Employment & Benefits

Federal Court in Crystal Crown Hotel Case: Service Charges Cannot be Used to Pay Hotel Workers their Salaries to Meet the Employer's Statutory Obligation to Pay Minimum Wage

Introduction

On 24 March 2021, the Federal Court in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restoran Semenanjung Malaysia* (Civil Appeal No. 02(f)-4-01 of 2018) ruled that the hoteliers cannot utilise the service charge imposed on bills to customers to meet the statutory minimum wage of their employees.

In an effort to alleviate the plight of low-income workers, the Parliament has fixed and revised the minimum wage on a national basis *vide* the National Wages Council Consultative Act 2011 ("**NWCCA 2011**") and various Minimum Wages Orders ("**MWOs**") from 2012 to 2020.

In this case, the hotelier had modified the wage rates of its employees by utilising the service charge element through the application of the service charge as part of the employees' basic wage so as to meet its statutory obligation to pay the minimum wage.

The Federal Court's decision therefore has a serious impact on the hotel industry, being one of the most significantly impacted industries during the COVID-19 pandemic. This Update seeks to provide a brief analysis of the grounds of decision by the Federal Court.

Background Facts

The Crystal Crown Hotel Petaling Jaya ("**Hotel**") commenced operations in January 1995 and the employment contracts of the employees provided for remuneration which comprises basic salary and service charge. The National Union of Hotel, Bar and Restaurant Workers ("**Union**") was granted recognition in 1999. In 2011, the Union invited the Hotel to commence collective bargaining in respect of the terms and conditions of employment to be contained in the parties' first collective agreement. The Hotel refused to do so, and in February 2012, the dispute was then referred to the Industrial Court for adjudication under section 26(2) of the Industrial Relations Act 1967 ("**IRA**").

The dispute in the Industrial Court revolved around the terms that ought to be incorporated into the first collective agreement, whereby the Union proposed for the retention of the service charge system together with a salary adjustment of 10%. Meanwhile, the Hotel proposed to implement a 'clean wage system' to substitute the service charge altogether or alternatively, if the service charge was to be maintained, the Hotel proposed to implement a 'top-up structure' whereby it could utilise the service charge to pay the minimum wages of the employees.

Decisions of the Preceding Courts

Industrial Court

The Industrial Court found in favour of the Union in that the salary and service charge are fundamental terms of the contracts of employment of the employees which could not be unilaterally varied at the instance of the employer. Hence, the Hotel was ordered to pay the statutory minimum wage as well as the contractual share of the service charge.

High Court

The High Court dismissed the Hotel's application for judicial review and upheld the award of the Industrial Court. The Court decided that, amongst others, the Hotel could not be permitted to meet its obligations under the NWCCA 2011 or the MWOs to pay the minimum wage by utilising the service charge payments made by the customers as: (i) the service charge did not belong to the Hotel - it was collected and held by the Hotel for distribution to eligible employees; and (ii) the service charge formed a fundamental term of the contract of employment which could not be removed unilaterally.

Court of Appeal

The Court of Appeal affirmed the decision of the High Court. The Court observed that utilising the service charge payments from customers to meet the obligation to pay the minimum wage is akin to utilising the employees' own monies to pay their salaries. Such conduct would defeat the purposes and objects of the NWCCA 2011 and the MWOs as the employees would then be deprived of the service charge payments as part of their contractual entitlement.

Decision of the Federal Court

The Federal Court dismissed the Hotel's appeal. In so doing, the Federal Court answered both the questions of law below in the negative:

(a) Whether under the NWCCA 2011, hoteliers are entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage

(b) Whether, having regard to the NWCCA 2011 and its subsidiary legislation, service charge can be incorporated into a clean wage or utilised to top up the minimum wage

The purpose of the statutory minimum wage must not be defeated

The Federal Court was of the view that the NWCCA 2011 and the MWOs serve as social legislation in that they had been implemented with a view to achieving higher quality in terms of income distribution between the poorest earning members of the work force and capital, as a whole.

