INDUSTRIAL COURT OF MALAYSIA

CASE NO: 7(13)/3-208/14

BETWEEN

THE ANDAMAN A LUXURY COLLECTION RESORT, LANGKAWI (ANDAMAN RESORT SDN. BHD.)

AND

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

AWARD NO: 1609 OF 2018

BEFORE	:	**Y.A. PUAN JAMHIRAH ALI – CHAIRMAN** Gilbert John Arokia ï Employeeôs Panel Anandaraju Mookkapillai ï Employer's Panel
VENUE	:	Industrial Court Malaysia, Kuala Lumpur.
DATE OF REFERENCE	:	07.03.2014.
DATES OF MENTION	:	28.04.2014, 09.07.2014, 23.09.2014, 11.11.2014, 28.11.2014, 15.01.2015, 26.01.2015, 24.03.2015, 07.05.2015, 18.06.2015, 24.08.2015, 29.09.2015, 29.10.2015, 15.12.2015, 24.03.2016, 04.04.2016, 26.04.2016, 19.09.2016, 08.12.2016, 18.01.2017, 13.03.2017, 27.03.2017, 17.04.2017.
DATES OF HEARING	:	15.03.2017, 28.03.2017, 27.04.2017.
DATES OF UNION'S WRITTEN SUBMISSION	:	07.06.2017, 28.07.2017, 09.02.2018, 01.06.2018.
DATES OF HOTEL'S WRITTEN SUBMISSION	:	22.06.2017, 25.07.2017, 02.08.2017, 21.08.2017, 14.05.2018.

REPRESENTATION : *for the Union – Lim Chooi Phoe together with Rusli Affandi;*
National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia (NUHBRW)

for the Hotel – Vijayan Venugopal together with Nadia Bt Abu Bakar;
M/s Shearn Delamore & Co.
Advocates and Solicitors

REFERENCE:

This is a reference dated 07.03.2014 from the Honourable Minister of Human Resources, Malaysia pursuant to section 26(2) of the Industrial Relations Act 1967 (IRA 1967) arising out of the trade dispute in respect of the restructuring of the employeesô wage pursuant to the implementation of the Minimum Wages Order 2012, which involved converting part or the whole of the service charge payable, to be included with the basic wages to form the minimum wages of RM900.00 per month between **The Andaman A Luxury Collection Resort, Langkawi (Andaman Resort Sdn. Bhd.)** (ñthe Hotelò) and **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia** (ñthe Unionò).

AWARD

PROLOGUE

1. It was mutually agreed by all parties that the instant case be heard together with case no. 7(13)/3-343/14 between Inter Heritage (M) Sdn. Bhd. (Sheraton Imperial Kuala Lumpur Hotel) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia; and that the decision in this case will bind that one. However, as both these cases have not been consolidated, but only heard together, customary

observances practiced by the Industrial Court of Malaysia necessitates that separate and distinct Awards be handed down for each individual case, which highlight the peculiarities of each.

2. The Hotel in the instant case produced 2 witnesses i.e. one Vijay Kumar (COW1), the Director of Finance of the Hotel and one Tan Sri DatoôAzman Shah Bin DatoôSeri Haron (COW2), who testified in his capacity as a Council Member of the Minimum Wages Council representing the employers. COW2 testified for the Hotel in the instant case and also on behalf of the Hotel in case no. 7(13)/3-343/14. It was also agreed between parties that the evidence of COW1 in this case be adopted and applied in that case (the Inter Heritage case above). The Union opted not to produce any witnesses in either case.

3. On the mention date of 19.01.2017, the learned Counsel for the Hotel in this case informed the Court that the Hotel wished to amend its Statement of Case (Amended SOC). The Hotel then filed an application to amend its SOC on 03.02.2017. The Union in its letter dated 16.02.2017 had informed this Court that the Union had no objection with regard to the said application. By an interim Award No. 354/2017 dated 02.03.2017 this Court allowed the Hotelôs application to amend the SOC; and thereafter the Amended SOC was filed on 06.03.2017; and the Union filed its Amended Statement in Reply (Amended SIR) on 09.03.2017; and an Amended Rejoinder was filed by the Hotel on 13.03.2017.

4. The hearing of this case commenced on 15.03.2017. Upon the conclusion of the trial both parties had filed their respective submissions and bundle of authorities. Oral submissions were heard. Subsequently, both parties, not being totally satisfied that they had fully appraised this Court of their respective views, observations and perceptions went on to file further written submissions on 09.02.2018 (the Union), 14.05.2018 (the Hotel) and on 01.06.2018 (the Union).

5. This Court takes the opportunity to place on record our sincere appreciation to both the erudite Representative of the Union and Learned Counsel for the Hotel for their unstinting efforts and labour in assisting the members of the Panel and I in conducting and bringing to a conclusion the instant case.

BACKGROUND

6. The National Wages Consultative Council (NWCC) was established under the National Wages Consultative Council Act 2011 (NWCC Act 2011) with the responsibility to conduct studies on all matters concerning minimum wages and to make recommendations to the Government to make minimum wages orders according to sectors, types of employment and regional areas, and to provide for related matters.

7. Subsequent to that, the Minimum Wages Order 2012 (MWO 2012) was gazetted on 16.07.2012 which came into effect on 01.01.2013; with the implementation of the minimum wages of RM900.00 a month in Peninsular Malaysia and RM800.00 a month in Sabah, Sarawak and the Federal Territory of Labuan. The Minimum Wages

(Amendment) Order 2012 came into effect on 01.10.2013. The implementation of the minimum wages of RM900.00 for the hotel industry commenced from 01.10.2013.

PLEADINGS

The Hotel's Case

8. In its Amended SOC the Hotel averred that the parties had entered into the 5th collective agreement (5th CA) effective for the period from 01.01.2013 to 31.12.2015; the terms of which are still on-going to date. The salary structure of the employees covered by the 5th CA was set out at Appendix A of the said Collective Agreement. The Hotel also stated that in addition to the basic salary paid under the salary structure as set out at Appendix A, it was provided for in Article 12 of the 5th CA that the Hotel shall distribute 90% of the service charge collected by the Hotel to all employees covered within the scope of the Collective Agreement as listed in Appendix B except part-timers, temporary, casual and retired employees.

9. The Hotel contended that pursuant to the MWO 2012 gazetted by the Government to be implemented by the hotel sector with effect from 01.10.2013, employees in the hotel sector in Peninsular Malaysia were to be paid RM900.00 as minimum wages per month. Further, by way of paragraph 6 of the said Order, it was permitted for an employer and the Union to negotiate the restructuring of wages before the MWO 2012 came into operation.

10. The Hotel further averred that in view of the fact that employees covered by the 5th CA were paid a basic salary as well as service charges, it was agreed by the NWCC, as set out in paragraph 3 of the "Guidelines on the Implementation of the Minimum Wages Order 2012" (the Guidelines) issued by the NWCC and endorsed by the Minister of Human Resources that **"**for the hotel sector where service charge is implemented, the employer may convert all or part of the service charge meant for distribution to the employees, to form part of the minimum wages**"**.

11. The Hotel in this case took the decision to implement the MWO 2012 by way of **"**top-up from individual employee's service charge**"**; whereby for employees with basic salary below RM900.00, the Hotel would restructure the wages by converting all or part of the service charge entitlement into the basic salary in order for the employees to receive the minimum wage of RM900.00.

12. In view of the implementation date of MWO 2012 for the hotel industry which was to take effect from 01.10.2013, the Hotel decided to raise a trade dispute vide a letter dated 30.09.2013 to the Director General of Industrial Relations (DGIR) to report that a trade dispute had arisen from the implementation of the NWCC Act 2011 and the MWO 2012 effective 01.10.2013 (COB pages 14-15).

13. The Hotel then received a letter dated 07.10.2013 from the Industrial Relations Department notifying the parties of a conciliation meeting to be held on 23.10.2013

(COB page 18). As the parties could not reach an amicable settlement during that conciliation stage, the trade dispute was escalated to this Court for adjudication.

14. The Hotel contended that the total salary paid to the employees would remain the same, both before and after the restructuring of the wages by converting all or part of the service charge entitlement into the basic salary to make up the minimum wages of RM900.00. In the event that the amount of service charge was not sufficient to make up to the minimum wages for any particular employee, the Hotel would bear the differential sums to ensure compliance to MWO 2012.

15. The Hotel further contended that the restructuring of the employeesô wages provided for fair, reasonable and equitable terms and conditions of employment having regard to the current terms and conditions of employment. The Hotel also highlighted that with the restructuring of the wages, the employees would be enjoying no less favourable wages than what they were earning prior to the restructuring of the wages. The restructuring of the wages was therefore not to the detriment of the employees.

16. The Hotel contended that for many years past, the wage system in the Hotel sector, where collective agreements have been in existence, had been premised upon basic salary plus service charge. Although the basic salary was low, the total salary received by an employee was considerably higher than that, in view of the inclusion of the service charge element implemented by the hotels.

17. The Hotel further contended that this Court should take due consideration of the spirit and intention of the Act, the Order and the said Guidelines, which were to ensure that employees who were earning below RM900.00 per month as basic salary would be paid a minimum wage of RM900.00 per month. Based on this reasoning, the NWCC accepted the employersôproposal that in restructuring the wages, the employers in the hotel sector could incorporate all or part of the service charge entitlement of the employees to make up the minimum wages under the Order. The Hotel emphasised that this notion reflected the fact that the NWCC obviously took cognizance of the established manner and practice of payment of wages in the hotel industry.

18. The Hotel pleaded that the exercise of the Unionôs proposal for the Hotel to use its own funds to make up the minimum wages for those employees who are earning less than RM900.00, would indubitably result in the Hotel being burdened with a considerable increase in its manpower costs; which in turn would inevitably and more importantly, detrimentally, influence the Hotelôs continuing ability to manage its business cost-effectively.

19. The Hotel also maintained that the Unionôs proposition would result in junior employees enjoying the same or almost the same basic salary as compared to those employees who were much more senior in service; thus instigating conceivable industrial disharmony at the workplace.

20. The Hotel further contended that if the necessary adjustments were not made through restructuring of wages to enable the Hotel to convert all or part of the service charge to make up the minimum wage of RM900.00 per month, (bearing in mind that the MWO 2012 is a supervening event, in that the 5th CA was in effect when the MWO 2012 was implemented) it would result in unjust enrichment to the employees concerned. Consequently, the employees would enjoy inordinate benefits if they were allowed to receive an upward revision of the minimum wage of RM900.00 per month from the Hotel funds, whilst the Hotel would suffer grave injustice.

21. The Hotel contended that the Unionôs position in this regard was inconsistent with the Unionôs previous persistent stand that service charge should be considered as part of wages.

