

A RADICAL DEPARTURE.

INTRODUCTION

In Malaysia, service charge is a practice unique to the hotel industry whereby it is imposed on the bills issued to the customers. The collected amount is then distributed to the hotel's employees in accordance with the service charge points allocated to each employee, save for 10% which is retained by the hotel to defray the administrative cost incurred in the maintenance of the service charge account, collection and distribution of the service charge. One of the primary objectives of service charge is to supplement the basic salary of employees which is kept low due to the fluctuating nature of the hotel industry.

However, with the introduction of minimum wage legislation in Malaysia, namely, the Minimum Wages Order 2012ⁱ (“MWO”), made pursuant to the National Wages Consultative Council Act 2011ⁱⁱ (“NWCC”), there would no longer be the need to have service charge to cushion the impact of low wages.

In fact, the accompanying Guidelines on the Implementation of the Minimum Wages Order 2012 (“Guidelines”) permit employers in the hotel industry to convert all or part of the service charge meant for distribution to the employees, to form part of the minimum wage.

THE CRYSTAL CROWN DECISION

Against the aforesaid background, the hotel in **KESATUAN KEBANGSAAN PEKERJA-PEKERJA HOTEL, BAR & RESTAURANT SEMENANJUNG MALAYSIA V CRYSTAL CROWN HOTEL & RESORT SDN BHD (CRYSTAL CROWN HOTEL PETALING JAYA)** (“Crystal Crown”), had proposed for the implementation of the clean wage system whereby service charge would be incorporated into the minimum wage, or alternatively, that service charge (or a part thereof as the case may be), be used to top-up the minimum wage, to bring the same up to minimum wage requirements under the MWO.

The **Crystal Crown** case involved the terms and conditions to be incorporated into the 1st collective agreement between the parties, and the Industrial Court's power to determine a trade dispute would include adjudicating on the hotel's wage structure, as envisaged by the MWO.

The Industrial Court chose to disregard the hotel's evidence that the impacted employees would not be financially worse off following such incorporation and that conversely, the hotel would be economically affected should it be compelled to continue paying the service charge whilst topping up the basic wage to meet minimum wage requirements, from its own pocket. The latter scenario would also result in a pecuniary windfall for the impacted employees.

Vide **Award No. 874 of 2015**ⁱⁱⁱ, the Industrial Court held that the service charge component of the remuneration package or part thereof, could not be utilised to top up the basic wage to meet the then recently introduced minimum wage requirements, on the basis that the impacted employees' contract of employment provided for the payment of both basic salary and service charge.

The Industrial Court's decision in **Crystal Crown** rejecting the aforesaid argument, was affirmed by the High Court as well as the Court of Appeal, and is currently pending appeal before the Federal Court^{iv}, which is the apex court in the Malaysian hierarchy of courts.

The aforesaid decision had far-reaching consequences on the hotel industry. Subsequent Industrial Court decisions dealing with the issue of restructuring the basic wage to include the service charge element, deemed themselves bound by the **Crystal Crown** decision which had been affirmed by the superior courts.

THE ANDAMAN/SHERATON DECISIONS

However, 2 recent decisions^v handed down on 13.7.2018, **Award No. 1608 of 2018** involving Inter Heritage (M) Sdn Bhd (Sheraton Imperial Kuala Lumpur Hotel) and **Award No. 1609 of 2018** involving The Andaman, a Luxury Collection Resort, Langkawi (Andaman Resort Sdn Bhd) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia, radically held that the hotels in question were entitled to restructure the employees' wages by converting part or the whole of the service charge payable to be included with the basic salary to form the minimum wage rate of RM900.00 in compliance with the MWO.

The Industrial Court justified its departure from **Crystal Crown** by distinguishing the facts/evidence.

However, a perusal of the Awards indicate that in essence, the Industrial Court was willing to accept that the impacted employees would not be earning less favourable wages following the restructuring and that the hotels would suffer adverse financial impact should they be compelled to utilise their own funds to top up the basic wage to the minimum wage rate. The Industrial Court had performed its statutory obligation under **Section 30(4) Industrial Relations Act 1967**^{vi}, as well as considered the discriminatory effect it would have on employees not covered under the collective agreement - similar arguments that were raised in the **Crystal Crown** matter.

The Industrial Court was further willing to appreciate the intention behind the introduction of service charge, as well as the basis for the implementation of the minimum wage legislation, its statutory obligation to consider **Section 30(5) Industrial Relations Act 1967**^{vii}, and in taking a purposive approach in its interpretation of the wording of the NWCC.

The Industrial Court further supported its aforesaid decisions by taking into account the Guidelines. While acknowledging that the said Guidelines has no legal force, the Court nonetheless opined that it remained a persuasive tripartite document and ought to be given due consideration by virtue of **Section 30(5A) of the Industrial Relations Act 1967**^{viii}.

OUR VIEWS

Whilst we are of the opinion that the conclusion taken by the Malaysian Industrial Court in the recent July 2018 decisions is correct, it remains to be seen whether the same would be upheld by the Malaysian superior courts^{ix} or would they hold that the principle of *stare decisis* applies and there was no basis for any distinction on the facts/evidence to have been made.

ⁱ Now superseded by the Minimum Wages Order 2016

ⁱⁱ With a deferment date of compliance until 31.9.2013 for the hotel industry

ⁱⁱⁱ [2014] 3 ILR 410

^{iv} Civil Appeal No. 02-4-01/2018 (W)

^v Heard together as they are part of the same group

^{vi} *In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.*

^{vii} ***The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form***

^{viii} ***In making its award, the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister***

^{ix} The Union has 3 months to challenge the aforesaid decisions by way of filing an application for leave to commence judicial review proceedings under Order 53 Rules of Court 2012.