24th MARCH 2021

PRESS SUMMARY FOR THE JUDGEMENT IN

THE FEDERAL COURT OF MALAYSIA

CIVIL APPEAL NO: 02(f)-4-01/2018

CRYSTAL CROWN HOTEL & RESORT SDN BHD V

KESATUAN KEBANGSAAN PEKERJA-PEKERJA HOTEL, BAR & RESTORAN SEMENANJUNG MALAYSIA

PRESS SUMMARY

1. The statutory stipulation of a "minimum wage" represents the lowest level below which wages cannot be allowed to decline. The fixing of a minimum wage by Parliament recognizes that wages cannot be left solely to market forces. The underlying philosophy is the recognition that labour must be remunerated reasonably, and that exploitation of labour through the payment of low wages is unacceptable[1].

3. Where Parliament has fixed the minimum wage on a national basis, vide the **National Wages Council Consultative Act 2011 ("NWCCA 2011")** and the **Minimum Wages Order(s) from 2012 – 2020 ("MWO 2012")** consecutively, is it open to an industrial adjudicator to re-

[1] See OP Malhotra's - The Law of Industrial Disputes (Sixth Edition)

constitute it, or to rework such a minimum wage, notwithstanding that which Parliament has expressly legislated?

7. Is the appropriation by the Hotel of the service charge element and utilisation of the same, to pay the hotel workers their salaries to meet the statutory minimum wage, permissible? That, in effect, is the central issue for our consideration and adjudication in this appeal. The appeal relates to salaries of workmen in the hotel industry dating back to 2012.

Questions of Law

8. This issue takes the form of **two questions of law**:

(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; and

(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.

Amicus Brief

9. In addition to the Hotel and the Union, the Malaysian Employers Federation and four Hotel Associations ('Amicus Parties') were granted

permission to appear and submit an amicus brief vide amicus curiae in respect of this appeal. The 4 Hotel Associations are:

(a) Association of Hotel Employers Peninsular Malaysia;

(b) Malaysian Association of Hotels;

(c) Malaysia Association of Hotel Owners; and

(d) Malaysia Budget Hotels Associations

10. Collectively, these 5 associations represent a large number of hotel operators and hotel employers in the country. They are not party to the present appeal but obviously, as employers, have a considerable interest in the outcome of the appeal. Appearing through amicus curiae, Dato' Dr Cyrus Das, it was submitted that they collectively represent the cross-section of hotel operators and employers, ranging from major established hotel chains to mid-range hotels and budget hotels, all of whom, he stressed play an important role in the tourism and hospitality industry in Malaysia, contributing to the economy of the country. They support the Hotel's stance that service charge should be utilised for either the clean wage system or top up salary structure.

Our Analysis and Decision

28. It is evident that this entire dispute arose as a consequence of the introduction of the **NWCCA 2011** and the **MWO 2012**. Therefore, a useful starting point for the analysis of this Court is to consider the purpose and objective of the **NWCCA 2011** which is implemented vide the MWOs issued periodically.

29. Learned counsel for the Hotel, Union and the amicus brief are all seemingly united in their comprehension of the purpose and objective of the **NWCCA 2011** and **MWO 2012**. They all made reference to the Hansard at the 2nd and 3rd reading of the **NWCCA 2011.**

30. In our view, the purpose and rationale for the introduction of such legislation may be summarized in this manner:

(a) It is an anti-poverty device – it applies to all employees across all sectors and will alleviate the working poor by enhancing their purchasing power and thereby raising their living standards;

(b) It increases motivation by providing a greater incentive to work and should increase productivity.[2] Accordingly the quality of goods and services so produced should increase;

(c) It addresses the problem of the exploitation of labour through the payment of unduly low wages. To this end it allows for a more equitable distribution of income between employer and employee.

[2] See Minimum Wage Policy in Malaysia: Its Impact and the Readiness of Firms by Joyce Leu Fong Yuen (Department of Business Studies HELP University, Kuala Lumpur, Malaysia) 2013 Proceedings Book of ICEFMO, 2013, Malaysia, Handbook on the Economic, Finance and Management Outlooks iSBN:978-969-9347-14-6

31. It is evident from the foregoing that this legislation serves as social legislation in that it has been implemented with a view to achieving higher equality in terms of income distribution between the poorest earning members of the workforce and capital, as a whole.