22. The Hotel further asserted that so long as the employees are paid wages, comprising of basic salary and service charges, as agreed under the collective agreement, in excess of the minimum of RM900.00 per month, the spirit and intent of the NWCC Act 2011, the MWO 2012 and the Guidelines are deemed to be complied with. It is the Hotelôs contention that service charge has always been a recognised part of wages and must thus be taken into account when determining whether the minimum wage requirement has been met.

23. The Hotel further contended that in considering the matters before it, this Court must have due regard to the public interest, the financial implications and to the effect of

the Award on the economy of the country and of the industry concerned and also its probable effect in related or similar industries, as required by Section 30 (4) of the IRA 1967.

24. The Hotel prayed that this Court hands down an Award upon the terms that:-

a. The Hotel shall be entitled to restructure wages by converting part or the whole of the service charge payable to comply with the MWO 2012;

b. That the collective agreement in existence be varied by the inclusion of an addendum to the collective agreement to permit the conversion of the service charge to make up the minimum wages with effect from 01.10.2013; and

c. Any further orders as this Court deems fit and appropriate to grant to preserve industrial harmony and interest of both parties.

The Union's Case

25. The Union in its Amended SIR asserted that the Guidelines which provided for service charge as an additional component in the restructuring of the minimum wages was in contravention of NWCC Act 2011, the MWO 2012 and the terms of Article 12 of the 5th CA. The Union further avowed that the Guidelines were not legally binding and did not promote the purpose or object underlying the NWCC Act 2011 as regards the said minimum wages.

26. The Union also contended that it had already rejected the Hotelôs proposal in this regard during a meeting held on 18.10.2013; but that the Hotel had unilaterally acted by proceeding with the said restructuring without the consent of the Union or any variation being agreed thereupon.

27. The Union stated that the restructuring of wages by the Hotel was merely a mathematical calculation which was not in accord to the NWCC Act 2011, the Minimum Wages Order 2012 and the terms of the 5th CA.

28. The Union further contended that since the negotiations had failed, the Hotelôs unilateral topping up with service charge to meet minimum wages was improper as the appropriate course would have been for it to be dealt with during negotiations for the renewal of the Collective Agreement; and not during the currency of this 5th CA.

29. The Union further claimed that the Hotel had failed to implement minimum wages; but by unilaterally converting part of service charge into it, the Hotel had implemented ócomposite wagesô(which unfortunately was left undefined by the Union at trial); and which in turn, they (the Union) claimed was not in accord with the NWCC Act 2011 and the MWO 2012. The Union further averred that the Hotelôs unilateral conversion of service charge in this manner hardly led to the preservation of industrial harmony in this sector.

30. The Union further contended that the minimum wages of RM900.00 had to be paid to the employees earning less than RM900.00 a month by the Hotel by using its own funds as it was not tied up with the profit of the Hotel, as the service charge was paid by customers for services rendered by the employees and it was not the Hotelõs money. The Union contended that the minimum wages means basic wages in NWCC Act 2011 and that it excluded other components including service charge.

31. The Union asserted that the Hotel was obliged to pay the minimum wages of RM900.00; and denied that it could be an excessive benefit; as the service charge payment was an element already payable and governed by the terms of the 5th CA.

32. The Union further contended that the service charge was paid by the customers of the Hotel and not derived at the expense of the Hotelõs revenue. The Union stated that the NWCC was not empowered to enact any form of what may be termed ñsubsidiary legislationò, which is what, the Union asserted that the ñGuidelinesò purports to be. The NWCC were expressly conferred the duty, through the Minister of Human Resources, to make the Minimum Wages Order under section 23 of the NWCC Act 2011. The Guidelines issued by NWCC was not legally binding but only advisory in nature and thus could not override the specific provision of section 23 of the said Act. The Union further averred that service charge was not expressly included in the minimum wages of RM900.00.

33. The Union prayed that this Court hands down an Award upon the terms that:-

a. the Hotelôs unilateral implementation of the minimum wages of utilizing part of the service charge of the employees be dismissed, as it was not in conformity with the NWCC Act 2011, the Minimum Wages Order 2012 as from 01.10.2013; and also Article 12 of the Collective Agreement;

b. order the Hotel to pay the minimum wages out of their own funds without recourse to the service charge as from 01.10.2013;

c. that the utilized service charge thus far be refunded to the employees as from 01.10.2013 within one month from date of the Award; and

d. that it be ruled that it is improper for this Court, as sought by the Hotel, to vary the contractual terms of the Collective Agreement which has been agreed upon by both parties and taken cognizance of by the Industrial Court.

ISSUE

34. The issue before this Court is whether the Hotel is entitled to restructure the employeesôwages by converting part or the whole of the service charge payable, to be included with the basic wages to form the minimum wages of RM900.00 per month in compliance to the MWO 2012.

Powers and Duties of the Industrial Court in a Trade Dispute

35. It is established industrial law jurisprudence that the Industrial Court, in exercising its powers in a trade dispute, is duty bound to find an equitable and fair

solution for the parties with a view of attaining industrial harmony; which was entrenched in the preamble of the IRA 1967 that states as follows:-

> **"An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."** [emphasis added]

36. Section 30 of the IRA 1967 provided this Court with the powers which are as follows:-

> **"(1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under section 20(3), to make an award (including an interim award) relating to all or any of the issues.**
>
> **…**
>
> **(4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.**
>
> **(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.**
>
> **…**

(6) In making its awards, the Court shall not be restricted to the specific relief claimed by the parties or the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3)." [emphasis added]

37. Further, section 17(2) of the IRA 1967 provided that:-

"(2) As from such date and for such period as may be specified in the collective agreement, it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court." [emphasis added]

38. In discharging its duties, the function of this Court is not just confined to administration of justice in accordance with the law, but it has the powers to create new rights and obligations beyond what was contractually agreed by the parties. In the Federal Court case of **Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304** the following passage from the Indian Supreme Court was cited with approval,

"The judgment of Gajendragadkar J. also cited with approval a passage from the judgment of Mukherjea J. in Bharat Bank Ltd., Delhi v.

Employees of the Bharat Bank Ltd., Delhi AIR 1950 SC 188 at page 209 which perhaps deserves to be quoted,

> **"In settling disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."**
>
> [emphasis added]

39. The Court of Appeal in the case of **Colgate Palmolive (M) Sdn. Bhd. v. Yap Kok Foong & Another Appeal [2001] 3 CLJ 9** cited the following passage of the Industrial Court's decision with approval,

> **"A fundamental aspect of industrial adjudication is the proposition that the function of the Court is not confined to interpreting and giving effect to the contractual rights and duties or obligations of the parties. The Court must have the authority to recognise and even create rights which exists independently of the contract whenever the justice of the matter requires were the Court to meaningfully perform the statutory function entrusted to it in the realm of industrial relations, in particular in the**

resolution of the claims arising out of the conflicting demands, interests and aspirations of the disputing parties." [emphasis added]

40. In the case of **M/s. Viking Askim Sdn. Bhd. v. National Union of Employees in Companies Manufacturing Rubber Products & Anor [1991] 3 CLJ (Rep) 195** the High Court which confirmed the power of the court stated as follows:-

"I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from subsection (4), (5) and (6) of s. 30 of the Industrial Relations Act (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily.

Counsel for the company had submitted that, in any event, this power of the Industrial Court should be limited to dismissal cases and collective agreement disputes. I regret I find this submission unacceptable. There is no warrant for imposing such a limitation on the power of the Industrial Court to create new rights and obligations. Section 26 of the Industrial Relations Act is widely drawn and refers to trade dispute generally; it makes no distinction between trade disputes connected with dismissals and collective agreements on the one hand and other trade disputes."

[emphasis added]

41. It is also mandatory for the Industrial Court to comply with the provisions of section 30(4) of the IRA 1967 when dealing with a trade dispute whereby it is a requirement for the Industrial Court to have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned and also to the probable effect in related or similar industries. In the case of **Mersing Omnibus Co. Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53** whereby, the High Court ruled that the Industrial Court must take into account Section 30(4) of the IRA 1967 in deciding a trade dispute,

> **"By its terms, s. 30(4) is a statutory requirement which the Industrial Court must take into account when deciding a trade dispute. It is a relevant provision. Section 30(4) states:**
>
> **In making its award in respect of a trade dispute, the Court shall have regard to:**
>
> **(i) the public interest,**
>
> **(ii) the financial implications, and**
>
> **(iii) the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.**
>
> **Applying the above principles, there is much merit in the company's argument that the Industrial Court had failed to have regard to s. 30(4) when making the award. There is hardly any mention in the**

award that the learned chairman had ever referred to and taken into account the provisions of s. 30(4) of the Act in his decision. Section 30(4) is mandatory in its terms by reason of the words "… the court shall have regard to …" in the section and hence obligatory. Accordingly, therefore, strict compliance of its provision is called for and thus, failure to adhere to the provision renders the impugned award erroneous in law." [emphasis added]

42. The High Court in the case of **Lam Soon (M) Bhd. v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1998] 1 LNS 354** held that the Industrial Court cannot disregard Section 30(4) of the IRA 1967 in making its decision,

"Based on the award and the recorded evidence of the Industrial Court, I hold that the Industrial Court had failed to have regard to the provision of s 30(4) when making the award. There is no mention whatsoever in the award that the learned Chairman had ever referred to and taken into account the provision of s 30(4) of the Act in his decision. While it is true that the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form [s 30(5)], the Industrial Court nevertheless cannot disregard the provision of s 30(4) in its decision in this case. The section is a statutory safeguard which the Industrial Court is obliged to have regard to in making the award relating to a trade dispute. Thus, in order to make the award respecting the impugned arts 8, 18, 41(a), and (b) and the Appendix

1 valid under the Act, the Industrial Court must make clear in its decision that, the three elements in the section have been considered and make its findings accordingly." [emphasis added]

43. Therefore, based on the foregoing authorities, this Court has wide powers to ascertain equitable and fair solutions to trade disputes; and while doing so the Court shall have due regard to public interest, the financial implications and the effect of the Award on the hotel industry as a whole; in order to achieve industrial harmony as entrenched in the preamble of the IRA 1967.

EVALUATION OF EVIDENCE AND RULINGS

44. In making this unanimous decision, this Court has analysed the issues and evaluated the evidence adduced in this case. In doing so, this Court has taken into consideration all the oral and documentary evidence that was presented and all the issues raised and discussed in the written and oral submissions, including the legal authorities filed by both the Hotel and the Union.

