CRYSTAL CROWN HOTEL & RESORT SDN BHD (CRYSTAL CROWN HOTEL PETALING JAYA)

v.

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

Federal Court, Putrajaya
Nallini Pathmanathan, Abdul Rahman Sebli, Mary Lim Thiam Suan FCJJ
[Civil Appeal No: 02(f)-4-01-2018]
24 March 2021

Labour Law: *Employment — Wages — Payment of minimum wages within hotel industry — Whether Hotel entitled to utilise part or all of employees' service charge to satisfy statutory obligations to pay minimum wage stipulated under National Wages Council Consultative Act 2011 — Whether service charge could be incorporated into a clean wage or utilised to top up minimum wage by Hotel — Employment Act 1955, s 2 — Industrial Relations Act 1967, ss 26(2), 30(4),(5),(6)*

This appeal concerned the payment of minimum wages for employees in the hotel industry. The National Union of Hotel, Bar and Restaurant Workers maintained that the utilisation of the service charge element of their remuneration, which employees received as a separate benefit, to substitute (vide a clean wage system) or to supplement prevailing wage rates (vide a top up salary structure), so as to meet the statutory minimum wage was unacceptable. Whereas, the appellant and *amicus curiae* parties ('the Hotel') submitted that they ought not to be compelled to pay the statutorily imposed increase in minimum wages from their own resources, as stipulated under s 23 of the National Wages Council Consultative Act 2011 ('NWCCA 2011'). Instead they maintained that the NWCCA 2011 and the Minimum Wages Order(s) from 2012 to 2020 ('MWO 2012') should be construed or read in such a manner that the definition of "basic wages" in the NWCCA 2011 and MWO 2012 included the element of service charge which was unique to the hotel industry. Accordingly, the issues to be determined in this appeal were: (i) whether under the NWCCA 2011, the Hotel was entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage; and (ii) whether having regard to the NWCCA 2011 and its subsidiary legislation, service charge could be incorporated into a clean wage or utilised to top up the minimum wage.

Held (dismissing the appeal):

(1) In construing the provisions of the NWCCA 2011 and MWO 2012 in conjunction with ss 26(2) and 30(4), (5) and (6) of the Industrial Relations Act 1967 ('IRA'), the interpretation which afforded the maximum protection

of the class in whose favour the social legislation was enacted must be given effect. The social legislation here referred to both the NWCCA 2011 and the IRA. And it was beyond dispute that both pieces of legislation were enacted in favour of labour or workmen. This did not mean that capital or employers and employers' unions' rights were to be trampled or trodden upon, or that their interests were to be ignored or diminished. What it meant was that when the two interests collided, the court was bound to consider the purpose for which the social legislation was enacted and give such object and purpose due effect. In this instance, the practical effect was that ss 26(2) and 30 IRA should be construed so as to ensure that the minimum wage prescribed under NWCCA 2011 and MWO 2012 was achieved without derogation from other entitlements or benefits enjoyed by the workmen. Otherwise, the minimum wage would be achieved at the cost of an entrenched benefit, which in monetary terms meant the workman was deprived of some monies. (paras 50-52)

(2) In the circumstances, it was not tenable to construe or apply ss 26(2) and 30(4) IRA otherwise than to ensure that the purport and object of the NWCCA 2011 and MWO 2012 were met. Therefore, it was not open for the Hotel to complain that its costs had increased several-fold and then went on to insist that a contractual benefit in the form of service charge be appropriated and utilised 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. (para 54)

(3) Based on s 2 of the Employment Act 1955 it was evident that the definition of "basic wages" excluded any other kind of cash emolument payable to the employee for work done. This follows from the fact that wages in s 2 of the Employment Act 1955 was defined as basic wages, and all other payments in cash payable to an employee for work done in respect of his contract of service. Basic wages were therefore separate from all other cash payments. Applied to the present factual matrix, it followed that service charge was a payment in cash payable to an employee for work done under his contract of service. It did not and could not fall within the definition of "basic wages" as defined in the minimum wage legislation and s 2 of the Employment Act 1955. Therefore, construing the minimum wage legislation as expressly drafted, in relation to the collective agreement in this case, that "basic wages" did not include the service charge element. (paras 73-74)

(4) When analysed in law, the service charge, being an entrenched part of the workmen's contract of service, and which became due to them because they were workmen/employees employed by the Hotel under a contract of employment or collective agreement, was an express and established term of their contracts of service. Accordingly, such contractual terms of service could not be unilaterally removed or varied without their consent. The Industrial Court could not therefore be faulted for refusing to remove or vary this express term of service which comprised a part of their "wages" as a whole. However, with the introduction of minimum wage legislation by Parliament which was

specifically targeted to increase the basic wages of workmen under contracts of employment, it would be a fundamental error for the Industrial Court or the superior courts to tamper or meddle with the clear sentiments, object and purpose of the minimum wage legislation, given the clear reference to "basic wages" in the Employment Act 1955 and "minimum wage" in the NWCCA 2011 and MWO 2012. (paras 90-94)

(5) Service charge, being monies collected from third parties, did not belong to the Hotel. When it was paid by a customer as part of the bill, ownership in those monies did not vest in, or transfer to the Hotel. Ownership of the monies was immediately transferred and lay with the employees who were eligible to receive those monies. And the employees eligible were those who enjoyed a contract of service granting them service charge points under their individual contracts or under their collective agreement. Those funds were kept separately by the Hotel, effectively in trust for the eligible employees to be distributed on a specific date as provided for in their contracts. Hence, the Hotel acted as a fiduciary or trustee who held the monies until distribution to the beneficiaries who were the eligible employees. Therefore, the payment and receipt of service charge reflected a trust situation whereby the customer paid, and the eligible employees received the monies they were entitled to, through the trustee or fiduciary namely the Hotel. In the result, as the monies did not, at any point in time, belong to the Hotel, there was 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. (paras 96-99)

Case(s) referred to:

Abdul Aziz Abdul Majid & Ors v. Kuantan Beach Hotel Sdn Bhd & Ors [2012] MLRAU 590 (distd)

Bharat Bank Ltd Delhi v. Employees of the Bharat Bank Ltd, Delhi AIR [1950] SC 188 (refd)

Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal [2001] 1 MLRA 472 (refd)

Dr A Dutt v. Assunta Hospital [1981] 1 MLRA 472 (refd)

Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1998] 5 MLRH 145 (refd)

Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 1 MLRH 303 (refd)

M/S Viking Askim Sdn Bhd v. National Union Of Employees In Companies Manufacturing Rubber Products & Anor [1990] 4 MLRH 335 (refd)

National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v. Mahsyur Mutiara Sdn Bhd [2017] 3 MELR 555; [2017] 6 MLRA 248 (refd)

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 1 MLRA 506 (refd)

Paper And Paper Products Manufacturing Employees' Union v. Tri-Wall (Malaysia) Sdn Bhd [2015] 2 MELR 713; [2015] 4 MLRA 231 (refd)

Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1986] 1 MELR 1; [1986] 1 MLRA 218 (distd)

Shangri-La Hotel (KL) Bhd & Ors v. National Wages Consultative Council & Ors [2017] MLRHU 336 (refd)

Thomas George v. Hotel Equatorial Sdn Bhd (Labour Court Case No: 813-94) (unreported) (distd)

Workmen of Indian Standards Institution v. Management of Indian Standards Institution [1976] 1 LLJ 36 (refd)

Legislation referred to:

Employment Act 1955, s 2(a), (b), (c), (d), (e), (f)

Federal Constitution, art 8

Industrial Relations Act 1967, ss 17, 26(2), 30(4), (5), (5A), (6), 32

National Wages Consultative Council Act 2011, ss 2, 4, 21, 22, 23, 24

Counsel:

For the appellant: N Sivabalah (E Reena & Benedict Ngoh Ti Yang with him); M/s Shearn Delamore & Co

For the respondent: Ambiga Sreenevasan (Shireen Selvaratnam & Lim Wei Jiet with her); M/s Sreenevasan

For the amicus curiae: Cyrus Das (Frida Krishnan with him); M/s The Chambers Of Frida

Watching Brief (solicitors for Sunway Biz Hotel Sdn Bhd and Sunway Hotel (Seberang Jaya) Sdn Bhd in the related High Court Cases No WA-25-44-01-2019 & WA-25-45-01-2019]: Vilasini VB Menon; M/s Vilasini Menon

[For the Court of Appeal judgment, please refer to Crystal Crown Hotel & Resort Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Resort Semenanjung Malaysia [2020] MLRAU 154]

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[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 recognises 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].

[2] Hotel workers are recognised as one of the vulnerable groups requiring legislative protection (see Hansard on the second reading of the National Wages Council Consultative Act 2011 of 30 June 2011 at 12.48pm). In

concluding that the introduction of a minimum wage was essential, the then Minister of Human Resources explained that the purpose was to alleviate the plight of low income workers so as to enable them to increase their purchasing power in view of the increase in the cost of living, as well as addressing the issue of poverty amongst the working poor.

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

[4] The National Union of Hotel, Bar and Restaurant Workers ('the Union') maintains vigorously that any such reworking or modification of the minimum wage is not permissible. To this end the Union maintains that the utilisation of the service charge element of their remuneration, which employees receive as a separate benefit, to substitute (vide a clean wage system) or to supplement prevailing wage rates (vide a top up salary structure), so as to meet the statutory minimum wage is unacceptable.

[5] The employer, Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) ('the Hotel') maintains on the other hand, that while a minimum wage may be necessary, the fixing of such a wage assumes that the employer possesses the capacity to pay such a minimum wage. That postulation, it maintains is not tenable in the hotel industry. And that is because the industry has survived thus far on the utilisation of the service charge element paid by the public, to subsidise hotel workers' wages. Without this supplement, the Hotel maintains it is unable to meet the threshold wage requirements stipulated under the NWCCA 2011.

[6] It is further maintained that no fixation of wages which ignores the capacity of the establishment to pay, is tolerable. To this end, the Hotel proposes to meet the minimum wage stipulated under the law, by utilising the element of "service charge" collected from the public, to supplement the prevailing rates of hotel workers' salaries. The workers would therefore no longer earn this element of their remuneration package as a separate allowance, but would instead receive a 'clean wage' which incorporates the service charge element, or a top up salary structure which uses the service charge to meet the requirements of the statutory MWO 2012.

[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.

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 four 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 five 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.

The Facts

[11] The salient facts are gleaned from the comprehensive submissions of learned counsel for the Hotel, Mr Sivabalah Nadarajah and learned counsel for the Union, Dato' Ambiga Sreenevasan.

[12] The Hotel commenced operations in January 1995. At the outset the employees enjoyed individual contracts of employment with the Hotel where their remuneration comprised a basic salary as well as service charge.

[13] The Union was granted recognition in 1999. In October 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' 1st collective agreement. The Hotel was not willing to do so resulting in the dispute being referred to the Industrial Court for adjudication under s 26(2) of the Industrial Relations Act 1967 ('IRA') in February 2012.

[14] The dates are of significance because it evidences the fact that the appeal relates to the adjudication of the components of a minimum wage for the eligible workmen of the Hotel from the year 2012. The workmen have been awaiting the outcome of this dispute for eight years. This hardly meets one of the most basic requirements of the IRA, namely that industrial disputes ought to be dealt with expeditiously. That too when it relates to a matter as fundamental as the minimum wage, which Parliament has legislated on from as early as 2011.

[15] In 2012, the MWO 2012 was enacted as subsidiary legislation under the NWCCA 2011.

[16] The dispute in the Industrial Court related to the terms to be incorporated into the 1st Collective Agreement. For the purposes of this appeal, the primary issue relates to salary structure and service charge contained in arts 10 and 12 of the 1st first Collective Agreement. This naturally involved the effect of the MWO 2012 on salary structure.

[17] The Union proposed the retention of the service charge system together with a salary adjustment of 10%. The Hotel proposed the introduction of a "clean wage system" to replace the service charge altogether or alternatively, if service charge was to be maintained that the Hotel implement a "top up structure" whereby it could utilise service charge to pay the minimum wages.