The Perspective of the Hotel and the Amicus Parties

The Hotel

32. The Hotel maintains that the Industrial Court ought to have utilized its powers and obligations under the **IRA** to resolve the trade dispute before it under **section 26(2) IRA**. The thrust of this particular contention is that as service charge is a contractual term it was open to the Industrial Court to exercise its powers so as to balance the seeming inequity to the Hotel in having to meet the large increase in the statutory minimum wage imposed on the Hotel, by adjusting or reworking the content of such wages by incorporating a part or all of the service charge element to alleviate the new and high operating costs thrust upon the Hotel. In making this submission, the Hotel relied *inter alia* on the following provisions of the **IRA**:

(i) The preamble to the **IRA** which is to promote and maintain industrial harmony and provide for the regulation of relations between employers and workmen... or dispute arising therefrom. The point made is that in order to maintain industrial harmony it was open to the Industrial Court to

"regulate" wages by modifying the minimum wage to include an element of service charge;

(ii) **Section 30** of the **IRA** which provides that the Industrial Court has power in relation to a trade dispute to make an award relating to all or any of the issues before it – in this context again the Hotel appears to be submitting that modification or regulation allows for the re-calibration or adjustment of the statutory minimum wage stipulated under the **NWCCA 2011** and **MWO 2012** by allowing for service charge to be utilized either vide the Clean Wage system or the Top Up Scheme;

(iii) **Section 30(4) IRA** which provides that the Industrial Court, in making its award, "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 its probable effect in related or similar industries – here the complaint is that the courts below failed to take into account the financial implications on the Hotel as well as the hotel industry as a whole, and thereby the economy of the country, in determining that service charge did not comprise a component of basic wages as provided in the **NWCCA 2011** and **MCW 2012**.

(iv) **Section 30(5)** which provides that the Industrial Court "shall" act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form – the complaint is much the same as (iii) above in that the courts below failed to take into account the equity "due" to the Hotel industry or to balance its needs against that of the workmen;

(v) And finally under **section 30(6)** that the Industrial Court is not restricted in its award to the specific relief sought but was empowered to include in its award "any matter or thing" which is necessary to resolve the trade dispute – again the contention is that this sub-section also required the Industrial Court to utilise its powers to resolve the matter by utilization of the service charge or a part of it towards meeting the statutory minimum wage.

33. It was open to the Industrial Court to "create new rights and obligations between them" which it considered essential for keeping industrial peace. The failure of the Industrial Court to do this amounted to a failure to adhere to or undertake its "mandatory" statutory obligations as provided under **section 26(2), section 30** and the general tenor of the **IRA** as encapsulated under it.

Amicus Parties

35. The Amicus Parties took a similar stance stressing in particular the importance of **section 30(4)** of the **IRA** on this case, as it affects the entire hotel industry. They highlighted that the words “shall have regard to” in section **30(4) IRA** made it mandatory that in any industrial adjudication the Industrial Court is obliged to take into account the financial impact of its award on the relevant industry. All the more so where the issue of wages would have a direct financial impact on other employers in the same industry.

(iv). As such the amicus parties submitted that in order to meet its mandatory duty under **section 30(4)**, the Industrial Court had to consider the fact that increasing wages to the statutory minimum would lead to an “automatic across the board salary increment for hotel employees that could financially impact negatively on the hotel industry”.

(vi) The “interpretation” of the implementation of the salary increase in line with the **NWCC 2011** and **MWO 2012** by the Union resulted in an “unanticipated salary increment” which is not the objective of the minimum wage legislation.

(vii) The amicus parties warned of the resultant implications which would result in driving employers out of business or lay-offs, retrenchment or even a complete closure of the undertaking.

The Union

37. The Union responded by stating that the natural consequence of the implementation of the minimum wage legislation is an increase to labour costs for all employers in the country. Such legislation does not permit any employer to suspend or reduce the minimum wage payments due to financial incapacity, the Covid-19 pandemic or otherwise. In short, financial incapacity or hardship is not relevant when complying with the payment of the statutory minimum wage. Employers simply had to comply.