The Service Charge System

45. The hotel industry is peculiar in that it has this unique ósservice charge systemô Prior to the service charge system, the hotels in Malaysia practiced the ótipping systemô However, the tipping system was not deemed to be equitable as only the guest contact employees benefited from this arrangement. Therefore, service charge was introduced to replace tipping so that every employee within the collective agreement could enjoy

their fair share of the funds collected. COW2 (Tan Sri DatoôAzman Shah Bin DatoôSeri Haron), the current President of the Malaysian Employers Federation (MEF) and a Council Member of the National Wages Consultative Council set up under the NWCC Act 2011 ~ explained at length how the service charge system was introduced into the hotel industry in Malaysia. His distinguished credentials are noted by this Court in that apart from being the President of MEF since 2006 and a Council Member of NWCC; COW2 also has vast experience, expertise and specialised knowledge in the hotel industry. COW2 commenced his career in the hotel industry in 1972 at the Holiday Inn-on-the-Park. He was the co-founder of Holiday Villa Hotels and Resorts and presently serves as the Chairman of Alangka-Suka Hotels and Resorts Sdn. Bhd. ~ which owns and manages the Holiday Villa chain operating in Malaysia and overseas. Prior to his association with Holiday Villa, COW2 was the Managing Director and shareholder of Central Holdings Berhad which owned and managed the Holiday Inn-on-the-Park, Holiday Inn City Centre and Holiday Inn Shah Alam for about two decades. COW2 was also the President of the Malaysian Association of Hotels (MAH) for 15 years ~ from 1981 to 1996.

46. COW2 in examination-in-chief explained as follows:-

> **"Q : Tan Sri, can you explain to the Court how were employees employed in the hotel sector paid wages and how was the service charge system implemented in the hotel industry prior to the implementation of the Minimum Wages Order 2012?**

A : Prior to the introduction of service charge which was initiated by the Federal Hotel (part of the Low Yat Group) in the 1960s, the hotels in Malaysia practised the tipping system whereby customers would tip the employees providing the services and the amount of tips would depend on the generosity of the customers based on their appreciation of the services rendered by the employees. It was found that the tipping system was not equitable as only the guest contact employees benefitted and other employees who were providing the backroom services did not receive any tips although they were indirectly providing the services to the guests. The former Prime Minister of Malaysia, Tun Dr Mahathir Mohamad initiated the 'no tipping policy' and the hotels consequently implemented a more equitable system of collecting a fixed service charge from the hotel guests which would then be distributed to all employees covered within the scope of the Union representation based on allocated service charge points.

Thereafter, around the mid-1970s, a fixed service charge was levied on the customer's bill and the money collected as service charge was put into a fund called the 'Service Charge Fund'. That practice was then incorporated into collective agreements whereby 10% of the fund is taken by the hotels to defray the

administrative costs incurred for the maintenance of the fund and the remaining 90% is distributed to eligible employees in accordance with the service point allocation under the collective agreement. Hence, prior to the coming into force of the Minimum Wages Order 2012, hotels having collective agreements have been contractually bound to pay to the employees the service charges collected by the hotels on the agreed percentage based on the service points each employee is entitled to. Based on this system although the basic wages paid to employees in the hotel sector were generally low but with the inclusion of service charges employees in the said sector received far more wages than employees in other sectors and it provided a more equitable system than the tipping practice."

47. COW2 also testified that historically the employees in the hotel industry have a low basic salary as the employees in this sector was subjected to statutory minimum remuneration governed under the Wages Regulation (Catering and Hotel) Order 1967 and Wages Regulation (Catering and Hotel) (Amendment) Order 1982. COW2 explained the statutory minimum remuneration in 1982 was only RM185.00 per month. This evidence was supported by the Hotel when it produced a table of comparison of average monthly salary between the employees in the hotel sector, manufacturing sector (under the Chemical Workers Union of Malaya) and textile sector (under the Textile and Garment Industry Workers Union); extracted from the MEF Analysis of

Collective Agreements and Awards on Terms and Conditions of Employment 2010 and 2011ô(COB 5 pages 4-11 & 12-18 respectively). The comparison table clearly showed that the employees in the hotel industry have the lowest basic salary as compared to similar positions in the textile and manufacturing sectors. However, COW2 went on to say that with the introduction of service charge in the hotel industry, industry employees stood to receive far more wages than employees in other sectors.

48. Therefore, from the above it is clear that the hotel industry employees were compensated with the income earned from service charge. This view was reflected in the case of **National Union of Hotel, Bar & Restaurant Workers v. Sea View Hotel, Pulau Pangkor [1980] 1 ILR 222**, where the Industrial Court stated:-

> **"The reason for the low basic salary of the employees, generally of Hotels, is that they are compensated by their share of the income earned from service charge. This share, as decided in the Federal Hotels Case No. 169 of 1976 in Award No. 148/78, is fixed on proportion of 9:1 in favour of employees who depend on that income, without relying any longer on tips from customers."**

49. The same was stated in the case of **Hotel Grand Central (KL) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers [1982] 2 ILR 99**, where the Court held:-

> **"Employees in the hotel industry are paid low basic wages because they are entitled to share of the service charge. In most collective agreements**

and awards, the employees are entitled to a share of the service charge that is actually collected."

50. As explained above, the introduction of service charge was to buffer the low basic salary received by the hotel employees. It became part of the wages received by the hotel employees. In short, the employees in the hotel industry received their salary in two parts i.e. the basic wage plus the service charge.

51. There are a string of authorities which held that **service charge is part of wages**. In the Privy Council case of **P.A. Pereira & Anor v. Hotel Jayapuri Bhd. & Anor [1986] 2 MLJ 1**, the issue was whether the company was obliged under the Employees Provident Fund Act 1951 to pay contributions in respect of the service charges collected from customers. The Privy Council held that both the appellant and the respondents were liable to make monthly contributions to the EPF Board in respect of the service charge paid to the appellant by virtue of his employment with the company; it was further held that the service charge was payable to the employee under the contract of service. For clarity ~ the Privy Council stated as follows:-

"The learned judge and the Federal Court concluded that Mr. Pereira's share of the service charge was not "wages" within the meaning of the Act. The reason which led them to this conclusion was that, as the Board and the hotel company have argued here, the service charge is money collected from the customers for distribution according to the points system and therefore, so ran the reasoning, was never the hotel

company's money but was money paid by the customers for the employees and passed to them through the hotel company. Even if this be a correct analysis of the position, 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 the 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 under 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 and the provisions of the Act entitling the employer to relief from the employee for the employee's share of the contribution under the Act, entitles the hotel company to deduct that contribution, not only from the basic salary, but also from the money due under his contract to Mr. Pereira in respect of his share of the collected service charges."

[emphasis added]

52. In the case of **Thomas George a/l M.J. George v. Hotel Equatorial (M) Sdn. Bhd. (Labour Case KBKL. 813/94)**, the employee made a claim of RM59.42 being short payment due from the company to him. The employee alleged that in computing the ordinary rate of pay for working on the birthday of DYMM Yang Di Pertuan Agong, the company did not include service charge, food allowance and 3rd shift allowance. The Labour Court Officer decided that the service charge, food allowance and shift allowance come within the meaning of wages under Section 2 of the Employment Act 1955 and ordered the company to pay the employee the sum of RM59.42 as claimed. It was held as follows:-

> **"I would therefore conclude that <u>service charge</u>, food allowance and shift allowance, not being ex gratia payments, not being payments not in connection with the contract of service and not expressly excluded by the definition, come within the meaning of wages as defined in Section 2 and <u>should be included with the basic wages to compute the Ordinary Rate of Pay</u> in determining the public holiday payment due to the complainant."**
>
> [emphasis added]

53. This decision was affirmed by the High Court in the case of **Hotel Equatorial (M) Sdn. Bhd. v. Thomas George a/l M.J. George (Civil Appeal No.: R2-16-6-95)** (hereinafter referred to as the **Hotel Equatorial case**); which was subsequently confirmed, without further elaboration, by the Court of Appeal in ***Rayuan Sivil* No: W-04-24-1997**; by way of Order dated **15.09.2003**. The High Court held as follows:

"Dalam penghakimannya, Pengarah Buruh membuat keputusan sedemikian setelah mendapati bayaran caj perkhidmatan, bayaran elaun makan dan bayaran elaun shif tersebut <u>suatu bayaran bagi kerja yang telah dilakukan (work done) oleh Responden berdasarkan atas fakta bahawa bayaran-bayaran ini adalah bayaran-bayaran kontraktual yang diterima oleh Responden bagi perkhidmatan yang diberi sebagaimana diperuntukkan oleh Perjanjian Bersama yang merupakan sebahagian kontrak perkhidmatan Responden dengan Perayu</u>. Ini bermakna, Pengarah Buruh menolak hujah peguam Perayu bahawa bayaran-bayaran tersebut adalah suatu "ex gratia payments"."

[emphasis added]

54. In the case of **National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. Mashyur Mutiara Sdn. Bhd. (Sheraton Langkawi Beach Resort) [2014] 1 MELR 286,** the claimant worked as a room attendant and was paid a basic wage of RM1,178 plus service charge of RM1,807. On the question of paying <u>retirement benefits</u>, the hotel contended that only her basic wages of RM1,178 could be taken into account and not her service charge of RM1,807. The union conversely contended that both her basic wages and service charge payments should be taken into account for that purpose. The Industrial Court in agreement with the union decided that service charge should be taken into account in paying retirement benefits. The High Court reversed the ruling of the Industrial Court, however upon appeal by the union, the

Court of Appeal reinstated the decision of the Industrial Court. In gist, the service charge payments were taken into account for paying retirement benefits.

55. Other cases which decided the same principle along the same lines of reasoning are **Pudu Sinar Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2002] 1 ILR 833; Hotel Fortuna Management Services Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2000] 2 ILR 163 and Ritz Garden Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2000] 3 ILR 542.**

National Wages Consultative Council Act 2011

56. The NWCC Act 2011 which came into force on 23.09.2011 replaced the Wages Councils Act 1947. As mentioned above, this is an act to establish the NWCC, a body responsible to make recommendations to the Government to institute minimum wages orders. The International Labour Organisation (ILO) has defined minimum wage as *"the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract. The purpose of minimum wages is to protect workers against unduly low pay. They help ensure a just and equitable share of the fruits of progress to all, and a minimum living wage to all who are employed and in need of such protection."* (see **Minimum Wage Policy Guide** by ILO)

57. Section 2 of NWCC Act 2011 provides for the definition of "wages" and "minimum wages" as follows,

> **""wages" has the same meaning assigned to it in section 2 of the Employment Act 1955 [Act 265], section 2 of the Sabah Labour Ordinance [Cap. 67] or section 2 of the Sarawak Labour Ordinance [Cap. 76];**
>
> **"minimum wages" means the basic wages to be or as determined under section 23;"** [emphasis added]

58. The learned Counsel for the Hotel submitted that since the NWCC Act 2011 relies on the definition of wages under the EA 1955, therefore all cases decided under Section 2 of the Employment Act 1955 would be equally applicable in this present case; and he referred to the case of **Hotel Equatorial case** which affirmed the decision of the Labour Court in ruling that service charge, food allowance and shift allowance come within the meaning of wages under section 2 of the Employment Act 1950. The learned Counsel further contended that section 2 of the NWCC Act 2011 had defined "minimum wages" as "basic wages" to be or as determined under section 23 of the same Act, but that there is conspicuously no definition of "basic wages" in the NWCC Act 2011, MWO 2012 or in any other related legislation. In the circumstances, the minimum wages under the NWCC Act 2011 could therefore include service charge, especially when the definition of wages under the NWCC Act 2011 is by direct reference to section 2 of the EA 1955, which in clear terms includes service charge, as decided in the **Hotel Equatorial case**.