Industrial Court

[18] Vide Award No 875 of 2015 dated 18 July 2014, the Industrial Court ordered, amongst others:

(a) That employees' minimum salaries be increased from RM900 to RM1,300.00;

(b) That the service charge system be retained and limited to only employees covered under the scope of the 1st Collective Agreement; and

(c) That the effective date for the 1st Collective Agreement was 1 October 2011.

[19] The learned Chairman reasoned, premised on an employee's contract of employment, that salary and service charge comprised fundamental terms of his contract of employment and could not be unilaterally varied at the instance of the employer, namely the Hotel. As such the Hotel was bound to pay the minimum statutory wage as well as the contracted share of service

charge as provided for in the collective agreement. The latter could not be varied either.

[20] The Hotel computes the resultant increase in costs as follows - the service charge value for unionised staff increased from RM74,730.77 to RM107,612.31 based on the Hotel's then salary costs (inclusive of service charge points) of RM267,688.54.

[21] The Hotel applied for judicial review to quash the award of the Industrial Court, and for the matter to be remitted to be reheard before another panel.

High Court

[22] The Hotel challenged the Industrial Court award in the High Court by way of judicial review on three separate grounds:

(i) The Industrial Court had made a fundamental error in failing to recognise its 'power' to resolve trade dispute when it held that the service charge comprised a fundamental term of the employee's terms and conditions of service that could not be unilaterally varied;

(ii) The Industrial Court had failed to take into account s 26 IRA which, it was contended, enabled the Industrial Court to order the implementation of the clean wage system;

(iii) The Industrial Court had abdicated its statutory duty under s 30(4) of the IRA in that it had failed to consider the elements of public interest, financial interest and the effect of the award on the industry and the economy of the country, generally.

[23] The High Court dismissed the Hotel's application for judicial review on 19 August 2015. It upheld the award of the Industrial Court save in relation to the 10% immediate increment on salary revision, which the Union had agreed to abandon in the Industrial Court.

[24] The comprehensive rationale of the High Court was that:

(a) The definition of "wages" envisaged the basic minimum wage as comprising that part of the price of labour that the employer must pay to all workmen regardless of the category to which the workman belonged. It did not include emoluments or any other emoluments;

(b) Prior to the coming into force of the MWO 2012, it was open to the employer to negotiate the restructuring of wages with the workman or union provided however that the restructured wages should be in accordance with the minimum rate of wages prescribed under the MWO 2012, should not be less than the

wages currently earned by the workman, should be remuneration for work done during normal hours only and should not result in the workman losing any remuneration defined under 'wages' in the statutes regulating the minimum conditions of labour throughout the country;

(c) The High Court then went on to consider the history and nature of the service charge which is unique to the hotel industry. It held that service charge did not belong to the employer/hotel, but was collected and held for distribution by the hotel on behalf of all eligible employees. As such, the Hotel could not be permitted to meet its obligations under the NWCCA 2011 or MWO 2012 to pay a minimum wage by utilising the service charge payments made by patrons or customers of the Hotel. Therefore, the Industrial Court had correctly rejected the proposal for the 'clean wage' system;

(d) On the issue of utilising the service charge component to supplement the basic wage stipulated under the MWO 2012, the High Court held that service charges are not a part of basic wage of a workman and could not be given to the Hotel to be utilised to pay the workman the minimum wage. This component comprised a fundamental term of the employment contract and could not be removed. The High Court also concurred with the Industrial Court that the proportion of 9:1 for service charge computation was to be maintained in accordance with preceding case-law.

[25] In conclusion, the High Court upheld all the findings of the Industrial Court and stated that the latter had not acted irrationally, disproportionately or illegally in making its determination within the ambit of the IRA.

The Court Of Appeal

[26] The Court of Appeal:

(i) Held that based on the NWCCA 2011, the implementation of the minimum wage could not result in employees getting anything less favourable than their current wages;

(ii) Acknowledged the origin and approved practice of service charge in the hotel industry. It relied *inter alia*, on *National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v. Mahsyur Mutiara Sdn Bhd* [2017] 3 MELR 555; [2017] 6 MLRA 248 where the same court had approved the explanation of the history and origin of service charge by the Industrial Court;

(iii) Stressed that service charge does not come from the hotel or employer's own funds or resources, but from customers who pay this 10% charge *in lieu* of 'tipping';

(iv) Held that service charge comprises a part of the hotel employees' contractual terms and conditions of service;

(v) The obligation of the Hotel to provide a minimum wage is separate from its obligation to comply with the contractual entitlement of its employees to a share of the service charge collected from the customers;

(vi) The Clean Wage System was disadvantageous to hotel employees in that it resulted in them being deprived of the separate element of service charge which was part of their contractual entitlement;

(vii) The introduction of the MWO 2012 did not prevent the employees from receiving their share of service charge. The latter ought to have been paid over and above the minimum wage stipulated;

(viii) The payment of the minimum wage should come from the Hotel's coffers. It was wrong for the Hotel to utilise monies collected from customers for the benefit of the employees to meet its obligation to pay the minimum wage. It was akin to utilising the employees' own monies to pay their salaries;

(ix) The implementation of the minimum national wage system would have a financial effect on all employers and industries. The Hotel was no exception and would have to bear additional financial responsibility to meet this obligation. It could not be exempted from its obligation; and

(x) The use of the service charge to meet this financial responsibility would defeat the purpose and object of the MWO 2012.

[27] In summary, all of the courts below, namely the Industrial Court, High Court and Court of Appeal held that service charge cannot be utilised to pay minimum wages whether by incorporating the same into the "Clean Wage System" or implementing a "Top Up Structure". Their primary reason for so holding was that "minimum wages" in the NWCCA 2011 are defined as 'basic wages' which do not encompass the element of service charge.

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 (much as I have alluded to at the outset).

[30] In our view, the purpose and rationale for the introduction of such legislation may be summarised 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.

[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 utilised its powers and obligations under the IRA to resolve the trade dispute before it under s 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 utilised 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 s 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 utilisation of the service charge or a part of it towards meeting the statutory minimum wage.

