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## Contractual Bonus Upon Termination Of Business – To Pay Or Not To Pay?

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The number of cases resurfacing in Malaysia is a clear indication that the COVID-19 pandemic poses a serious threat to society. Consequently, the various movement control orders and the restrictions imposed resulted in unprecedented inconveniences to all including businesses. Addition, weak economic and fiscal conditions have also led to business closures over the past year. Employment disputes resulting from the closure of businesses in different sectors are also rising.

A prevailing issue is whether employers are obliged to pay contractual bonus to their employees notwithstanding the closure of business. Referring to the decision made recently in *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran Semenanjung Malaysia v Ramada Plaza Melaka (MTB Realty Sdn Bhd)* (Award 1137 of 2021), the Industrial Court recently ordered the employer to pay a contractual bonus to their employees notwithstanding the termination of the business.

### Background Facts

The Claimant, National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia (the Union) had filed a complaint of non-compliance of the award against the Respondent, Ramada Plaza Melaka (MTB Realty Sdn Bhd) (the Hotel) who failed to act in accordance with Article 11 under Collective Agreement dated 30.5.2019. Article 11 is reproduced herein below:

#### *“Article 11: Annual Bonus Clause*

(a) *The Hotel shall pay to each and every employee at the end of each calendar year, an annual bonus as follows:*

(i) *An employee who is in service with the Hotel for one (1) year or more,*

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*shall be entitled to one (1) month's last drawn basic salary as bonus.*

- (ii) *An employee who is in service with the Hotel for less than one (1) year, shall be entitled to a pro-rate basis of one (1) month's last drawn salary a bonus.*
- (iii) *Notwithstanding the above, no bonus shall be paid to an employee who is dismissed unless upheld by the Industrial Court, resigns to avoid dismissal or leaves the Hotel in breach of his contract of service."*

Following the COVID-19 pandemic and the declaration of movement control order, the Hotel had decided to permanently cease operating as of 30.6.2020.

On 28.4.2021, the Hotel issued a two months termination notice to terminate the services of all its employees and had paid the benefits required by law. However, the Hotel did not pay the annual bonus on a pro-rata basis pursuant to Article 11. The Union informed the Hotel that the pro-rated annual bonus must be paid to the employees because they were prepared to perform their contractual duties but were unable to do so due to the termination of hotel's operations.

The Hotel averred that the employees have been terminated from 30.6.2020. Consequently, they were not eligible for the annual bonus payable only at the end of the calendar year, on 31.12.2020. The Hotel also claimed that it had suffered losses because of the pandemic and the movement control order, rendering it unable to pay any annual bonuses.

## Issue

The sole issue to be determined by the Industrial Court in this case was whether the Hotel must pay the pro-rated annual bonus to all the employees?

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## Industrial Court's Findings

At the outset, this instant case ought to be distinguished from *RIH Management Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2000] 2 ILR 549 where it concerned an outbreak of Japanese Encephalitis epidemic which had significantly reduced the hotel's occupancy rate, causing the hotel to suffer losses. Given that the epidemic was unexpected, causing the hotel to suffer losses, the Industrial Court granted the employer's request for a variation in the collective agreement to postpone the annual increment of salary.

Unlike *RIH Management Sdn Bhd*, the Hotel in this case did not raise COVID-19 as a special circumstance and seek to set aside or vary Article 11 of the Collective Agreement. Thus, the Industrial Court declined to exercise its power to set aside or vary Article 11.

The Industrial Court ruled that it was the Hotel's decision to close its door and terminate all employees as of 30.6.2020. In other words, the employees were willing to serve the Hotel until the end of the year, but the Hotel stood in their way. On that basis, employees were entitled to the payment of an annual bonus on a pro-rata basis.

In arriving to this decision, the Industrial Court referred to *Progress Castings (1982) Sdn. Bhd. v. Metal Industry Employees' Union* [1983] ILR 250 and *Shaw Computer & Management Services Sdn. Bhd. v. National Union of Cinema & Amusement Workers* [1985] ILR 75. These cases concluded that the bonus payable under a contract is not contingent upon the realisation of profit by the employer. In fact, this was a deferred salary payment. Therefore, employees were entitled to a portion of that amount for period of service.

The Industrial Court ruled that Article 11 did not explicitly state that employees are entitled to the pro-rated annual bonus if, and only if, they completed their service by the end of the year. In this case, it was clear that the employees were dismissed and prevented from performing their duties until the end of the year. In the circumstances, the Hotel was obliged to pay the employees their pro-rated annual bonus.

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## Commentary

The COVID-19 outbreak can be regarded as a special circumstance which is beyond one's control. In this regard, the Hotel did put forward the same argument as set out in *RIH Management Sdn Bhd* that there were special circumstances that warranted the delaying of the implementation of the collective agreement. Nevertheless, one must be mindful that the existence of special circumstances must be pleaded comprehensively and established.

The terms of the collective agreement must be followed by all parties in the spirit of contract. In instances of non-compliance, either party may file a complaint with the court for failure to observe the terms of agreement. However, if there is an express clause in the agreement indicating that the employees are not entitled to a bonus if the business ceases to exist, the court may rule otherwise.

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