Our View

41. It appears to this Court, on a consideration and balance of the competing submissions of the parties on:

(a) **section 26(2)** relating to the powers of the Industrial Court when determining a trade dispute; and

(b) **section 30(4)** relating to the mandatory obligation of the Industrial Court to consider the implications on the industry, country and economy

that what the Hotel (and the Amicus Parties) are asking this Court to do is **to construe and utilize section 26(2) and section 30(4) IRA to alter,**

modify, vary or supplement the statutory effect and consequences of the NWCCA 2011 and MWO 2012.

42. Why do we so surmise? This is because the net effect of these parties' submissions is that the Hotel and the hotel industry respectively, ought not to be compelled to pay the statutorily imposed increase in minimum wages from their own resources, as stipulated under **section 23 NWCCA 2011**. Instead they maintain that the **NWCCA 2011** and **MWO 2012** should be construed or read in such a manner that the definition of 'basic wages' in the **NWCCA 2011** and **MWO 2012**, includes the element of service charge which is unique to the hotel industry.

The question that then arises is whether statutory provisions in the IRA can or ought to be construed such that they effectively abrogate clear and express legislation enacted by Parliament under the NWCCA 2011 and consequently MWO 2012. Can or should one Act be construed so as to undermine or stultify the purpose and object of another?

44. The answer must necessarily be no. This is so for several reasons.

42. The object and purport of the **NWCCA 2011** and **MWO 2012** is to enhance and alleviate the plight of labour, more particularly the working poor. That is not in dispute. Similarly, the **IRA** was enacted to protect the livelihood of labour i.e. workmen, while taking into account the

interests of capital or employers, in the interests of the economy of the country. Both pieces of legislation comprise social legislation enacted to meet the needs of particular sections of society, more particularly the vulnerable and marginalized sections. The **IRA** and the **NWCCA 2011** (and **MWO 2012**) therefore seek a similar objective and purpose, namely to protect and alleviate the plight of workmen and the working poor. As such the **IRA** cannot and ought not to be construed so as to read down or abrogate the purpose, object and effect of the minimum wage legislation. On the contrary, the **IRA** and **NWCCA 2011** and **MWO 2012** should be construed harmoniously.

Social Legislation

46. Our **Federal Constitution** guarantees equal protection of laws to all citizens. However, the full purport of such a guarantee may not be available to all segments of society, particularly the poor and vulnerable sections. It is to ensure social justice that special measures are taken by Parliament in the form of, for example the enactment of minimum wage legislation and industrial adjudication legislation to ensure that there is equality of justice available and accessible to these marginalized persons.

We then referred to the recent decision of the Court in PJD Regency where the issue of social legislation was addressed albeit in relation to the **Housing Development Act 1966**.

49. In that case, this Court went on to summarise the principles on the interpretation of social legislation. Of relevance here is the pronouncement that:

> *"(i) Statutory interpretation usually begins with the literal rule. However, and without being too prescriptive, where the provision under construction is ambiguous, the Courts will determine the meaning of the provision by resorting to other methods of construction foremost of which is the purposive rule (see the judgment of this Court in* ***All Malayan Estates Staff Union v Rajasegaran & Ors*** *[2006] 6 MLJ 97).*

50. It follows that in construing the provisions of the **NWCCA 2011** and **MWO 2012** in conjunction with **sections 26(2) and 30 (4), (5)** and **(6) IRA**, the interpretation which affords the maximum protection of the class in whose favour the social legislation was enacted must be given effect. The social legislation here refers to both **NWCCA 2011** and the **IRA**. And it is beyond dispute that both pieces of legislation were enacted in favour of labour or workmen. This does not mean that capital or employers and employers' unions rights are to be trodden upon, or that their interests are to be ignored or diminished. What it does mean is that when the two interests collide, the Court is bound to consider the purpose for which the social legislation was enacted, and give such object and purpose due effect.

51. The practical effect is that in construing the minimum wage legislation and the relevant sections of the **IRA** above, the statutory provisions of the **IRA** ought to be construed so as to enable the most complete remedy which the minimum wage legislation prescribes, is achieved.