[33] In maintaining that the Industrial Court and the superior courts below had failed to appreciate the jurisdiction and power of the Industrial Court to "regulate" or modify the terms and conditions of service of the hotel employees, reliance was placed on *Dr A Dutt v. Assunta Hospital* [1981] 1 MLRA 472 where it was held, (relying in turn, on the judgment of Mukherjea J in *Bharat Bank Ltd Delhi v. Employees of the Bharat Bank Ltd, Delhi* [1950] AIR SC 188) that the function of the Industrial Court was not merely to interpret or give effect to the contractual rights and obligations of the parties. It was open to the Industrial Court to "create new rights and obligations between them" which it considered essential for keeping industrial peace. As such the contention is that wages for the hotel workmen in the union ought to have been altered, modified or replaced with a "clean wage system" by utilising the service charge benefit that they have been contractually entitled to thus far; or that the statutory wage be achieved by utilising the service charge benefit to top up the existing wage. 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 ss 26(2), 30 and the general tenor of the IRA as encapsulated under the IRA.

[34] They also made reference to several other cases which referenced the powers of the Industrial Court to create rights in order to resolve claims between employer and employee. (See *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal* [2001] 1 MLRA 472; *M/S Viking Askim Sdn Bhd v. National Union Of Employees In Companies Manufacturing Rubber Products & Anor* [1990] 4 MLRH 335 ('*Viking Askim*') per Edgar Joseph Jr and *Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998]

1 MLRH 303 ('*Mersing Omnibus*') and *Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1998] 5 MLRH 145 ('*Lam Soon*'). The Hotel concluded on this point that the Industrial Court had "abdicated its duty and committed a grave error of law" by failing to vary or create new terms in view of the introduction of the NWCCA 2011 and MWO 2012.

Amicus Parties

[35] The Amicus Parties took a similar stance stressing in particular the importance of s 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 s 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.

[36] Like the Hotel, the Amicus parties relied on *Mersing Omnibus*, *Lam Soon* as well as *Paper And Paper Products Manufacturing Employees' Union v. Tri-Wall (Malaysia) Sdn Bhd* [2015] 2 MELR 713; [2015] 4 MLRA 231 to bolster their submissions that:

(i) Section 30(4) had to be taken into account in determining a trade dispute which included a dispute relating to wages;

(ii) Section 30(4) is a statutory safeguard which the Industrial Court is obliged to have regard to in making its award;

(iii) The mere statement of compliance with s 30(4) was insufficient. Actual regard had to be had to the section failing which the entire award was invalid;

(iv) As such the amicus parties submitted that in order to meet its mandatory duty under s 30(4), the Industrial Court was obliged to make an actual consideration of the financial impact of its award on the industry in cases where its decision is likely to constitute a precedent in like cases in the industry such as the present. In this context the 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".

(v) 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.

(vi) 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.

[38] The Union pointed to the fact that the Court of Appeal held that the financial impact and s 30(4) had already been taken into account in the fixing of the minimum wage by the Wages Council. As such, the questions before the court are purely on the implementation of the statutory minimum wage and do not relate to wage structure.

[39] In any event s 30(4) also obliges the Court to have regard to public interest and it is in the public interest to ensure that the workforce in the country are not exploited and are allowed to earn enough to ensure a reasonable standard of living.

[40] With respect to s 26(2) on the powers of the Industrial Court when dealing with a trade dispute, the Union accepted the wide powers of the Industrial Court under the section but maintained that just because the power exists it did not follow that it had to be exercised in favour of the Hotel. Instead the power had to be exercised reasonably and not arbitrarily (relying on *Viking Askim*). The fact that the Industrial Court had chosen not to utilise its powers to remove or vary a fundamental term of the contract of employment (the service charge element) and utilise it to meet the statutory minimum wage, did not mean that it had committed a fatal error of law.

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 utilise ss 26(2) and 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 s 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.

[43] The grievance, in effect, is that the Industrial Court failed to accede, or accord permission for the utilisation of the service charge element of the workmen's existing salaries (which is collected from third parties) to off-set or substitute the wage increase that has been statutorily imposed throughout the country on all employers. The Hotel (and the Amicus Parties) maintain that this should necessarily have been awarded by the Industrial Court vide ss 26(2) and 30(4) IRA.

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.

[45] 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 ie 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 marginalised 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 law 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 marginalised persons.

The Decision Of This Court In *PJD Regency*

[47] This Court had occasion to address this issue of the construction of social legislation recently in the case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 1 MLRA 506. That series of cases dealt with housing developers and housing purchasers under the Housing Development (Control and Licensing) Act 1966 ('HDA 1966'), more particularly the mode of computation of liquidated and ascertained damages for late delivery. The Chief Justice, Tun Tengku Maimun binti Tuan Mat held *inter alia*, as follows, in relation to social legislation:

> "[31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this Court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 MELR 1; [1995] 2 MLRA 435 ('*Hoh Kiang Ngan*').
>
> ...
>
> [33] When it comes to interpreting social legislation, the State having statutorily intervened, the courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

[48] The court went on to refer and cite with approval the dictum of Bhagwati J in *Workmen of Indian Standards Institution v. Management of Indian Standards Institution* [1976] 1 LLJ 36 at p 43, with which we agree and adopt, as follows:

> "[1] It is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'. Whenever a question arises whether a particular concern is an 'industry', the approach must be broad and liberal and not rigid or doctrinaire. **We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to** *(sic)* **its avowed social objective**.".
>
> [Emphasis added]

[49] This court then 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] 1 MELR 44; [2006] 2 MLRA 61).

(ii) The literal rule is automatically displaced by the purposive rule when it concerns the interpretation of the protective language of social legislation.

(iii) For the avoidance of doubt, it is important to emphasise that even where a term or provision of a social legislation or a statutory contract enacted thereunder is literally clear or unambiguous, the court no less shoulders the obligation to ensure that the said term or provision is interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted".

[50] It follows that in construing the provisions of the NWCCA 2011 and MWO 2012 in conjunction with ss 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 trampled 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.

[52] Put another way, ss 26(2) and 30 IRA should be construed so as to ensure that the minimum wage prescribed under NWCCA 2011 and MWO 2012 is achieved without derogation from other entitlements or benefits enjoyed by the workman. Otherwise, the minimum wage would be achieved at the cost of an entrenched benefit, which in monetary terms means the workman is deprived of some monies. To that end the purpose and object of the minimum wage legislation is not achieved.