59. Further to this, it was the contention of learned Counsel for the Hotel, that the Union was being unreasonably contrarian when it reasoned, in the present case, that the service charge ñbelongsò to the employees; and thus could not be used to top-up to form the minimum wage. This articulation, Counsel stoutly believed, could not stand the test in the decided cases where the Union has successfully and consistently argued that óservice chargeôshould be considered as ópart of wagesôfrom the Hotel; and should be taken into account in the computation of overtime, retirement benefits, retrenchment benefits and ordinary rates of pay, etc. To come and avow that the very nature of óservice chargeôis suddenly now the exclusive ñpropertyò of employees and so cannot be used to top-up to form the minimum wage is to irrationally and perversely approbate and reprobate the stand of the Union on this issue.

60. The Union conversely, contended that minimum wages cannot include service charge and this is a question of law. The Union cited the case of **Muir Mills Co. Ltd., Kanpur vs. Its Workmen 1960 SCR (3) 488**, where the Court held:

> **"The phrase "basic wages" is also ordinarily understood to mean that part of the price of labour, which the employer must pay to all workmen belonging to all categories. The phrase is used ordinarily in marked contra-distinction to "dearness allowance", the quantum of which varies from time to time, in accordance with the rise or fall in the cost of living.**
>
> **Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production."**

61. The Union also cited the case of **Decor Wood Industries (Trengganu) Sdn. Bhd. v. Timber Employees' Union [1990] 1 ILR 423 (Award No. 107 of 1990)** and referred to the following:-

> **""Basic wage", therefore, does not include additional emolument which some workmen may earn on the basis of a system of bonus related to production. Nor does it include any other supplements and allowances, such as housing and cost of living, not directly related to the work in that category."**

62. The erudite Representative for the Union submitted that it was clear that NWCC Act 2011 does not allow the Hotel to include service charge into the basic wages and it was wrong to read into the Act of Parliament words which are not there. It was also the Union's submission that service charge was paid over and above the minimum wages and that the cases cited above discount any other components into the minimum wages.

63. Section 2 of the Employment Act 1955 (the EA 1955) defined "wages" as follows,

> **""wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include-**
>
> **(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;**

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus;"

64. As discussed in the authorities above and as defined under section 2 of the EA 1950, it was settled law that service charge has not been excluded from the definition of wages. It is clear, though, the service charge was paid by the customers; but that the customers did not pay the service charge directly to the Hotelôs employees, but through the Hotel; which then paid it to its employees for **services rendered or work done under their contract of service** with the Hotel; and it was distributed as stipulated by Article 12 of the said collective agreement.

65. The words in section 2 of the EA 1955 were explained succinctly by the Supreme Court in the case of **Lee Fatt Seng v. Harper Gilfillan [1980] Sdn. Bhd. [1988] 1 CLJ (Rep) 156** as follows:

"It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages."

66. In the case of **Port View Seafood Village Sdn. Bhd. v. Rocelyn Tubal Raneses [2011] 4 CLJ 959**, David Wong Dak Wah J (as His Lordship then was) had comprehensively examined the line of authorities relating to wages and concluded as follows:

"[13] Reverting to the issue at hand and applying the established principle of constructing legislation of giving the words their natural meaning and bearing in mind that there was no amendment to the Employment Act after the *Pereira* case, I concur with the interpretation given by the learned Chairman. <u>The pivotal words in my view are 'work done in respect of his contract of service' and as long payments are made because of that service, it is caught by the definition of wages. In this case there cannot be any denial that the 'service charge' is payment made for 'work done in respect of his contract of service'. My view is of course fortified by the decision of the Privy Council.</u>"

[emphasis added]

67. Therefore, the above cases had clearly specified that if any payment was made for work done in respect of the employeeôs contract of service, then it has to be regarded as **part of wages**. The same principle was also applied in the case of **P.A. Pereira & Anor v. Hotel Jayapuri Bhd. & Anor [1986] (supra)** and in the **Hotel Equatorial case**, by those respective Superior Courts.

68. In fact, a very careful reflection of the principles raised in the decision of **Decor Wood Industries (Trengganu) Sdn. Bhd. v. Timber Employees' Union (supra)**, would create the strongly comprehended notion that the very same principles that were applied in the cases quoted just above, were also applied in this case (i.e. **Decor Wood Industries**). The Industrial Court in the said case held as follows:

> **"The issue before us is <u>whether annual increment is part of "basic wages"</u> as envisaged in Article 27(a) of the award. Unfortunately, the term "basic wages" has not been defined in the Award. Nor has it been defined under any of the social legislations, either in the Employment Act, 1955 or the Industrial Relations Act, 1967. However, the term "basic wage" is ordinarily understood to mean that part of the <u>price of labour</u> wherein the employer must pay to all workmen belonging to all categories. The term is used ordinarily in contradistinction to allowances – the quantum of which may vary in different contingencies. "Basic wage", therefore, does not include additional emolument which some workmen may earn on the basis of a system of bonus related to production. Nor does it include any other supplements and allowances, such as housing and cost of living,**

not directly related to the work in that category. Having gone this far to find out the meaning of basic wage, we must now return to the issue of whether annual increment forms part of the "basic wage".

…

If we accept the term "basic wage" as it is ordinarily used, i.e. the price of labour which the employer must pay to his workmen belonging to a particular category of workmen, in contrast with supplements and allowances, such as housing and cost of living, not directly related to their work, we will arrive at a conclusion that annual increment is not any supplement or allowance but part of the structure within the salary structure accorded to the workmen directly to their work …

…

… the annual increment is part of the basic wage. It is the price of labour paid to the workmen directly related to their work. It is not a supplement or an allowance given. For the reasons given above, we hold that annual increment is part of basic wages and we, therefore, order the Company to comply with it." [emphasis added]

69. Therefore, a meticulous reading of the case of **Decor Wood Industries** quoted above clearly shows that the Industrial Court Chairman in that case had decided that ñannual incrementò was **the price of labour paid to the workmen directly related to their work**ò which in our considered opinion has a similar meaning to **"work done in respect of his contract of service"**. It was decided that annual increment was not any

supplement or allowance but part of the construction within the salary structure accorded to the workmen directly related to their work. Supplements and allowances, such as housing and cost of living, not directly related to their work are **excluded**. Therefore, similarly, **the service charge, being payment for work done which was a payment directly related to the work of the employees under their contract of service,** should be **included with the basic wages** to form the minimum wages. Moreover, all the aforementioned authorities had also clearly and judiciously decided that **service charge** forms an **integral part of wages,** as defined under section 2 of the EA1955.

70. Further, section 2 of NWCC Act 2011 provides that ñminimum wagesò means the ñbasic wagesòto be or as determined under section 23 of NWCC Act 2011 which states that:

> **"(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."**

71. Section 22 of NWCC Act 2011 states that:

"22. (1) Based on the actions taken under section 21, the Council shall, at such time as the Minister may determine, make a recommendation to the Government through the Minister on the following matters:

(a) the minimum wages rates;

(b) the coverage of the recommended minimum wages rates according to sectors, types of employment and regional areas;

(c) the non-application of the recommended minimum wages rates and coverage to any sectors, types of employment and regional areas or to any person or class of persons;

(d) the commencement of the minimum wages order and the different dates for the commencement of the minimum wages order to different sectors, types of employment and regional areas, or to different persons or class of persons; and

(e) other matters relating to the minimum wages, including the implementation of the recommended minimum wages rates and coverage.

(2) The Government may, after considering the recommendation–

(a) agree with the recommendation; or

(b) …

(3) …

(4) The Government may, after considering the fresh recommendation made pursuant to subsection (3) –

(a) agree with the fresh recommendation; or

(b) disagree with the fresh recommendation and determine the matters specified in paragraphs (1)(*a*) to (*e*).”

72. Section 21 of NWCC Act 2011 states as follows:

“21. Before any recommendation is made under section 22, the Council shall take the following actions:

(a) have consultation with the public on the minimum wages rates and coverage in such manner as the Minister may determine; and

(b) collect and analyse data and information and conduct research on wages and the socioeconomic indicators.”

73. Section 23 NWCC Act 2011 is a section where the minimum wages rate is determined. However, the said Act did not define the term ~ ñbasic wagesò. On the other hand, it did define the term ~ ñwagesò as per section 2 of the EA 1955. The Unionôs representative submitted that since the NWCC Act 2011 defined ñminimum wagesò to be ñbasic wagesò, therefore the meaning of ñwagesò as per section 2 of the EA 1955 was included therein to cause ñmischiefò, and therefore, it had no significance to the issue at hand and was superfluous.

74. The learned Counsel for the Hotel, for his part, submitted that the meaning of ñwagesò as per section 2 of the EA 1955 was inserted in the NWCC Act 2011 by Parliament deliberately and for the distinct purpose of lucidity, comprehensibility and to rationalise what in fact the term ñwagesò meant in the context of the NWCC Act 2011. It was certainly not there to cause a ñmischiefò. This Court is thus minded to acquiesce with the argument of learned Counsel for the Hotel, in that the definition of wages as per section 2 of the EA 1955, was inserted in the said Act with a purpose that was deliberately and consciously promulgated by Parliament, which never acts in vain. Further, one must bear in mind that the said definition has not been disturbed by amendment to date; and consequently this Court is of the considered view that the definition, has to be given due regard and weight in its clear and unequivocal meaning and import; where one cannot close an eye to its clear significance.

75. Further, the Union also submitted that as Section 2 of the NWCC Act 2011 contains the word ñmeansò in the definition of ñminimum wagesò, the interpretation of ñminimum wagesò is therefore limited to ñbasic wagesò ~ to the exclusion of all others and can thus not include other components.

76. The learned Counsel for the Hotel in reply, submitted that such a literal interpretation could not promote the purpose or object underlying the introduction of minimum wages in Malaysia. The learned Counsel averred that this Court should prefer a construction of Section 2 of NWCC Act 2011 that would promote the purpose or object

underlying the Act; which approach is expressly provided for under **Section 17A of the Interpretation Acts 1948 and 1967** which states:

> **"Regard to be had to the purpose of Act**
>
> **17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."**

77. The learned Counsel cited the case of **Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn. Bhd. [2004] 2 CLJ 265** whereby the Court of Appeal held as follows,

> **"When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein."** [emphasis added]

78. Further, the learned Counsel referred to illuminating decision of Lord Denning M.R. in **Nothman v. Barnet London Borough Council [1978] 1 WLR 220** who held as follows,

"In all cases now in the interpretation of statutes <u>we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary</u> - so as to do what Parliament would have done, had they had the situation in mind." [emphasis added]

79. In view of the above cases, the learned Counsel for the Hotel submitted that this Court should adopt a purposive approach in determining the definition of ñbasic wagesò under section 2 of NWCC Act 2011.