54. It is therefore not tenable to construe or apply **sections 26(2)** and **30(4) IRA** otherwise than to ensure that the purport and object of the **NWCCA 2011** and **MWO 2012** are met. Put another way, it is not open to the Hotel to complain that its costs have increased several-fold and then go on to insist that a contractual benefit in the form of service charge be appropriated and utilized to assist it, in meeting its mandatory statutory payment obligations. That would run awry of both the **NWCCA 2011** and **MWO 2012**, as well as the **IRA**.

It needs to be pointed out that to utilize sections**. 26(2) and 30(4) IRA** to abrogate **NWCCA 2011** and **MWO 2012** would effectively be placing the Industrial Court above Parliament because the Industrial court would than be displacing the specific provision of law as promulgated by Parliament. This is inconceivable.

The "Minimum Wage" as Envisaged Under NWCCA 2011 and MWO 2012

59. The crux of this judgment turns on the definition to be accorded to "**minimum wage**" as defined in the minimum wage legislation contained

in the **NWCCA 2011** and consequently the **MWO 2012** for the relevant period. This requires a construction of the minimum wage legislation holistically, both in terms of the express provisions of the **NWCCA 2011** and **MWO 2012** as well as ascertaining and giving effect to the purpose and intention of the legislation.

The Relevant Statutory Provisions in NWCCA 2011 and MWO 2012

60. **Section 2 of the NWCCA 2011** defines "wages" and "minimum wages" as follows:

> *"wages" – has the same meaning assigned to it in* ***section 2*** *of the* ***Employment Act 1955***
>
> *"minimum wages" – means the* ***basic wages*** *to be or as determined under* ***section 23***
>
> (emphasis ours).

61. **Section 2 of the Employment Act 1955** defines wages as:

> *"..."wages" means basic wages and all other payments in cash payable to an employees for work done in respect of his contract of service but does not include-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) ...*
>
> *(e) ...*
>
> *(f) ...*

62. And **section 23 of NWCCA 2011** provides:

"***23.*** *(1)* ***Where the Government agrees with the recommendation of the Council*** *under paragraph 22(2)(a) or 22(4)(a) or determines the matters under paragraph 22(4)(b), the* ***Minister shall****, by notification in the Gazette,* ***make a minimum wages order*** *on the matters specified in paragraphs 22(1)(a) to (e)* ***as agreed to or determined by the Government.***

(2) The Minister may, upon the direction of the Government, by notification in the Gazette, amend or revoke the minimum wages order.

Effect of the minimum wages order

24. *(1) For the purpose of this section, "contract of service" includes the collective agreement made under* ***section 14 of the Industrial Relations Act 1967 [Act 177]****.*

(2) Where the rates of the basic wages agreed in a contract of service is lower than the minimum wages rates as specified in the minimum wages order, the rates shall be substituted with any rates not lower than the minimum wages rates as specified in the minimum wages order*.*

(emphasis ours)

63. It is therefore apparent that **minimum wages comprises the quantum of monies determined by the Government as the minimum sum of money to be paid as a wage under a contract of service or collective agreement.** That sum is stipulated under **MWO 2012** (which will vary from time to time).

64. **Section 23 has to be read with section 24 NWCCA 2011** in order to appreciate the direct and practical effect for workmen under a contract of service. **Subsection (2) of section 24 NWCCA mandatorily requires the rate of the "basic wages"** of a workman **under the contract of service** to be increased to the **minimum wage stipulated under the MWO 2012.**

65. What is the definition of "**basic wages**" under a contract of service or collective agreement? It is both permissible and necessary to turn to the **Employment Act 1955** to ascertain the definition of "**basic wages**" because there is express reference to the definition of "wages" under the **Employment Act 1955** in the **NWCCA 2011**. The clear intention of the Legislature is that recourse be had to **section 2 of the Employment Act 1955** in construing what is meant by "**wages**" and thereby **"basic wages"**. "**Basic wages**" are the key concern here.

66. **Section 2 of the Employment Act** (as set out earlier) defines "**wages**" as "**basic wages**" and all other payments in cash payable to an employee for work done in respect of his contract of service but excludes

the items set out in (a) to (f). What is clear therefore is that **basic wages does not include any payments in cash "payable to an employee for work done in respect of his service"**.