[53] F urther, the minimum wage legislation is intended to confer benefits on vulnerable groups of employees, of which hotel employees were expressly recognised in Parliament when this legislation was enacted. A construction which seeks to detract from or take away those benefits, even indirectly, does not meet the governing principle of ensuring that the statute should confer benefits on the particular class or category for which the social or beneficial legislation is intended.

[54] It is therefore not tenable to construe or apply ss 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 utilised 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 utilise ss 26(2) and 30(4) IRA to abrogate NMCCA 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.

[55] In this context it is relevant that the IRA aims at maintaining a peaceful and harmonious environment in, *inter alia*, the hotel industry. Such a liberal interpretation requires that the workman or labour benefits as it is the vulnerable group, *albeit* not to the complete detriment of the employers. Here, what the employers view as the seeming 'detriment' is imposed statutorily by Parliament itself. It follows therefore that Parliament, when determining that minimum legislation was required to, and did take into account the needs and capacity of all industries, including the hotel industry. Ultimately the point is that the construction to be afforded to the NWCCA 2011 and MWO 2012, as social legislation, must meet the object prescribed by Parliament, which is to assist the workman. The IRA in no way detracts from that object and accordingly its provisions should be construed liberally and purposively to achieve that same object. And not so as to detract from, or seek to abrogate the benefit created for what is ultimately the welfare of the weaker working class[3]. The modes of statutory construction put forward by the Hotel and the Amicus Parties do precisely that.

[56] Ultimately, the interpretation of the IRA in conjunction with the minimum wage legislation should be done in such a way that the mischief is suppressed and the remedy advanced. The mischief sought to be suppressed by the minimum wage legislation is the exploitation of labour by capital, of workmen by their employers. The remedy is to prescribe a minimum wage. If the Hotel or the Amicus parties' legal contentions are accepted this would result in a decrease in the workmen's remuneration as a whole. To that end the mischief would be advanced and the remedy abrogated or stultified. That again is not tenable.

The Case-Law Relied Upon By The Hotel And The Amicus Parties

[57] A consideration of the case-law relied upon by the Hotel and Amicus Parties divulges that in each of those cases, the trade dispute was between an employer and employee or trade union, relating to a range of issues including collective bargaining. In these cases, in determining the quantum of monies payable to individual workmen or a trade union of workmen, the IRA requires

that consideration be accorded to the matters as set out collectively in s 30 IRA. However none of these cases deals with the implementation of the provisions of a different statute relating to a minimum wage. The present appeal is unique in that the NWCCA 2011 and MWO 2012 impose a basic statutory minimum for wages for all industries throughout the country. And the Hotel and Amicus Parties seek to override those provisions utilising some selected parts of the IRA. This approach is flawed, as argued *in extenso* above, because it fails to appreciate that it is erroneous to try and use selective portions of one statute relating to industrial adjudication to override the effect of the minimum wage legislation. Further it overlooks the undisputable fact that both pieces of legislation share a common underlying philosophy, namely to ensure that labour is not exploited and to alleviate the position of the working poor. To that end the reliance on case law such as *Mersing Omnibus, Lam Soon* and *Viking Askim* do not support the Hotel's contentions. As has been explained above, the two statutes must be read harmoniously as far as is possible.

[58] In the present scenario the construction of the two statutes to achieve the object of the minimum wage legislation and to maintain industrial harmony are not mutually exclusive. In point of fact, these two pieces of legislation complement each other. Far from conflicting with each other, the minimum wage legislation and the IRA admit more to a harmonious construction, namely to enhance industrial relations as a whole.

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 wage"as follows:

> "wages" - has the same meaning assigned to it in s 2 of the **Employment Act 1955**
>
> "minimum wages" - means the **basic wages** to be or as determined under **s 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 s 23 of NWCCA 2011 provides:

"23. (1) **Where the Government agrees with the recommendation of the Council** under para 22(2)(a) or 22(4)(a) **or determines the matters** unde para 22(4)(b), the **Minister shall**, by notification in the Gazette,**make a minimum wages order** on the matters specified in paras 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 **s 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 the MWO 2012 (which will vary from time to time).

[64] Section 23 has to be read with s 24 NWCCA 2011 in order to appreciate the direct and practical effect for workmen under a contract of service. sub-section (2) of s 24 NWCC 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. In other words, the clear intention of the Legislature is that recourse be had to s 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".

[67] It also does not include the value of housing accommodation, fuel, house, lighting or medical attendance (see (a), nor travel allowance, EPF, bonus, retirement benefits, gratuity and the entire list of matters excluded from the definition of "wages" in s 2 of the Employment Act.

[68] What follows from a consideration of the definition of "basic wages" under s 2 of the Employment Act and the use of the term "basic wages" and "minimum wages" in s 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 s 2 of the Employment Act in s 24 NWCCA 2011.

[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 s 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 refer 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, s 24 requires the employer to increase the "basic wages" 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 comprise 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.

[73] What are the "basic wages" of the unionised hotel employees under their collective agreement? Does it include the service charge element? Applying the approved definition under the minimum wage legislation, namely s 2 of the Employment Act 1955 it is evident that the definition of "basic wages" excludes any other kind of cash emolument payable to the employee for work done. This follows from the fact that wages in s 2 of the Employment Act 1955 are defined as basic wages plus all other payments in cash payable to an employee for work done in respect of his contract of service.

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 s 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 s 23 of NWCCA 2011. Such a misinterpretation distorts the object and purpose of the legislation, apart from being legally incoherent.

[77] We were also invited to consider the International Labour Organisation's (ILO) recommendations in Convention No 131 which is the Minimum Wage

Fixing Convention 1970 which Malaysia ratified in 2016. Convention 131 states, amongst a great many other things, that some countries use only basic wages for the purpose of computing minimum wages, while other countries utilise gross earnings. Reference was also made to the fact that the courts in this jurisdiction take into account ILO principles and conventions in arriving at its decision. While this is true, these general background statements in the Convention cannot override or alter the specific and precise nature of the definition of a "minimum wage" as stipulated in the NWCCA 2011 and the MWO 2012. To that end, these submissions are not helpful in light of the specificity of the minimum wage legislation in defining the minimum wage.

