No escape from paying minimum wage

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It is a standard practice in the hotel industry to collect a 10% service charge from the customers in place of a tipping system, which will in turn be distributed to the eligible employees. This seemingly explains why the hotel industry employees were paid low basic salary, because they would be compensated with the income earned from service charge.[1]

However, following the introduction of the National Wages Consultative Council Act 2011 ("NWCCA") and the Minimum Wages Order(s) from 2012 to 2020 ("MWO") consecutively, the hotel industry found themselves having had to incur additional salary costs to meet the minimum wage. To mitigate the costs incurred, the hotel industry resorts to utilising the service charge to supplement the employees' wages in order to meet the minimum threshold for wage requirements.

Nonetheless, this practice is no longer allowed after the Federal Court decision in *Crystal Crown Hotel Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia.*[2]

Facts

The appeal at the Federal Court stemmed from a trade dispute between a hotel and a trade union following the unwillingness on the part of the hotel to commence a collective bargaining. The dispute was referred to the Industrial Court for adjudication in February 2012. In light of the NWCCA and the MWO, the trade union proposed to retain the service charge system together with a salary adjustment of 10% in the collective agreement. On the other hand, the hotel proposed to utilise service charge to pay the minimum wage.

It was a common legal position in all the courts below (namely the Industrial Court, High Court and Court of Appeal) that service charge cannot be utilised to pay minimum wages.

[1] *National Union of Hotel, Bar & Restaurant Workers v Sea View Hotel, Pulau Pangkor* [1980] 1 ILR 222.
[2] 2021 1 LNS 249

Issues

The following questions of law were posed to the Federal Court:

> (1) *Whether under the NWCCA hoteliers are entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage; and*
>
> (2) *Whether having regard to the NWCCA and its subsidiary legislation, service charge can be incorporated into a clean wage or utilised to top up the minimum wage?*

One of the arguments for the hotel rested on section 30(4) of the Industrial Relations Act 1967 ("**IRA**") which provides that the Industrial Court shall have regard to the public interest, the financial implications and the effect of the award on the industry concerned and related or similar industries. It was submitted that the 'basic wages' in the NWCCA and MWO should include the element of service charge by having regard to the financial impact on the hotel industry as a result of the automatic increase of wages to the statutory minimum.

Decision of the Federal Court

The Federal Court dismissed the appeal filed by the hotel and answered the abovementioned questions in the negative. The key takeaways may be summarised as follows:

(1) No compromise with the employees' benefits

The IRA, NWCCA and MWO are social legislations which share the common objective of meeting the needs of the vulnerable and marginalised sections of society. As such, the IRA should be construed to ensure that the minimum wage under the NWCCA and MWO is achieved without abrogating other benefits or emoluments enjoyed by the employees.

(2) Basic wages do not include service charge

Pursuant to the NWCCA, 'wages' means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service as defined under the Employment Act 1955. 'Minimum wages' means the basic wages determined by the Parliament under a minimum wages order. The NWCCA further provides that the rate of 'basic wages' under a contract of service (including a collective agreement) must be increased to the minimum wages stipulated under the MWO. It follows that it is the 'basic wages' that the NWCCA and MWO intend to increase to the minimum stipulated amount. Thus, the question is whether 'basic wages' include the element of service charge. If it does, the hotel would not have problem meeting the minimum threshold for minimum wage.

Following the definitions alluded to above, the Federal Court opined that 'wages' comprise two elements, namely 'basic wages' and 'other cash payments payable in respect of a contract of service'. As such, service charge cannot be a part of the basic wages as it falls within the definition of 'other cash payments'.

(3) A contractual term cannot be varied without consent

The 'service charge' is an additional cash emolument expressly provided in the contract of employment. If the hotel were to ulitise the service charge to pay the minimum wage, it would akin to depriving the employees of the entrenched term of service which cannot be done unilaterally.

(4) Hotels hold service charge on trust

The service charge does not belong to the hotel but the eligible employees. The hotel merely collects and holds the monies as a fiduciary or trustee until distribution to the eligible employees. As such, the hotel is not entitled in law to appropriate and utilise the service charge to meet its statutory obligation.

(5) Principles of law prevail over the interests of a particular sector

The COVID-19 pandemic which affects the hotel industry as a whole cannot be a reason for the Courts to depart from the accepted principles of law in respect of the construction that 'service charge' is not a part of 'basic wages' under the minimum wage legislation.

Conclusion

Whilst the Federal Court decision may be unpopular among the hoteliers or related and similar industry due to the financial impact caused by the COVID-19 pandemic, it is inevitable. The long-term impact on the society that the decision may bring about as a binding precedent outweighs any likely detriment that it may cause on a particular industry for the time being. In this regard, the Federal Court also remarked that the decision is not confined to the facts of the appeal, but it has pronounced the material law on the relevant legislations which do not vary from case to case.

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