68. What follows from a consideration of the definition of "**basic wages**" **under section 2 of the Employment Act** and the use of the term "**basic wages**" **and "minimum wages" in section 24 of the MWO 2012**, is that the term "**basic wages**" **as utilised under the minimum wages definition, refers to a sum of money which may well differ in terms of quantum, from the** "**basic wages**" **under a contract of service under section 2 of the Employment Act**.

69. The difference which we have sought to explain above is simply that "**basic wages**" under the **minimum wages definition refers to a sum of money which Parliament determines under section 23** to be the bare minimum sum payable for work done under a contract of service for all employees in the nation, regardless of what their individual contracts of service or collective agreement provide. In short it cuts across all contractual arrangements to provide a basic minimum wage, legislatively.

70. Whereas "**basic wages**" under the **Employment Act 1955** refers to the contractual sum negotiated between the employer and employee under a contract of service or a collective agreement.

71. Therefore the effect of the minimum wage legislation is to increase the quantum of basic wages under individual contracts of employment or a collective agreement where the sums paid as "**basic wages**" fall below the statutory minimum prescribed by law. That is the difference which the **NWCCA 2011** and **MWO 2012** seek to address. Put another way, where the quantum of "**basic wages**" under a contract of service or collective agreement is less than the **"minimum wage" as stipulated under the MWO 2012, section 24 requires the employer to increase the "basic wage" to meet the 'minimum wage' stipulated under the MWO 2012**.

72. So the question for this Court in the context of this appeal is this:

What in reality comprises the "basic wages" of a hotel employee under his contract of service (or collective agreement) with the Hotel? More particularly does it include the element of service charge or not? Again it should be reiterated that the issue relates to "basic wages" and not "wages" per se.

If the element of "basic wages" **includes** the service charge element then virtually no hotel employee's basic wages under his contract of service will fall below the minimum wage specified under the **MWO 2012**.

If basic wages **does not include** the service charge element then it will follow that the employees' basic wages under their contracts of service or collective agreement will have to be increased to meet the minimum wage specified under the **MWO 2012**.

Basic wages are therefore separate from all other cash payments

74. Applied to the present factual matrix, it follows that **service charge** is a payment in cash payable to an employee for work done under his contract of service. It does not and cannot fall within the definition of "**basic wages**" as defined in the minimum wage legislation and **section 2 of the Employment Act 1955**. Therefore construing the minimum wage legislation as expressly drafted, it follows, in relation to the collective agreement here, that "**basic wages**" does **not** include the **service charge element**.

The Amicus Submissions on the definition of Minimum Wages

75. After detailing the relevant provisions of the minimum wage legislation, namely the definitions as set out in **NWCCA 2011** and **MWO 2012** as considered above, the amicus curiae submitted that *"...as the **NWCCA 2011** applies the definition of "wages" as per the **Employment Act** and NOT the **EPF Act**, it is clear that "wages" for the purposes of the **NWCCA 2011** and minimum wage includes service charge."* (emphasis added)

76. It follows from our reasoning above that this submission is inaccurate because it misinterprets the minimum wage legislation by applying the definition of "**wages**" under the **Employment Act 1955** to define "**minimum wage**" under the **NWCCA 2011** and **MWO 2012**, when the latter specifically refers to "**basic wages**" and not "**wages**" **as a whole** in the **Employment Act 1955** in computing minimum wage under **section 23 of NWCCA 2011**. Such a misinterpretation distorts the object and purpose of the legislation, apart from being legally incoherent.