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 para 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:

> "Subject to negotiation between the employer and employee, the method of restructuring of wages is based on the following conditions:
>
> (i) the restructuring process is made only once before the commencement date of this Order and not a continuous process after the commencement date of the Order;...
>
> (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 & Ors v. National Wages Consultative Council & Ors* [2017] MLRHU 336. 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 para 3(v) is of persuasive value more particularly in relation to s 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 para 3(v) of the Guidelines, even if coupled with s 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 s 30(4) IRA to override the effect of the minimum wage legislation.

[82] Neither can the Guidelines and s 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.

The Privy Council Decision In *Pereira*

[83] Nonetheless, the Hotel argued rigorously that the element of "service charge" does comprise a part of "wages" by reason of the Privy Council decision in *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* [1986] 1 MELR 1; [1986] 1 MLRA 218 ('*Pereira*'). The Hotel utilised the case in this context: It made reference to the decision of the Court of Appeal which held, *inter alia* that the utilisation of service charge for the payment of minimum basic wages is, "akin to using the employees' monies to pay their own salaries". The Hotel then submitted that this was in direct contradiction to *Pereira* because there the Privy Council had held, *inter alia* that:

> "...it is plain that Mr Pereira's entitlement to his share of the service charges collected by the hotel company arises under his contract of service with the hotel company and therefore, even if the hotel company in terms of that contract is acting as his agent to collect for him and other employees from the hotel's customers, the service charges which they pay to the hotel company, that money is due to them by the hotel company under their contracts of service as a reward for the service which the employees render their contracts of service to the hotel company itself. Accordingly, the share of service charge is properly to be regarded as due to Mr Pereira under his contract of service as remuneration and for the reasons already given it is in respect of the normal periods of work. That money, once in the hands of the hotel company is due by them as employer to Mr Pereira in terms of his contract of employment."

[84] The Hotel submits, premised on the passage above, that the service charge, like basic salary, is due to the workman under the contract of service. It is further contended that the service charge, like salary, only belongs to the employees as and when it is paid out to the employees, but not before that. As such service charge is said to be part of "wages" under s 2 of the Employment Act 1955 premised on the definition of the same as comprising "basic wages

and all other payments in cash payable to an employee for work done in respect of his contract of service".

[85] A perusal of *Pereira* in its entirety discloses that:

(a) There is a distinction between "basic wages" and "wages" as is evident from a construction of the definition of "wages" under the Employment Act 1955. In this appeal we are concerned with "minimum wage" under the NWCCA 2011 and MWO 2012 which incorporates the definition of "wages" in the said Act, by making reference to the "basic wages" element only in the said definition, not "all the other payments in cash payable to an employee under his contract of service."

To that extent these other payments are not relevant to construing what is meant by a "minimum wage" under the minimum wage legislation. Only the element of "basic wages" is relevant;

(b) The question in *Pereira* was whether the hotel employer in that case and Pereira himself were obliged to pay contributions under the Employees Provident Fund Act 1951 ('EPF Act 1951') in respect of not only basic salary and food allowance, but also in respect of service charge. If service charge fell within the definition of "wages" (as defined in the Employment Act 1955), EPF contributions fell to be paid, otherwise such contributions did not. Therefore it is clear that Pereira is not authority for the proposition that service charge comprises a part of "basic wages". Instead it is authority for the legal proposition that service charge (then) comprised a part of "wages" under s 2 of the EPF Act for the express purpose of the EPF Act. That however, does not have bearing on ascertaining the definition of "minimum wage" under the NWCCA 2011 and MWO 2012, which relates only to the element of "basic wages" (and not wages as a whole) under s 2 of the Employment Act 1955 and s 23 of the NWCCA 2011. (The EPF Act was subsequently amended);

(c) The statement in *Pereira* that the employee's entitlement to service charge arises under his contract of service as a reward which the employee renders to the hotel company under his contract of service, however, has no relevance to the definition of "minimum wage" under the minimum wage legislation. The statement in *Pereira* means that the employee's entitlement to the service charge component of his remuneration arises from his contract of service, without which he would not enjoy such remuneration. The service charge becomes due or attributable to his salary or wages as a whole, by reason of his contract of service with the hotel. However, the fact that service charge becomes due to the employee as a consequence of his contract of service, does not transform service charge into a part of "basic wages". It becomes a part of the additional emoluments

he receives under his contract of service for work done, and to that extent amounts to remuneration or, at the time of the case, "wages". The element of "basic wages" is different from "wages". The latter includes components in cash other than basic wages. Basic wages is recognised under s 2 as the minimum sum which is payable by the employer to the employee;

(d) The Court of Appeal's decision of *Abdul Aziz Abdul Majid & Ors v. Kuantan Beach Hotel Sdn Bhd & Ors* [2012] MLRAU 590 which affirmed the decision in *Thomas George v. Hotel Equatorial Sdn Bhd (unreported)* (which in turn affirmed the decision of the Labour Court in that case) that service charge came within the meaning of "wages" in s 2 of the Employment Act 1955, and was therefore to be included when determining retrenchment benefits, are both distinguishable on the same reasoning. These cases were dealing with the construction of the ordinary rates of pay or retrenchment benefits which turned on the definition of "wages" rather than "basic wages".

More importantly perhaps, none of these cases was dealing with the definition to be accorded to "minimum wage" under special legislation (NWCCA 2011 and MWO 2012) which carries a specific legislative definition within that legislation. In view of the legislated definition, there should be strict adherence to the same.

[86] For the reasons we have expressed, it follows that we are unable to concur with the Hotel's submission that the decision in *Pereira* supports its contention that service charge, being a part of "wages" therefore or in like manner should be construed as comprising a part of "minimum wage" under the NWCCA 2011 and MWO 2012.

Service Charge

[87] It is necessary to consider the element of service charge because it is the core source of difference between the parties. It is not in dispute that service charge is a benefit or cash emolument that is specific to the hotel industry. It has been in practice since at least the '80's as borne out, *inter alia*, by the case of *Pereira* (above). 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."