80. The concept of the purposive approach was also explained in the House of Lords in **Pepper v. Hart [1993] AC 593** where Lord Griffiths observed that:

".. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. ..."

81. The learned Counsel for the Hotel also produced the excerpt from the Parliamentary Hansard during the 2nd and 3rd reading of the NWCC Act 2011 to explain

the intention and purpose of introducing the minimum wages; and to understand the concept of ñbasic wagesò within the context of ñminimum wagesò. The relevant parts of the speech of the Honourable Minister of Human Resources, YB Datuk Dr. S. Subramaniam (as he was then) are as follows:

> ***"Tuan Yang di-Pertua, mengikut Pertubuhan Buruh Antarabangsa, gaji minimum ditakrifkan sebagai gaji paling rendah yang patut dibayar kepada pekerja untuk kerja atau perkhidmatan yang dilakukan dalam tempoh tertentu sama ada dikira berdasarkan masa atau output yang tidak boleh dikurangkan oleh individu atau menerusi perjanjian bersama, dijamin oleh undang-undang dan ditetapkan bertujuan untuk menampung keperluan minimum kehidupan pekerja dan keluarganya berasaskan keadaan sosioekonomi sesebuah negara. Definisi gaji minimum itu sendiri menunjukkan bahawa pelaksanaan Dasar Gaji Minimum memerlukan suatu undang-undang yang khusus.***
>
> ***…***
>
> ***Tuan Yang di-Pertua, pelaksanaan gaji minimum bertujuan untuk membantu golongan berpendapatan rendah meningkatkan kuasa beli bagi menghadapi peningkatan kos sara hidup dan seterusnya menangani isu kemiskinan dalam kalangan pekerja iaitu the working poor.***
>
> ***…***
>
> ***Dalam fasal 2 rang undang-undang ini, gaji minimum ertinya gaji pokok yang diwartakan dalam perintah gaji minimum. Rasional gaji pokok dipilih sebagai gaji minimum adalah bagi mengelakkan pelaksanaan gaji***

minimum ini dimanipulasikan kaedah pembayarannya kepada pekerja. Selain itu, secara umumnya pembayaran elaun atau pemberian faedah pengajian oleh majikan adalah berdasarkan kepada gaji pokok seseorang pekerja. Oleh itu sebarang pemberian elaun seperti elaun lebih masa yang diasaskan kepada gaji pokok akan dapat meningkatkan pendapatan keseluruhan seseorang pekerja. Gaji pokok juga akan dapat memastikan seseorang pekerja dapat menerima caruman Kumpulan Wang Simpanan Pekerja atau PERKESO yang lebih tinggi dan ini akan dapat menjamin masa depan masa hadapan pekerja dan keluarganya. Dengan kata lain, gaji minimum juga bertujuan meningkatkan perlindungan sosial kepada pekerja bukan sahaja semasa mereka bekerja tetapi juga untuk hari tua."

[emphasis added]

82. The Learned Counsel further submitted that Parliament intended to assist the lower income earners to increase their spending power to face the increase in the cost of living and to address the issue of poverty as well as to increase social protection. Therefore, the purpose of introducing MWO 2012 was to ensure that employees would, on an overall basis, take home a certain level of minimum wages; which the rate was as determined under section 23 of NWCC Act 2011.

83. Malaysia is a member country of International Labour Organisation (ILO). The minimum wages in Malaysia was introduced as a result of Malaysia's ratification of **ILO Convention No. 131: Minimum Wage Fixing Convention 1970 (C131)**. In fact,

Malaysia was the first among Asean member countries; and the fifth country in Asia, to ratify this International Labour Convention on minimum wages. The õMinimum Wage Policy Guideôissued by ILO had stated that õMinimum wages have been defined as the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contractô It was also stated that other wage components can be included as minimum wages. However, Convention No. 131: Minimum Wage Fixing Convention 1970 did not explicitly indicate the elements to be included in the minimum wages.

84. Regrettably in Malaysia, the NWCC Act 2011 did not state which components should actually be included and which were to be excluded in the formulation of ñminimum wagesò. Also the term ñbasic wagesò was sadly left undefined. However, the term ñwagesò was defined as per section 2 of the EA 1955 in the said Act. Thus, in the absence of an express exclusion, this Court is of the measured view that it can be interpreted that by virtue of the **express inclusion** of the definition of ñwagesò as per section 2 of the EA 1955 in the NWCC Act 2011, the NWCC Act 2011 **did not exclude service charge** (which clearly was held as being part of wages as decided in numerous previously cited cases [supra]). Therefore, service charge ought to be included as a constituent component of ñminimum wagesò. We also take comfort in this view by reference to the intention and purpose of the concept of ñminimum wagesò as cited in the Hansard above.

Financial Implication to the Hotel

85. It is the Hotel's contention that if the Hotel's implementation of the wage restructuring was dismissed by this Court, it would result in the Hotel being burdened with a very high increase in its manpower costs which is likely to adversely affect the Hotel's continuing ability to manage its business in a mercantile configuration that is cost-effective.

86. The Hotel through COW1, one Vijay Kumar, the Director of Finance of the Hotel, produced its Financial Statements for the year ended 31.12.2013 (COB4 pages 3-45), Financial Statements for the year ended 31.12.2014 (COB4 pages 46-90) and Financial Statements for the year ended 31.12.2015 (COB4 pages 91-135). A summary of the profit and loss in the years 2013, 2014 and 2015 are as follows,

Year	Profit/(Loss)	Pages
2013	**(**RM1,660,304.00**)**	COB4 page 9
2014	RM3,047,878.00	COB4 page 52
2015	RM4,392,313.00	COB4 page 97

87. COW1 agreed during cross-examination that the Hotel's revenue was increasing every year. However, COW1 explained during re-examination that there would still be serious impact to the Hotel if the Hotel had to bear the entire minimum wage cost from its own funds. He said as follows:-

> **"A : Revenue is going up – agreed. The other costs are also going up equally. If we top up minimum wage, it will have adverse**

implications on profitability and also revenue is going up, service charge is also going up. We collect 10% service charge from revenue. When revenue is going up and the service change value per point is also going up. In 2016, page 3 – revenue is RM68 million, approximately RM6.8 million for service charge. The cost is also increasing."

88. COW1 explained that although the Hotel made profits in 2014 and 2015, the minimum wage top up was still significant as against the profitability of the Hotel, he explained during his examination-in-chief as follows:-

"Q : Page 24 COB3, the Union is saying the top up for minimum wage should be from the hotel. What would be the financial effect if the hotel were to use its own funds to top up for the minimum wage?

A : The summary at page 24 COB3 is showing the profit and loss and the minimum wage top up. In 2015 even though we are making a profit of RM4,392,313, the top up is RM952,385, that is 23% of the total profit, and the health spa profit is also included in this profit. The union's CA is only with the Hotel not the spa.

Q : In 2013 was a loss. You are making a profit in 2014 and 2015, even after taking into account the minimum wage top up, forget about the spa. Is the difference in minimum wage top up significant to the profitability?

A : Yes, it is significant. It is already taking 23% from the profit in 2015. For 2014, minimum wage component computes to 27% and 23% for 2015. Page 23 COB3 – refer to 2015, the company has made RM61,655,864 revenues and the profit is only RM4,392,313. This profit is very significant to the company because the hotel is getting old, 20 years old property, we need to upkeep the building and machineries, furniture to go with the current trends. Taking all those into consideration, the profit is not much at all."

It can be seen that the proportionality of the profit earned by the Hotel in 2014 and 2015 was not significant, after considering the minimum wage top up.

89. According to COW1, the Hotel also operates a health spa, that is, V Integrated Wellness which was solely managed by the owner of the hotel. The revenue and expenses from the health spa are consolidated under Andaman Resort Sdn. Bhd.ôs financial statement. COW1 testified that the health spa made a profit of almost RM1.2 million in 2016 and on average, made profit close to between RM800,000.00 and RM1 million per annum from 2013 ï 2015. The profit figures of the hotel are therefore artificially inflated by the contribution of the health spa. COW1 also confirmed that no union employees work in the health spa and the profit of the health spa, which was run as a separate business entity, should therefore not be taken into account. The learned Counsel for the Hotel highlighted that the profitability of the hotel was therefore actually

lower than indicated in the figures stated at the summary of the profit and loss in the years 2013, 2014 and 2015 above.

90. The Hotel also produced the overview of its financial statement from 2013 until 2020 as found at COB2 page 3. COW1 explained that the figures from 2013 until 2016 are the actual figures while the figures for 2017 was the projected and targeted number for the Hotel to achieve (at the material time of the trial); whereas the figures for 2018 ï 2020 are the forecast for the Hotel. This document showed the Hotelôs Gross Operating Profit (GOP) which was the total revenue of the Hotel after deducting the operating expenses. It is to be noted that the actual GOP and financial statement on the document marked as exhibit COB2 at page 3 (together with other financial statements of the Hotel produced in Court) was ordered by this Court to be kept confidential on the application of the Hotel in order to protect its proprietary interests. It will accordingly not be revealed in this Award apart from what follows.

91. The Hotel contended that in the event the Hotel was ordered to use its own funds, the total amount to be borne by the Hotel was reflected at the 9th line of COB 2 at page 3, entitled: **"Add: Minimum wage top up cost"**. For clarity, the figures involved are as follows:-

	2013	2014	2015	2016	2017	2018	2019	2020
Add minimum wage top up cost (RM)	177,525	818,608	952,385	874,597	918,326	964,234	1,012,455	1,063,078

92. The above explanation by COW1 read together with the document at COB2 at page 3 plainly showed that the minimum wages, if it had to be paid by the Hotel using its own funds, would increase the Hotelôs operating costs; which in turn meant that the GOP would predictably decrease. Therefore, in order to keep the GOP at comparative levels, the Hotel would have no choice but to increase their room rates, F & B charges and other charges and costs. This then would render the Hotel less competitive in the industry.

93. It is the Hotelôs contention that if the Hotelôs implementation of the wage restructuring is rejected by this Court, it would cause a serious and adverse impact on the hotel industry as a whole in terms of financial costs and competitiveness of the hotel industry, in particular; and to Malaysian tourism, in general. COW2 further explained that this would cause financial constraints to hotels; and it would depend how long the owners could sustain themselves in this atmosphere of strained financial straits. This would eventually and inexorably lead to many hotels ceasing operations or being sold off; or leading to retrenchment exercises; which in effect means that it would literally amount to ñkilling the goose that lays the golden eggsò

94. In expansion of the foregoing, COW2 stressed his contention that if the hotels had to raise their room rates, F& B charges and other charges and costs, it would affect tourism in this country. Hotels will become more expensive and less competitive. This would undoubtedly affect Malaysia as a holiday destination. He explained that every destination has got its competition. Malaysia was not the only attractive, tropical and

multiracial country in this region. Countries like Singapore, Philippines and Thailand are our closest competitors. Therefore, the hotel industry had to peg their rates based on how competitive Malaysia is to the closest destinations around Malaysia. Therefore, any rise in operating costs would have a far reaching and adverse impact on the hotel and tourism industries of this country.