The Guidelines on the Implementation of the Minimum Wages Order dated 6 September 2012 ('the Guidelines')

78. Both the Hotel and the Amicus parties relied considerably on **paragraph 3(v) of the Guidelines** to maintain that the conversion or utilisation of service charge to comprise a part of the minimum wage was expressly encouraged. The relevant portion of the Guidelines provides:

> ***(v) For the hotel sector where the service charge collection is implemented, the employer may convert all or part of the service charge meant for distribution to the employee, to form part of the minimum wages;***...."
>
> (emphasis ours)

79. The amicus curiae rightly disclosed to the court that while these Guidelines *"strongly and clearly set out the desired meaning of "minimum wage" and the intention of the* ***NWCCA 2011****",* these Guidelines were subsequently held to be ultra vires the **NWCCA 2011** by the High Court

in 2016 in **Shangri-la Hotel (KL) Bhd v National Wages Consultative Council & Ors [2017] 1 LNS 657**. This decision was affirmed by the **Court of Appeal No: W-01(A)-484-12/2016 on 14 August 2017 and leave to appeal to the Federal Court was refused on 25 January 2018**. The Hotel did not point this out and continued to rely on the Guidelines. There is no reason, as pointed out by amicus curiae, to revisit this issue.

80. However the point sought to be made by counsel for the Hotel and the amicus curiae is that it was envisaged that the **Clean Wage Structure** and the **Top Up Structure** were alternative or plausible wage structures for the hotel sector that were considered at the time. It is maintained by counsel and the amicus curiae, that these Guidelines comprise useful guidance as it was produced by those seeking to administer the minimum legislation themselves. To that extent it is argued that the Guidelines, namely **paragraph 3(v)** is of persuasive value more particularly in relation to **section 30(5A) of the IRA**, which recognises the application of codes and guidelines in industrial adjudication.

81. Ignoring the fact that these Guidelines have been struck out for being ultra-vires the primary legislation, it appears to us that **paragraph 3(v) of the Guidelines**, even if coupled with **section 30(5A) IRA** cannot override the specific statutory definitions set out in the primary legislation, for the reasons we have set out at length earlier on in the

judgment in relation to the use of **section 30(4) IRA** to override the effect of the minimum wage legislation.

82. Neither can the **Guidelines** and **section 30(5) IRA** override the specific object and purpose of the minimum wage legislation. If given the effect sought by the Hotel and the Amicus Parties, solely for the hotel industry, it would, at the very least mar, and at worst, injure and transform beyond recognition, the express meaning attributed to "minimum wage" as specifically defined in the legislation.

Service Charge

87. We have then considered the Privy Council decision in **Pereira** and explained why it is wholly inappropriate. The nature of service charge is captured succinctly in that decision, as it is in the judgment of the Court of Appeal here. In **Pereira**, the Privy Council said this:

> *"...Service charges are demanded by the hotel company from their customers who have to pay them since they form part of the bill. The object of the service charge is to replace tipping which only benefited those who had personal contact with the customers, like waiters and waitresses."*

90. When analysed in law, the service charge, being an entrenched part of the workmen's contract of service, and which becomes due to

them because they are workmen/employees employed by the Hotel under a contract of employment or collective agreement, is an express and established term of their contracts of service. Accordingly such contractual terms of service cannot be unilaterally removed or varied without their consent. The Industrial Court cannot therefore be faulted for refusing to remove or vary this express term of service which comprises a part of their “wages” as a whole.

91. But as pointed out earlier this case goes much further than a simple contractual entitlement that may be varied in the course of industrial adjudication under the **IRA** to meet the needs of the Hotel, or to save the Hotel in terms of its ability to operate. As pointed out at the outset, what we have here is the introduction of minimum wage legislation by Parliament nationwide, which is specifically targeted to increase the basic wages of workmen under contracts of employment, such that all workmen in the country receive a minimum wage which does not fall below a certain level. In short, in the context of the Hotel Industry, it means that the basic wage, say of RM300-00 or less, is no longer considered to be tenable by Parliament.

92. Hence the myriad provisions of the **NWCCA 2011**, which ensure that the quantum of the minimum wage that is implemented from time to time meets the needs of the workmen or working poor in the nation. Under the **NWCCA 2011**, the National Wages Consultative Council under **sections 4, 21** and **22** is bound to take into consideration according to

sectors, types of employment and regional areas as well as other matters relating to minimum wages. They are also to consult the public on the minimum wages rates, collect and analyse data and information and research on wages and socio-economic indicators, coordinate, supervise and evaluate the impact of the implementation of minimum wages, review the same and disseminate information and analysis on wages when determining the quantum and setting of the minimum wage. The National Wages Consultative Council is also empowered to make a recommendation on the non-application of the recommended minimum wage rate to any sector or type of employment.