[88] Service charge is therefore not a tax nor any other form of payment which customers are forced to pay out under any statute. As submitted by the Union, the Hotel has been collecting service charge for its employees from the date when it commenced business, ie from 1995. In the instant case a ten per cent

(10%) service charge is imposed on all bills to customers. It is essentially for services rendered. The Industrial Court has generally continued to utilise this 9:1 formula. The Hotel collects this monies for and on behalf of the employees. Out of the 10%, the Hotel keeps one per cent (1%) by way of administrative charges and the remaining 9% is distributed to the employees on the basis of service charge points. It is the scale and number of service charge points that comprise the basis for industrial adjudication in contracts of service and collective agreements. There is no question of dealing with the quantum as the monies are derived from a third party source, and not the Hotel. The Hotel has no control over the quantum of service that may be collected from customers in any given month. The actual quantum available for each workman will depend on the business of the Hotel and the number of employees who are eligible to receive the service charge. The purpose of the service charge was to supplement the very low monthly salaries paid to workmen in this industry. It will also be recalled that in introducing the minimum wage, this particular group of employees was singled out as a vulnerable group, who were intended to benefit from the introduction of such legislation.

[89] To put matters in perspective it is pertinent to refer to the example utilised by the Industrial Court in this matter, where the basic wage was RM300.00. The service charge is utilised to bring the basic wage up to a survival rate. In the context of the Hotel, most employees, have a minimum of 2.5 service charge points, which based on its 2012 average value over a period of 7 months would provide these employees with an average of about RM975.00 (RM390 x 2.5) per month in addition to their basic wages. To that end, service charge is an additional cash emolument that comprises a part of their total remuneration or "wages" as a whole. It is therefore clear that service charge is and does not comprise a part of the Hotel's funds. Neither is it reflected as revenue in the Hotel's financial statements.

[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 ss 4, 21 and 22 are 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 to 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 Consultative Council from 2011 to 2020. They comprise persons who served on the Amicus Parties from time to time. They continue to do so. In point of fact, as submitted by the Union, the Minister did defer the commencement date of the MWO 2012 from 1 January 2013 to 1 October 2013 for member hotels represented by 4 of the 5 Amicus Parties that implemented the service charge before 1 December 2012. But no further exemptions have been made for the hotel industry since the MWO 2012. There have been three further MWOs, in 2016, 2018 and 2020.

[94] In short, this means that in determining the minimum wage, the Wages Consultative 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.

[98] Therefore the correct analysis in law of the payment and receipt of service charge, is that it reflects a trust situation whereby the customer pays, and the eligible employees receive, the monies they are entitled to, through the trustee or fiduciary namely the Hotel.

[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 ss 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 Consultative Council would apply with equal force here.

[104] In this context it cannot be stressed enough that it is not open to the court to modify, alter or vary the object and intent of enacted legislation to meet the needs of a single group of employers in a one sector. That in effect is what the Hotel and the Amicus Parties are asking this court to do.

[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 s 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 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. We have dealt with these issues *in extenso* in this judgment and concluded that service charge cannot comprise a part of "basic wages" under the NWCCA 2011 and MWO 2012 in law, either vide the "Clean Wage Structure" or the "Top-Up Structure". The fact of the pandemic in 2020 and 2021 cannot and does not alter our findings. Neither can s 30(4) IRA be utilised to alter a matter relating back to a trade dispute and award dating back to 2012.

Distribution Of The Service Charge To Eligible Employees

[110] During the course of the hearing, we had expressed concern about the manner of distribution of service charge and queried whether all eligible employees had been included. The Union has answered that question satisfactorily in its further written submissions. Applying ss 17 and 32 IRA, it follows that only eligible employees under the Hotel and Union's Collective Agreement may participate in and be entitled to service charge.

[111] Employees outside the scope of the Collective Agreement who cannot be represented by the Union, namely employees working in the

security, personnel, confidential and managerial capacity are not entitled to participate by reason of the provisions of the IRA which expressly exclude such personnel from being represented by the Union. Although ss 17 and 32 IRA refer to all workmen who are employed by and subsequently employed in the undertaking, ie the Hotel here, it refers only to those employees who are capable of being represented by the Union. Employees employed under those excluded categories do not fall within the purview of the Collective Agreement. In these circumstances, there is no discrimination under art 8 of the Federal Constitution as contended by the Hotel.

[112] As for the other group that concerned us, namely foreign workers, the Union submitted that the issue does not arise here, as at the material time, there were no foreign workers employed by the Hotel. As such, we make no further findings on this issue, as it does not arise for consideration.

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 judgment.

The Two Questions Of Law

[115] We now answer the two questions of law before us:

> Question(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?

Answer: No, under the NWCCA 2011 hoteliers are not entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage.

Question (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?

Answer: No, having regard to the NWCCA 2011 and its subsidiary legislation, service charge cannot be incorporated into a clean wage or utilised to top up the minimum wage.

[116] We conclude and confirm that the courts below and the Industrial Court did not err in deciding that service charge was not to be included when computing and implementing the minimum wage in accordance with the NWCCA 2011 and the MWO 2012. We therefore dismiss the appeal.

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

[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

[3] (Shashni, Akriti, *Beneficial Interpretation in Welfare Legislation: Study of Judicial Decisions in India* (July 26, 2013). Available at SSRN: https://ssrn.com/abstract=2298771 or http://dx.doi org/10.2139/ssrn.2298771)

