force majeure, emphasizing that the COVID-19 pandemic constituted an unprecedented special circumstance beyond its control. It cited the Movement Control Order (MCO), a government-mandated lockdown that significantly disrupted business operations, as a clear example of force majeure. The argument leaned on case law that supports the notion that courts have the power to vary or set aside provisions of collective agreements when genuine special circumstances are demonstrated. The pandemic, coupled with regulatory restrictions, was presented as a compelling justification for the Company's inability to meet its obligations under the collective agreement.

- **Financial Hardship Defense**

The Company further substantiated its claim of financial distress by presenting evidence of a RM942,000 loss in 2020 and a marked reduction in revenue during the pandemic period. It contended that these financial constraints were genuine and directly linked to the economic downturn caused by COVID-19. The Company too argued that despite these losses, it prioritized business continuity and employee welfare, ensuring that there were no retrenchments or salary cuts. This strategic allocation of limited financial resources was portrayed as a responsible corporate decision aimed at sustaining operations and protecting jobs.

- **Public Interest and Economic Considerations**

Lastly, the Company invoked Section 30(4) of the Act, which mandates the Industrial Court to consider "public interest, financial implications, and the effect on the economy" when adjudicating disputes. The argument extended to broader economic concerns, suggesting that compelling employers to meet bonus payments during periods of severe financial hardship could destabilize not just the Company, but also have a domino effect on related industries and the wider economy. The Company positioned its approach as a balancing act between business sustainability and employee welfare, highlighting its commitment to protecting livelihoods while navigating financial adversity.

These four (4) pillars form the backbone of the Company's defense, reflecting a strategic reliance on contractual interpretation, force majeure principles, financial hardship evidence, and public interest considerations. Together, they illustrate the multi-faceted legal arguments that employers may employ when faced with disputes over collective agreement obligations during extraordinary times.

Legal Principles and Precedents Cited

- **Definition of Trade Dispute**

A critical foundation in industrial relations disputes is the definition of a trade dispute. Under Section 2 of the Act, the term is given a broad interpretation, encompassing any disagreement between employers and employees concerning employment terms, conditions, or rights.

The case of ***Dynamic Plantations Bhd v. YB Menteri Sumber Manusia & Anor [2011]*** served as a key reference, underscoring the wide ambit of what constitutes a trade dispute. In this case, the courts affirmed that disputes related to collective agreements, salary adjustments, and employment benefits fall squarely within this definition, reinforcing the notion that the threshold for establishing a trade dispute is deliberately broad to capture various employment-related conflicts.

- **Social Legislation Interpretation**

In cases involving social legislation, courts are guided by principles of liberal interpretation. This was firmly established in ***PJD Regency Sdn. Bhd. v. Tribunal Tuntutan Pembeli Rumah & Anor [2021]***, where the Federal Court

ruled that social legislation must be interpreted in a manner that advances its purpose rather than applying rigid or restrictive readings.

The judgment emphasized that the objective of social legislation is to protect vulnerable parties (in this case, employees), and courts are required to interpret the law with a view to enhancing social justice and safeguarding the interests of workers. This principle is particularly relevant in disputes involving employee entitlements under collective agreements or statutory benefits.

- **Precedent on Financial Incapacity**

One of the significant arguments raised by employers is financial incapacity as a justification for non-compliance with collective agreements. The case of **Prestige Ceramics** (supra) introduced a nuanced perspective on this defense.

In **Prestige Ceramics**, the High Court acknowledged that substantial financial decline could be a relevant factor in assessing an employer's capacity to fulfill obligations under a collective agreement. This decision departed from the traditional view that financial incapacity per se is not sufficient to constitute "special circumstances" under Section 56(1) of the Act, as previously held in **Hyatt Kuantan** (supra). Instead, **Prestige Ceramics** suggested that the court should examine the causes of financial distress, marking a shift toward a more contextual understanding of economic hardship in industrial disputes.

Conclusion

As the Industrial Court rightly put it its Award No. 415 of 2025 dated 20th March 2025, that collective agreements must be interpreted with equity and good conscience, considering economic realities and public interest. Despite the hurdle, we have managed to get a favourable outcome for the Company. The Court acknowledged that the pandemic created exceptional financial hardship for the Company, including revenue loss, increased operational costs, supply chain disruptions, and significant financial losses, and the Company's efforts to sustain employment despite its losses were taken into account.

The Court ultimately favored the Company's arguments, determining that the unprecedented nature of the COVID-19 pandemic constituted special circumstances that justified deviation from the strict letter of the Collective Agreement, particularly given the Company's efforts to maintain employment without retrenchments or pay cuts during this challenging period.

Rajeswari Karupiah | Partner
Employment & Industrial Relations
rajeswari@rdslawpartners.com

Muhamad Sharulnizam Bin Mohd Roni
Senior Associate
Employment & Industrial Relations
sharul@rdslawpartners.com