Given the financial impact of increasing the salary of the employees in the hotel industry, the Hotel (and the Amicus parties) contended that section 26(2) and section 34(4) of the IRA ought to be construed to give effect to public interest, the financial implications on the hotel industry and the effect on the economy of the country. The Federal Court rejected the argument and observed that the object and purport of the NWCCA 2011 and the MWOs as well as the IRA are similar. These pieces of legislation seek to enhance and alleviate the plight of the low-income earners and to protect the livelihood of labour. Therefore, the IRA cannot and ought not to be construed so as to read down or abrogate the purpose, object and effect of the NWCCA 2011 and the MWOs. Instead, the IRA should be construed to achieve the most complete remedy prescribed by the NWCCA 2011 and the MWOs which are pieces of social legislation. Further, the minimum wage under the NWCCA 2011 and the MWOs applies to all industries across the country and the hotel industry ought not be treated differently.

The service charge element does not form part of basic wages

The NWCCA 2011 defines "wages" as having the same meaning assigned to it in the Employment Act 1955 ("**EA**"), and "minimum wages" to mean "basic wages" as determined under section 23 of the NWCCA 2011. "Basic wages" under section 23 refers to the amount determined by the Government, through the MWO, as the minimum sum of money to be paid as a "wage" under any contract of service or collective agreement for all employees in the country. On the other hand, "wages" is defined under the EA to mean "basic wage" plus all other payments in cash payable to an employee for work done in respect of his contract of service. "Wages" and "basic wages" therefore are two different concepts and should not be treated as the same. Applying the definitions and distinctions provided, "basic wages" therefore excludes any other kind of cash emolument payable to an employee for work done, including service charge.

The NWCCA 2011 therefore has the effect of increasing the "wages" under the individual contract of employment or collective agreement where the sums paid as "basic wages" fall below the statutory prescribed minimum threshold.

The Federal Court further observed that service charge is a benefit or cash emolument that is specific to the hotel industry to supplement the very low monthly salaries paid to the hotel employees. The

unique element of service charge was introduced since the 1980s. A 10% service charge is imposed on all bills to customers in lieu of 'tipping' whereby the Hotel will collect these monies for and on behalf of the employees. Out of the 10%, the Hotel keeps 1% by way of administrative charges and the remaining 9% are distributed to the employees based on service charge points. When analysed in law, the Federal Court held that service charge is an entrenched part of the employees' contract of service, which cannot be unilaterally altered or removed without the consent of the employees.

More importantly, the Federal Court observed that the employers or hotels were represented in the Wages Consultative Council from 2011 to 2020. Therefore, Parliament has access to all the relevant data and advice needed before arriving at the quantum of the minimum wage rate applicable to all industries across Malaysia. The industrial adjudicators therefore have no reason to tamper or meddle with the clear object and purpose of the NWCCA 2011.

The trust relationship between the Hotel and the Employees

Furthermore, the Federal Court opined that as service charge is a payment collected from third parties, it does not belong to the Hotel. In fact, when a customer pays the service charge as part of the bill, the ownership of the monies is immediately transferred to and lies with the employees who are eligible to receive those monies. The Hotel merely holds the monies in trust until distribution to the beneficiaries - the eligible employees. As the service charge does not at any time belong to the Hotel, the Hotel is not entitled in law to appropriate and utilise it to meet its statutory obligation prescribed under the NWCCA 2011 and the MWOs.

The impact on the hotel industry in light of the COVID-19 pandemic

The Federal Court stressed that the COVID-19 pandemic in 2020 and 2021 cannot and does not alter the findings that service charge monies do not form part of "basic wages" under the NWCAA 2011 and the MWOs in law.

Key Takeaways

1. Under Section 23 of the NWCCA 2011, an employer who fails to pay the basic wages as specified in the MWOs to his employees commits an offence and shall, on conviction, be liable to a fine of not more than RM10,000 for each employee.

2. "Basic wages" excludes any other kind of cash emolument payable to an employee for work done, including service charge.

3. The Federal Court's interpretation of the NWCCA 2011 and the MWOs was predicated on questions of law. It thus has binding effect on all the lower courts when construing the

provisions of the NWCCA 2011 and the MWOs, regardless of the industry in which the dispute arises.

4. Employers across all industries should ensure that in computing "basic wages", any other kind of cash emolument payable to an employee for work done is excluded, and the "basic wages" are in compliance with the amount stipulated in the MWOs.

5. For the details of the current position of the minimum wages in Malaysia after the enactment of the Minimum Wages Order 2020, please click here.

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