Employees would not be in a worse-off position

95. The Hotel contended that the evidence of COW2 which showed that pursuant to the conversion of part or the whole of the service charge to the basic wages, the employees would not receive wages lower than what they were paid before the restructuring exercise. This was supported by the evidence of COW1 who testified that the employees were not in a worse off situation when the Hotel implemented the wage restructuring; and it did not result in the employees enjoying less favourable wages. The employees would be receiving the same amount of salary that they had received before the restructuring of the wages, nothing lesser, with in fact, a higher contribution to SOCSO, EPF and overtime payments (COB1 pages 5-7 and UBD1 page 3). Thus, the restructuring of the wages was not to the detriment of the employees. The learned Counsel for the Hotel submitted that the Union did not dispute this contention; as their argument was that the Hotel is simply not entitled to utilise the service charge for the said conversion.

96. The Union however argued that if the Hotel were to convert part of the service charge of the employee, the employee would be receiving less in terms of the service

charge. The Union referred to a payslip of Cik Shidah binti Sobri for October 2013 (UBD1 page 3) which showed that she had received RM479.00 less in service charge. Her payslip showed as follows:-

Basic salary	RM421.00
Top up service charge	RM479.00
	RM900.00
Total service charge	RM795.24
Less converted service charge	RM479.00
	RM316.24
Service point value	RM397.62
	x 2 points
	RM795.24

The erudite Representative of the Union averred that as Cik Shidahûs basic salary was RM421.00, the Hotel would have to top up with its own funds of RM479.00 without recourse to service charge. In this case the Hotel had caused Cik Shidah to lose her remuneration on service charge element in contravention of paragraph 6 (e) of MWO 2012.

97. It is to be noted that in the above explanation the said employee did not receive any less favourable wages, as she was in fact receiving the same amount of service charge, except that a portion of it was converted to form part of the minimum wages. In other words, she did not make any extra remuneration from the implementation of MWO 2012.

98. COW1 further explained that in December 2015, the Hotel spent RM104,063.51 to pay for the employeesô basic salary; and RM4,569.45 and RM17,216.00 for the contributions towards SOCSO and EPF, respectively (COB1 pages 5-7). If the Hotel was required to use its own funds to increase the basic salary to meet the rate of RM900.00 (as minimum wages); and were not permitted to incorporate the service charge, the Hotel would need to pay RM176,400.00 for the employeesôbasic salary and also RM4,569.45 and RM17,216.00 for the contribution towards SOCSO and EPF, respectively (COB1 pages 8-10). COW1 further explained that if the Hotel is not permitted to incorporate the service charge, the Hotel would have to pay from its own funds the difference to make up the RM900.00; and at the same time would also make a higher pay out towards SOSCO and EPF contributions, overtime and bonus payments. This he said would cause the Hotel to have cash flow implications, affecting adversely the profitability, and thereby contributing to less bonus pay out to all the employees of the Hotel.

99. COW1 explained that the difference the Hotel would have to bare, if the Hotel is not permitted to incorporate the service charge is RM72,336.49 **(RM176,400.00 – RM104,063.51)**; although this amount may appear to be rather insignificant in the whole scheme of things, he added that salary was just one aspect that it had to take into account ~ the Hotel has other expenses that would rise every year, the market may well vary, the competition fluctuates from time to time; and new hotels would be coming on-line; therefore it would be uncertain if the Hotel could make continuing and sustainable profits. Cash flow is all important, hotel owners would have term loans to pay and

depreciation of property; therefore, any increase in costs would adversely affect the financial cost-effectiveness which consequently would have an impact upon the ability of the Hotel to continue in business.

100. He further emphasised that with the new minimum wages rate of RM1,000.00, the Hotel is projected to pay RM195,000.00 for the employeesô basic salary and RM7,384.95 and RM19,387.00 for the contributions towards SOCSO and EPF, respectively (COB1 pages 11-13). Therefore, COW1 contended that the Hotelôs financial position would suffer negative impact if the Hotel is required to use their own funds to meet the minimum wage rate.

101. COW1 also explained that the list of employees at COB2 pages 4-9 are the employees covered under the 5th CA wherein the data was taken from the payroll in December 2016. There are about 168 employees who earned a basic salary of less than RM900.00 per month; upon whom the Hotel has used the conversion of part of the service charge to meet the minimum wage rate. As for the remaining employees who earned above RM900.00 per month, it is needless to say (but said it he did) that their service charge was not affected in any way by the exercise of the said conversion.

102. COW1 also explained that the document at COB2 pages 10-26 are the breakdown of the calculation for the minimum wages conversion costs whereby the total figures involved from years 2013 till 2020 corresponds to the figures in the document found at COB2 at page 3 (at 9th line ó Add: minimum wage top-up cost).

103. COW1 further referred to COB2 page 27 which was the comparison in salary and take home pay between the employees not covered under the 5th CA and employees covered under the said Collective Agreement for the year 2016. According to COW1, the employees who were covered under the 5th CA took home more nett salary than the employees who were not covered under the said Collective Agreement, as listed below:-

a. Abd Latiff bin Baharin who was an Account Supervisor ï AP (covered by the 5th CA), took home a nett salary of RM43,976.10 in 2016 as compared to Bedah binti Ismail who was an Income Audit (non-CA), who took home a nett salary of RM31,296.50 in 2016.

b. Rosmawati binti Saad who was Captain - In Room Dining (covered by the 5th CA), took home a nett salary of RM43,800.15 in 2016 as compared to Mohd Huzir bin Hassan who was an Assistant Manager (non-CA), who took home a nett salary of RM43,016.15 in 2016.

c. Robeâah binti Bakar who was Supervisor ï Room (covered by the 5th CA), took home a nett salary of RM4,211.46 in February 2016 as compared to Noor Laila Wati binti Che Edrus who was an Assistant Housekeeper (non-CA), who took home a nett salary of RM2,400.65 in February 2016.

104. Therefore the Hotel contended that if the Hotel were to use its own funds to top-up to make up the minimum wages, that would mean the employees covered under the 5th CA would receive an upward revision to their basic salary while the employees not covered under the said Collective Agreement would not receive any increase in salary

at all. Obviously, this would not be fair to the employees concerned. This, with indubitable certainty would result in creating avoidable unhappiness, no less causing grave disharmony amongst the employees; which is without a doubt, against the spirit and intention of promoting and maintaining industrial harmony. It would therefore be in order and proper for the Hotel to be allowed to implement the wage restructuring that has already been applied by the Hotel, to provide for a just and equitable solution for all its employees; and not only the employees represented by the Union and covered by the said Collective Agreement.

105. Further, the learned Counsel for the Hotel submitted that, aside from being inequitable between employees within the scope of the Collective Agreement and those outside the scope of the same; the rejection by this Court of the Hotel's current implementation of the MWO 2012 would also be unfair to categories of employees at different levels of salary under the scope of the same Collective Agreement as will be shown below. To illustrate the point, an employee who was within the scope of Collective Agreement and currently earning RM400.00 would get an increment of RM500.00 from the funds of the Hotel; whereas an employee who is currently earning RM850.00 would only secure an increment of RM50.00. An employee, who was within the scope of the Collective Agreement and currently earning RM950.00, would get no increment at all from the Hotel (COB1 pages 5-7). Such a scenario would certainly not be in tandem with equity and good conscience, nor would it, by any stretch of the imagination, promote industrial harmony.

106. It would appear that in order to achieve a fair and even distribution of wages; and to avoid any industrial disharmony, the Hotel would have to make an across-the-board salary adjustment involving all its employees, regardless of whether they are receiving salaries above or below the threshold limit of RM900.00. This would, beyond doubt, cause a substantial financial impact for the Hotel, whereby it would now have to escalate the whole salary structure of all its employees upwards; which in consequence would affect the Hotelôs ability to sustain and indeed continue its business.

Guidelines on the Implementation of the Minimum Wages Order 2012

107. The National Wages Consultative Council (NWCC) also introduced the ó Guidelines on the Implementation of the Minimum Wages Order 2012ô (Guidelines). Paragraph 3(v) of the Guidelines specifically sets out the method of restructuring of the wages for the Hotel sector, as follows:-

> **"3. METHOD OF RESTRUCTURING OF WAGES**
>
> **Subject to negotiations between the employer and employee, the method of restructuring of wages is based on the following conditions:**
>
> **…**
>
> **(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 added]

108. The Union had submitted that the Guidelines issued by NWCC are *ultra vires* and does not have the force of law as decided in the case of **Shangri-La Hotel (KL) Bhd. & 4 Ors v National Wages Consultative Council & 2 Ors (OS No: 24-74-11/2015)**; which was affirmed by the Court of Appeal vide *Rayuan Sivil* No: W-01-484-12/2016 on 14.08.2017. The application for leave to appeal to the Federal Court was dismissed vide Mahkamah Persekutuan Permohonan Sivil No: 08-413-09-2017(W) on 25.01.2018.

109. The Hotel however contended that implementation of the MWO 2012 was in consonance with those Guidelines. COW2 explained that the said Guidelines, (in particular paragraph 3 of the same) were introduced because employers, mainly from the hotel industry did not agree to the minimum wage of RM900.00 being imposed upon them, as it would cause a high increase in manpower costs in the said industry; which in turn would have an adverse effect on the Hotelôs financial ability. The hotel industry is a labour intensive one; where manpower costs are the principal element. The NWCC had therefore the vital task to formulate a possible solution to conciliate and moderate stakeholders in the hotel industry so that the minimum wage threshold of RM900.00 could be met.

110. COW2 testified that at the time when the Guidelines were agreed and issued there was no objection raised by the Union, which was part of the Malaysian Trades Union Congress (MTUC). According to COW2, it was a unanimous decision of the NWCC to allow the employer (hotel) to convert all or part of the service charge to form the minimum wages. Therefore, COW2 contended that the Guidelines were an agreed

document between all the stakeholders, i.e. the Union (represented by MTUC), the employers (represented by MEF) and the Ministry of Human Resources, for and on behalf of the Government of Malaysia. It is to be noted that this important piece of evidence by COW2 was neither disputed, nor challenged in any shape, form or manner by the Union. The weight of this piece of primary evidence could not be discounted nor ignored by this Court as COW2 testified that he was present, in person, at the meeting of the NWCC that came up with this formula. This averment, as to his presence at the said meeting, was also not tested at all in cross-examination. Therefore, based on the principles of equity and good conscience, due weight and apposite consideration should be given to it.