93. It is also pertinent that the employers or Hotels were represented in the Wages Council from 2011 to 2020. They comprise persons who served on the Amicus Parties from time to time.

94. In short, this means that in determining the minimum wage, the Wages Council and thereby Parliament had access to all relevant data and advice and therefore did consider all these matters before determining the application and quantum of the minimum wage rate to all sectors in West Malaysia and a different quantum for East Malaysia. There is therefore absolutely no reason for the industrial adjudicators to tamper or meddle with the clear sentiments, object and purpose of the minimum wage legislation. It would be a fundamental error for the Industrial Court or the superior courts to do so, given the clear reference to “basic wages” in the Employment Act 1955 and “minimum wage” in the

NWCCA 2011 and **MWO 2012**. It is not the function of the Industrial Court or the Judiciary to intrude upon the functions of Parliament.

The Subsistence of a Trust Situation Between the Hotel and Union in Law

95. A further reason subsists as to why the service charge collected from third parties ought not to be utilised to introduce a "clean wage" restructuring or to "top-up" the basic salaries of the Hotel's employees under the collective agreement.

96. Service charge, being monies collected from third parties, does not belong to the Hotel. When it is paid by a customer as part of the bill, ownership in those monies does not vest in, or transfer to the Hotel. Ownership of the monies is immediately transferred and lies with the employees who are eligible to receive those monies. And the employees eligible are those who enjoy a contract of service granting them service charge points under their individual contracts or under their collective agreement.

97. The Hotel collects the monies and does not mix or intermingle it with its own funds. These funds are kept separately, effectively in trust for the eligible employees to be distributed on a specific date as provided for in their contracts. This is further evidence of a lack of transfer of ownership of these funds. The Hotel in point of fact, acts as a fiduciary

or trustee who holds the monies until distribution to the beneficiaries who are the eligible employees.

99. It follows that as the monies did not, at any point in time, belong to the Hotel, there is no entitlement in law for the Hotel to appropriate and utilise those monies to meet the statutory obligation created by the **NWCCA 2011** and the **MWO 2012**. Those monies at all times belonged to the eligible employees. It is in that context that the Court of Appeal likened the top up structure or the clean wage system as amounting to asking the employees to pay themselves from their own monies. Wages, by their very definition, envisage monies belonging to the employer being paid to the employee under a contract of service. It does not envisage monies that are collected for the benefit of the employees being utilised by the employer to offset its own liabilities. The **NWCCA 2011** and **MWO 2012** certainly did not statutorily provide so.

The Clean Wage Structure

100. By reason of the above, we concur with the Union that the clean wage system amounts to a relabelling of service charge. The Hotel continues to charge a customer the same sum without calling it service charge. But the source of the monies remains the customer. It avoids the effect of the minimum wage legislation by substituting service charge with a new label. It does this by taking away service charge as it has traditionally been charged as a means of rewarding employees as a whole, and utilises these monies meant for the employees for itself. The

effect on the employee is that he loses his service charge component. This does amount to the removal of an entrenched term of service unilaterally, and arguably, taking and utilising monies that were paid on trust for the employees for itself. Neither the Industrial Court nor the superior courts by way of judicial review are justified in allowing this as it does not meet the object or purpose of the minimum wage legislation.

The Top Up Structure

101. The position is the same with the top up structure as it amounts to an appropriation and utilisation by the Hotel in like manner of the service charge. Ultimately the nature of service charge, by reason of its unique development, is one of monies held on trust by the Hotel and therefore it cannot be utilised haphazardly. It has come to be referred to as a contractual term simply because the courts have adjudicated on the manner of distribution of the monies between different categories of employees or by reason of the employer wanting to retain a greater portion of the sum collected. But that in no way alters the fact that ownership of the monies vests in the eligible employees after the customer has paid his bill and is simply held on trust for them by the Hotel.

The Ripple Effect of the Imposition of the Minimum Statutory Wage

102. Both the Hotel and the Amicus Parties complain of the “ripple effect” that inevitably follows the imposition of the minimum statutory

wage as it was intended to be under the **NWCCA 2011** and the **MWO 2012**. The ripple effect refers to the fact that as the minimum wage is implemented across the board, more senior employees further up the wage scale enjoy indirect wage increases or “increments” (as the Hotel refers to it) in order that the differences in job status, or higher wages for employees with more seniority or skill.