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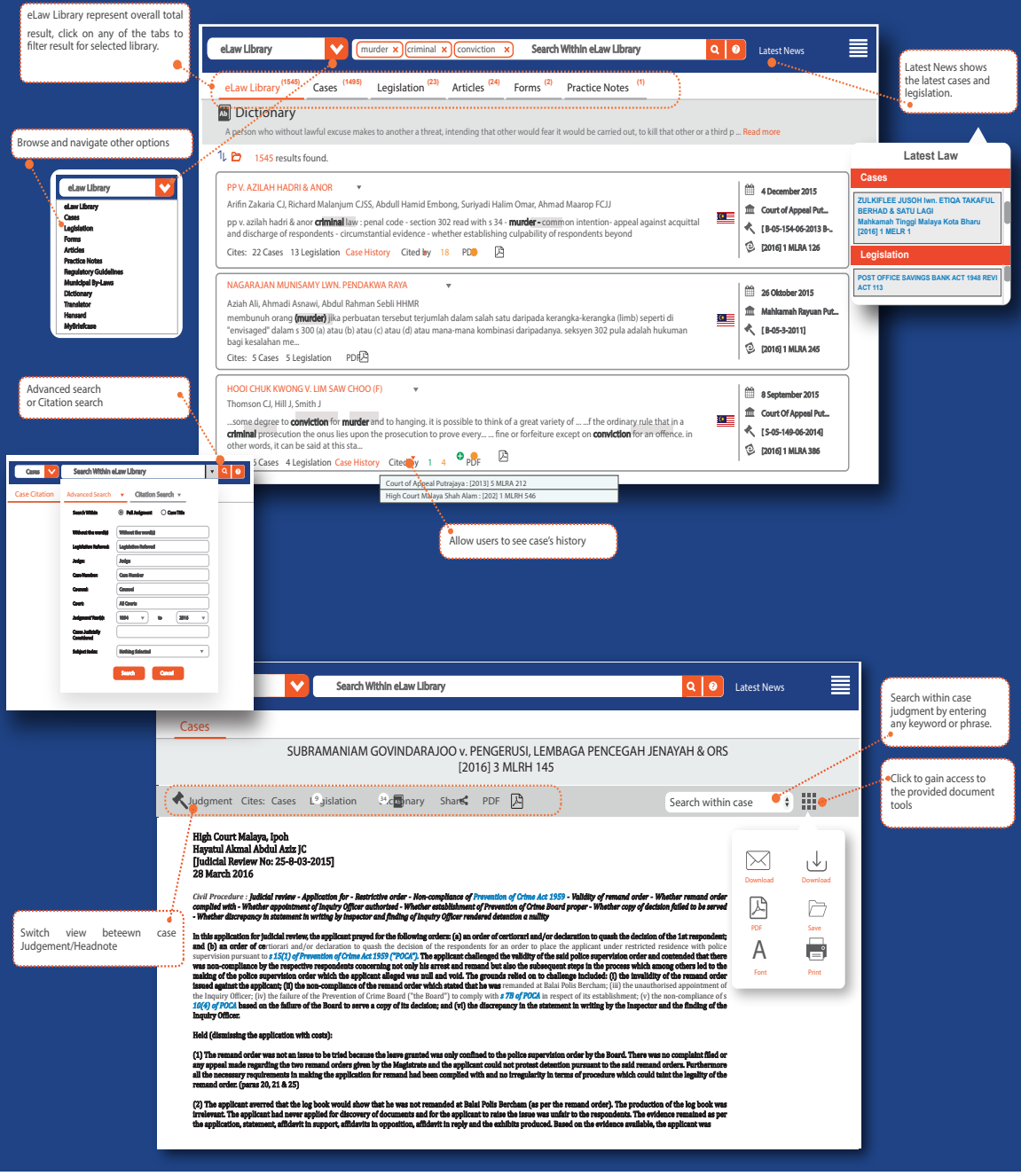

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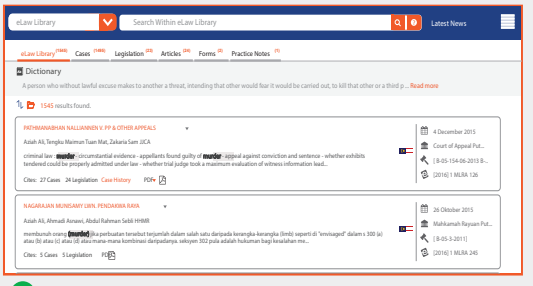

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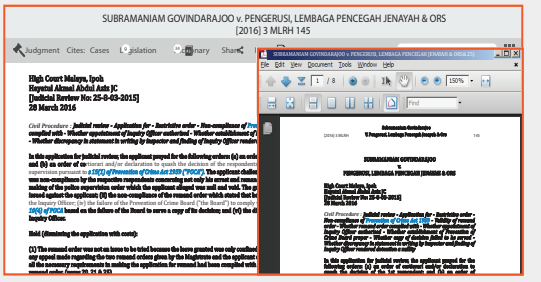

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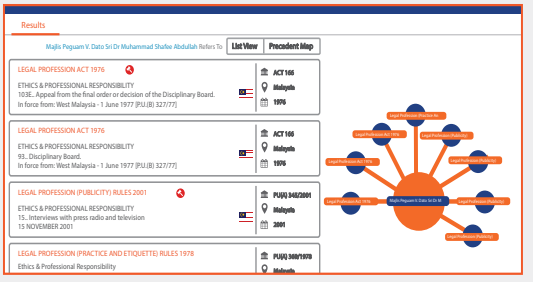

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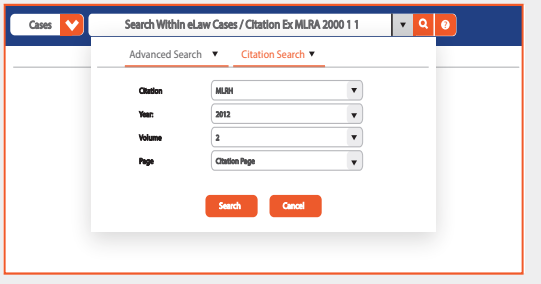

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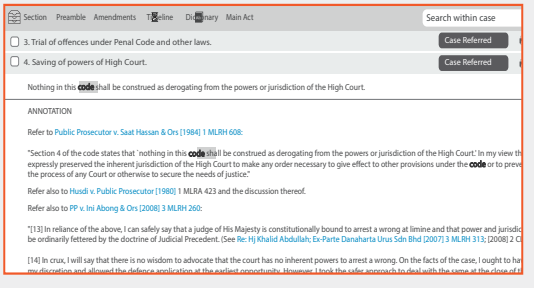

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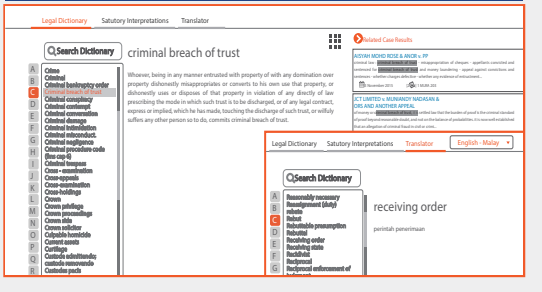

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