111. COW2 further testified that the agreed Guidelines was endorsed by the then Minister of Human Resources (this evidence was not disputed at trial); and therefore, MWO 2012 and the Guidelines should be read together by this Court in its decision making process of whether there was any merit in the Hotelôs contention that it was entitled to convert all or part of the service charge to form the minimum wages.

112. The erudite Representative of the Union submitted that COW2ôs testimonies on what had transpired at the NWCC that led to the formulation of the Guidelines were irrelevant as the Guidelines have been held *ultra vires* the NWCC Act 2011; and has no force of law; wherein the said Guidelines relied on by the Hotel are untenable; and so in this case the Hotel is obliged to pay the minimum wages out of its own funds.

113. The learned Counsel for the Hotel submitted that the Hotel conceded that the Guidelines did not have any force of law; and is therefore not legally binding in this case. However, learned Counsel further submitted that in industrial jurisprudence, this Court is bound to take into consideration any code or agreement relating to employment practices in determining issues before it. This is in fact expressly provided for under section 30(5A) of the IRA 1967 which provides that:

> **"(5A) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister."**
>
> [emphasis added]

114. The learned Counsel submitted that the Guidelines were introduced by the NWCC, a council established under the NWCC Act 2011 which has the function to advise the Government on all matters relating to minimum wages; and that the Guidelines have been endorsed by the Government; and as such should not be ignored. Therefore, and in effect learned Counsel urged this Court to deem that, by virtue of section 30(5A), this Court should take into consideration the said Guidelines, in its decision making process, where the said Guidelines expressly gives both the Hotel and the Union some latitude in the implementation of the MWO 2012 in an equitable manner for all concerned.

115. The learned Counsel further submitted that the Industrial Court has, in various decisions, referred to a number of codes agreed between the employer and employees which were approved by the Minister, which although were not legally binding, were meant to be persuasive guidelines to ease the implementation of employment practices, such as the **'Code of Conduct for Industrial Harmony'**. By way of an analogy, the learned Counsel referred to the case of **Saw Kong Beng v. Mahkamah Perusahaan Malaysia & Anor [2016] 8 CLJ 891** which related to the dismissal of the applicant on the grounds of redundancy. Although that case is somewhat different from the instant one, Counsel highlighted that in that case, the High Court held that the principle of 'Last In, First Out'which is contained in the said Code of Conduct for Industrial Harmony is typically adhered to. The relevant portion is as follows:-

> **"[76] <u>The "Last In, First Out" (LIFO) rule is contained in the Code of Conduct for Industrial Harmony. Although contained in a code, the adherence to the principles of LIFO is normally observed unless there are valid reasons to countenance its departure</u>. See the case of *Syarikat Eastern Smelting Bhd. v. Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Lagon Se-Malaya* (Award No. 16 of 1968), it was held that:**
>
> > **It is well-established and accepted in industrial law that in effecting retrenchment, an employer should comply with the industrial principle of last come first go, unless there are some valid reasons for departure."** [emphasis added]

116. In another case, that of **Chan Shy Yean v. Marcus Evans (M) Sdn. Bhd. [2016] 1 ILR 353**, the Industrial Court held,

> **"[26] Moreover the company had failed to comply with the Code of Conduct for Industrial Harmony (hereinafter referred to as the "Code").**
>
> **[27] Under the said Code the company is required to consult with the claimant and Ministry of Labour and Manpower prior to the retrenchment exercise. It is incumbent upon the employer if the retrenchment exercise becomes necessary appropriate measures must be taken before hand to avert or minimise reduction of workforce and thereafter the company is required to give early warning to its employees amongst other useful guidelines set out therein. Many guidelines are stated therein and should be considered for fair employment practice. There is no evidence to suggest that the company in this instance complied with the said Code and its useful guidelines. In the case of *Equant Integration Services Sdn. Bhd. v. Wong Wai Hung & Anor* [2012] 3 MELR 339 it was held by the High Court that not only is a genuine substantive decision as to the existence of a redundancy required but also that any dismissal for redundancy must be carried out in a procedurally fair manner before it can be justified. In the Federal Court case of *Said Dharmalingam Abdullah v. Malayan Breweries (Malaysia) Sdn. Bhd.* [1997] 1 CLJ 646 it was held that a blatant disregard of the terms agreed in the Code would tantamount to the perpetration of unfair labour practice or even to connote *mala fides*."**
>
> [emphasis added]

117. Apart from the aforesaid Code of Conduct, the learned Counsel for the Hotel also submitted that the Industrial Court has in the past also referred to the **'Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace'**. The learned Counsel cited the Industrial Court case of **Fuchs Petrolube (Malaysia) Sdn. Bhd. v. Chan Puck Lin [2003] 3 ILR 845**. This case concerned an employee who was dismissed for committing the misconduct of sexually harassing a customer. In concluding that the dismissal was with just cause or excuse, the Industrial Court was guided by the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace:

> **"The issue of sexual harassment at the work place is one that is often discussed but does not appear to have featured significantly in the industrial jurisprudence of this country. The court agrees with the company's submission that a relevant document in this regard is "The Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace" which has been adopted by some companies and corporations in the private sector. The court is guided by this document."** [emphasis added]

118. In another case of **Varitronix (M) Sdn. Bhd. v. R Thandavanaiker P Raman [2004] 3 ILR 426**, the Industrial Court also took guidance from the Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace when it held:

> **"The next issue which calls for determination is whether these proven acts of misconduct afford just cause and excuse for the extreme**

punishment of dismissal. <u>The company's representative William Joseph referred to the Code Of Practice On the Prevention And Eradication Of Sexual Harassment In The Workplace (the Code) launched by the Ministry of Human Resources in 1999. The court takes guidance from this Code.</u>"

[emphasis added]

119. The learned Counsel submitted that the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace and the Code of Conduct for Industrial Harmony are not legislative, but merely codes which have been issued by the Ministry of Human Resources. Since then, the said "Codes of Practice" have been taken into consideration by the Industrial Court in numerous cases. Therefore, the learned Counsel stoutly submitted that this Court should similarly take into consideration the Guidelines on the Implementation of the MWO 2012, as endorsed by the Minister of Human Resources; which provides the Hotel the latitude to convert all or part of the service charge entitlement to make up the minimum wages.

120. This Court being a Court of equity and good conscience agrees with the Hotel's contention that the Guidelines should be given due consideration and ought to be read together with MWO 2012, as it was an agreed document between the relevant parties at the material time. This Court has no reason to disbelieve COW2's evidence, as he was a cogent and consistent witness; and further his evidence went unchallenged by the Union. The Guidelines, though this Court fully agrees that it has no legal force, nevertheless, is a persuasive document that reflects the intention of the parties at the

material time. Whether it was issued with or without any legal authority under the NWCC Act 2011, the fact remains that it was an unchallenged **agreed document** by the tripartite entities who were the council members of NWCC; the body who had the authority to conduct studies on all matters concerning minimum wages; and to make recommendations to the Government to make the minimum wages orders according to sectors, types of employment and regional areas; and to provide for related matters. Therefore, by virtue of section 30(5A) of the IRA 1967, this Court ought to give due consideration to the Guidelines and it ought to be read harmoniously with the MWO 2012 in order to achieve industrial harmony, which is the fundamental objective of the IRA 1967.

121. The erudite Representative of the Union in his submission stated that minimum wages are basic wages and this is in accordance with NWCC Act 2011. It was the bare minimum the Hotel was obliged to pay to the employees earning less than RM900.00 a month, with its own funds without recourse to service charge as opposed to the unilateral conversion of part of the service charge by the Hotel with effect from 01.10.2013. This obligation, it was strongly averred, was absolute. As it is the bare minimum, it has nothing to do with the profit and loss of the Hotel and was not related in any way to the financial or ñpayingò capacity of the Hotel. The circumstances on the so called supervening events and Guidelines relied upon by the Hotel are without basis. Therefore, if the Hotel was unable to pay the minimum wages or the bare minimum, **"it has no right to exist!"**. Moreover, the Union also contended that there was no consent obtained from the Union as the variation on the topping up was conducted unilaterally.

122. In support of its contention the erudite Representative of the Union cited the following Indian authorities which was also referred to by the Industrial Court in **Subang Jaya Hotel Development Sdn. Bhd. (Dorsett Grand Subang) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2015] 4 ILR 539** in dismissing the hotel's implementation of the minimum wages by converting part of the service charge to make up the minimum wage:-

a. **Hindustan Hosiery Industries v. F.H. Lala And Another (1974) 4 SCC 316** whereby the Supreme Court held that:

> **"16. From an examination of the decisions of this Court, it is clear that the floor level is the bare minimum wage or subsistence wage. In fixing this wage, Industrial Tribunals will have to consider the position from the point of view of the worker, the capacity of the employer to pay such a wage being irrelevant. The fair wage also must take to pay such a wage being irrelevant. The fair wage also must take note of the economic reality of the situation and the minimum needs of the worker having a fair-sized family with an eye to the preservation of his efficiency as a worker."**

b. The Hindustan Hosiery decision made reference to the case of **Kamani Metals and Alloys Ltd. v. Workmen AIR 1967 SC 1175** which held:-

> **"(7) Broadly speaking the first principle is that there is a minimum wage which, in any event, must be paid, irrespective of the extent of profits, the financial condition of the establishment or the availability**

of workmen on lower wages. This minimum wage is independent of the kind of industry and applies to all alike big or small. It sets the lowest limit below which wages cannot be allowed to sink in all humanity. The second principle is that wages must be fair, that is to say, sufficiently high to provide a standard family with food, shelter, clothing, medical care and education of children appropriate to the workman but not at a rate exceeding his wage earning capacity in the class of establishment to which he belongs."

c. **The case also referred to the case of M/s. Jaydip Industries, Thana v. Their Workmen AIR 1972 SC 605** which observed the decision in **U Unichoyi** as follows,

"11. In considering the question what are the component elements of minimum wages, this Court observed as follows in U. Unichoyi v. State of Kerala, (1962) 1 SCR 946 at p. 957 = (AIR 1962 SC 12 at p. 17):

> **"Sometimes the minimum wage is described as a bare minimum wage in order to distinguish it from the wage structure which is 'subsistence plus' or fair wage, but too much emphasis on the adjective 'bare' in relation to the minimum wage is apt to lead to the erroneous assumption that the maintenance wage is a wage which enables the worker to cover his bare physical needs and keep himself**

just above starvation. That clearly is not intended by the concept of minimum wage. On the other hand, since the capacity of the employer to pay is treated as irrelevant, it is but right that no addition should be made to the components of the minimum wage which would take minimum wage near the lower level of the fair wage, but the contents of this concept must ensure for the employee not only his subsistence and that of his family but must also preserve his efficiency as a worker."

d. In the case of **U. Unichoyi And Others v. State of Kerala AIR 1962 SC 12** the Supreme Court held:-

"There can no longer be any doubt that in fixing the minimum wage rates as contemplated by the Act the hardship caused to individual employers or their inability to meet the burden has no relevance."