103. Again given that the function of the Courts is to interpret and give effect to the intention of Parliament in legislation it is asked to interpret, it can only be concluded that the Legislature comprehended and took into account the ripple effect that would result when enacting the minimum wage legislation. In this context **sections 4, 21** and **22** of the **NWCCA 2011** are relevant in that these provisions ensure that the recommendations take into account all the relevant factors we have discussed above. Our statements above in relation to the composition of the Wages Council would apply with equal force here.

105. Further, as submitted by the Union, the ripple effect of the minimum wage has been acknowledged as a benefit or a consequence of minimum wages by the **ILO**. In like vein the ripple effect would have an effect on all employers in all industries. The hotel industry perhaps feels the difference more keenly because it has until now been relatively insulated by relying on its customers or third parties to meet its basic costs and overheads in relation to its employees. Without this sizeable subsidy or supplement, which other industries have had to cope with, the effect of

the implementation of the minimum wage has been particularly grim and challenging. However, that in itself cannot justify a distorted or biased construction of the definition of “basic wages” and “minimum wage” as specified, or of the purpose and object of the minimum wage legislation.

106. It has also been highlighted by the Union that it did not in the negotiations with the Hotel ask for any increase of salaries to reflect the difference in seniority. In these circumstances, the ripple effect does not afford any rational basis for the implementation of the “Clean Wage Structure” or the “Top-Up Structure”.

The Covid-19 Pandemic

107. It was urged upon us that the impact of the Covid-19 pandemic could not be ignored by this Court. And that **section 30(4) IRA** ought to be utilised together with judicial notice taken by this Court of the present circumstances and conditions faced by the hotel industry, which has been particularly hard hit by the pandemic. It would be impossible for this Court not to have noticed the pandemic or its effect on industry as a whole, and in particular the tourism, travel and thereby the hotel industry.

108. However the reality is that the present appeal deals with wages relating back to 2012. The eligible employees have been waiting from then until now to have this trade dispute dealt with. They have not received any of the monies owed to them as a consequence of the

implementation of the minimum wage legislation for at least six or seven years. It would have been anticipated by any prudent employer that monies due from those dates would have been set aside and therefore available for payment to the eligible employees, who as members of the hotel industry are equally affected by the pandemic.

109. Shortly put, we are answering a legal question relating to the construction of the minimum wage legislation and our answer must be in accordance with accepted principles of law.

The Impact of this Decision

113. The Amicus Parties urged us to confine this decision to this appeal. This appeal deals with the trade dispute between the Hotel and Union. The Hotel refers to the Crystal Crown Hotel. To that end, the decision of this Court adjudicates on the existing trade dispute between those two parties. However, it cannot be denied that amicus curiae in the instant case, went beyond simply assisting the Court. There were arguments made, and stances taken in relation to the construction of the relevant legislation in relation to the questions of law before us. The reality is that this Court has considered, analysed and adjudicated on the numerous submissions put forward not only by the Hotel and Union, but also by the Amicus Parties.

114. Our analysis, moreover, has been predicated on questions of law rather than of fact. We determined the construction to be accorded to the relevant law, primarily the **NWCCA 2011** and the **MWO 2012**. These are pronouncements on the material law by the apex court in this jurisdiction. The construction of law, being a legal question does not vary from case to case, otherwise we would have the problem of the law changing with the proverbial length of the Chancellor's foot. Perhaps more significantly the doctrine of *stare decisis* ought not to be eroded or ignored lightly. The doctrine stipulates that lower courts are bound by the decisions of higher courts, save in the well acknowledged exceptions. The impact of the present decision in law is clear from these grounds of judgement.

The Two Questions of Law

115. For these reasons we answer the two question of law before us in the negative. We therefore dismiss the appeal.

NALLINI PATHMANATHAN

Judge

Federal Court of Malaysia

Note: This summary is merely to assist in understanding the judgment of the court. The full judgment is the only authoritative document.