123. The learned Counsel for the Hotel in reply submitted that the Indian cases referred to by the Union are distinguishable, as all the cases cited relates to the fixing of minimum wage rates by the Indian courts and concerns the principle of law that the financial capacity of an employer in that particular context to pay its workmen is irrelevant. Importantly, the learned Counsel submitted that the Indian legislation has no corresponding provision of Section 30(4) of the Industrial Relations Act 1967 which specifically mandates this Court to have regard to, *inter alia*, the **financial implications**

and the effect of the award on the hotel industry in adjudicating the present trade dispute. The Industrial Relations Act 1967 is a statute passed by the Parliament of Malaysia and thus takes precedence over all those Indian authorities which have been cited.

124. This Court unequivocally agrees with the submission of the learned Counsel for the Hotel; and takes firm view that the position in India is totally far removed from the position in Malaysia in this area of the law. The Malaysian position, apart from the provision of section 30(4) of the IRA 1967, is clearly set out in, sections 21 and 22 of the NWCC Act 2011, which provides that:

> **"21. Before any recommendation is made under section 22, the Council shall take the following actions:**
>
> **(a) …**
>
> **(b) collect and analyse data and information and conduct research on wages and the socioeconomic indicators."**
>
> [emphasis added]

Meaning that in Malaysia, even during fixing of minimum wage rates, the NWCC must take into account the social and economic factors prevalent in the country; which would naturally and necessarily include any financial implication, ability and capacity of employers to meet their obligations under the MWO 2012.

125. In relation to section 30(4) of the IRA 1967, we reiterate that it also makes it a mandatory requirement for the Industrial Court to have regard to the public interest, the **financial implications** and the effect of the award on the economy of the country, and on the industry concerned and also to the probable effect in related or similar industries. This was clearly decided in the case of **Mersing Omnibus Co. Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53** and in the case of **Lam Soon (M) Bhd. v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1998] 1 LNS 354 (also supra).**

126. Besides the above two cases, in a recent Court of Appeal decision in **Paper and Paper Products Manufacturing Employees' Union v. Tri-Wall (Malaysia) Sdn. Bhd. [2015] 3 CLJ 615**; which was affirmed by the Federal Court, it was held that ósection 30(4) of the Act is a **statutory safeguard which the Industrial Court is obliged to have regard to in making the Award relating to a trade dispute**. The mere statement of compliance with section 30(4) of the Act was insufficient to satisfy the requirements of the provision. Further, in making an Award in respect of a trade dispute, the Industrial Court is obliged, by law, to have regard to (i) the public interest; (ii) the financial implications and the effect of the award on the economy of the country and on the industry concerned; and (iii) the probable effect in related or similar industriesô Aziah Ali JCA (as Her Ladyship was then) stated that:-

> **"[32] We agreed with the learned High Court Judge that <u>the mere statement of compliance with s. 30(4) is insufficient to satisfy the requirements of that provision. We find that the decision-making process</u>**

is flawed and the Award was made without compliance with the relevant and mandatory provision of s. 30(4). The Industrial Court has committed an error of law which rendered the whole Award invalid."

[emphasis added]

127. It is undisputed by both the parties that what is before this Court in the instant case is a "Trade Dispute". Therefore, based on the relevant provisions of NWCC Act 2011 as cited above; and section 30(4) of the IRA 1967; and the authorities mentioned above, it is with the utmost of respect that this Court finds that the Indian cases alluded to by the Union's Representative are wholly irrelevant in the context of the instant case.

128. In passing, we feel compelled to observe that the Union's contention that if the Hotel cannot pay the minimum wages, **"it has no right to exist!"** was rather an inconsiderate and inappropriate position to take. This Court was aghast at this unreasonable assertiveness. We find that it was harsh, imprudent, tactless and reckless statement made and/or stand taken by the Union. The ILO Convention No 131, the NWCC Act 2011 and the Parliamentary Hansard produced in this Court, show that the whole intent and purpose of the introduction of the minimum wages was not to ferment the closing down of businesses of this country. It was to upgrade the standard of living of lower income employees and to uplift the economy of this country. To reiterate and as reinforcement, this is precisely the very reason why Parliament, in its infinite wisdom, enacted section 30(4) of the IRA, which has made it mandatory for the Industrial Court to take into consideration the public interest, the financial implications and the effect of

the Award on the economy of the country and on the industry concerned; and the probable effect in related or similar industries; so that any decision that is made in a trade dispute would not cause employers to shut down their businesses; which in turn would indubitably lead to major upheavals to the economy of this country.

129. Further, the Union also tried to convince this Court that section 30(4) of the IRA 1967 is not applicable in trade dispute cases; particularly so in cases on minimum wages, in view of section 52(2) of the Act. The erudite Representative of the Union referred to the case of **Dunlop Industries Employees Union v. Dunlop Malaysian Industries Bhd. & Anor [1987] 2 MLJ 81,** where the Supreme Court held:-

> **"Section 56 must be read, construed and understood in the light of section 52(2) which prescribes that the provisions of the Act relating to trade dispute other than section 26(2) and section 30(4) shall apply to any matter referred to or brought to the notice of the Industrial Court under the Act. <u>It accordingly follows that in dealing with a complaint of non-compliance under section 56 the Industrial Court has all the powers with which it is invested in relation to trade disputes other than the two excepted provisions of the Act specified in section 52(2)</u>."**
>
> [emphasis added]

130. Section 52(2) of the IRA 1967 reads as follows:-

> **"52. Application.**
>
> **…**

(2) The provisions of this Act relating to trade dispute other than section 26 (2) and section 30 (4) shall apply to any matter referred to or brought to the notice of the Court under this Act."

131. This Court agrees with the learned Counsel for the Hotel's explanation that the aforesaid section 52(2) provides the general rule that the provisions relating to trade dispute are applicable to any matter referred to the court or brought to the notice of the court, except sections 26(2) and 30(4) of the IRA 1967. This means that all provisions relating to trade disputes will be applicable to other matters, for example, in a complaint of non-compliance or reference under section 20 of the IRA 1967 which relates to unfair dismissal cases. However, sections 26(2) and 30(4) of the IRA 1967 will only be applicable in a trade dispute matter. This is fortified with the fact that Section 30(4) of the IRA 1967 explicitly states that, **"In making its award in respect of a trade dispute …"**. Clearly, section 30(4) is applicable to a trade dispute matter contrary to the Union's interpretation and assertion.

132. Learned Counsel further submitted that the decision in the **Dunlop Industries (supra)** case does not actually support the Union's contention (refer to the emphasised paragraph). In fact, the Supreme Court held that Sections 26(2) and 30(4) of the IRA 1967 are not applicable in a complaint of non-compliance by virtue of Section 52(2) of the IRA 1967. The Supreme Court did not rule that in a trade dispute matter, Section 30(4) could not apply in view of Section 52(2) of the IRA 1967.

133. This Court agrees with learned Counsel for the Hotel and with utmost respect we find that the Union had unfortunately misdirected itself and thereby misinterpreted the aforesaid section 52(2) of the IRA 1967.

Unilateral Variation of the 5th CA

134. To restate it, the Union contended that the Hotel had not obtained the consent of the Union to vary the terms of the 5th CA; and by unilaterally topping up from the service charge to make up the minimum wages, the Hotel has infringed Article 2(b) of the Collective Agreement which ostensibly dealt with ôvariationsô to the terms of the 5th CA.

135. In this regard, learned Counsel for the Hotel replied that under Article 12 of the said Collective Agreement ~ the Hotel was required to distribute 90% of the service charge collected from the customer to the employees within the scope of the Collective Agreement. In this case, the Hotel implemented the MWO 2012 by converting part or all of the service charge to the basic wages in order to meet the minimum wage rates as provided under the MWO 2012. There was no reduction to the distribution of the 90% of the service charge allocation to the employees concerned; and thus by no stretch of the imagination could there have been a unilateral variation of the Collective Agreement perpetrated by the Hotel. The learned Counsel expounded that there could have been a variation to Article 12 only if the Hotel had stopped paying altogether or had varied the percentage of the service charge allocation, as provided under Article 12 of the 5th CA~ i.e. 90%, which was certainly not the case here.

136. The relevant provision governing the service charge system was provided under **Article 12 of the 5th CA** which provides as follows:

> **"ARTICLE 12 SERVICE CHARGE**
>
> **Clause (a) The Hotel shall retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% service charge shall be fully distributed to all employees covered within the Scope of this Agreement as listed in Appendix B, except part-timers, temporary, casual, retired employees."**

The Crystal Crown Decision

137. In the case of **Crystal Crown Hotel & Resort Sdn. Bhd. (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2015] I LNS 1450** (the Crystal Crown decision) (this High Court decision was affirmed by the Court of Appeal vide case No W-02(A)-1601-09/2015 on 31.07.2017). The High Court judge had found in favour of the union and dismissed the hotel's judicial review application, and stated as follows:-

> **"[34] Let me begin by examining the definition of 'wages' and 'minimum wages' provided under section 2 of the NWCC:**
>
> **34.1. The definition of "wages" has the same meaning assigned to it under section 2 of the Employment Act 1955; and**
>
> **34.2. The definition of "minimum wages" means the "basic wages" to be or as determined under section 23.**

[35] What amounts to the "basic wages" had been illustrated in the case of *Decor Wood Industries (Trengganu) Sdn. Bhd. v. Timber Employees' Union* [1990] 1 ILR 423 as:

> **"… does not include additional emoluments which some workmen may earn on the basis of a system of bonus related to production. Nor does it include any other supplements and allowances, such as housing and cost of living which is not directly related to the work in that category."**

[36] From the above, it would appear that the concept of "basic wages" under the NWCC does not include any other additional components. This concept had been illustrated in OP Malhotra's "The law of Industrial Disputes" at page 84 (supra) as follows:

> **"The phrase 'basic wage' is also ordinarily understood to mean that part of the price of labour, which the employer must pay to all workmen, belonging to all categories. The phrase is used ordinarily, in contradistinction to allowance----the quantum of which may vary in different contingencies. The 'basic wage', therefore does not include additional emoluments, which some workmen may earn on the basis of a system of bonuses, related to production. The quantum of the earnings from such bonuses, varies from individual, to individual according to efficiency and diligence; it will vary sometimes from season to season, with the**

variation in the working conditions in the establishment; it will also vary with variations in the rate of supply of raw materials or with assistance obtainable from machine. This element of variation excludes the additional emoluments from connotation of the 'basis wage'."

[37] For the purpose of implementing the MWO, the employer may, before the coming into force of the MWO, negotiate on the restructuring of wages (see Order 6 of the MWO) provided that:

37.1. The restructured basic wages to be paid to the employee should be in accordance with the minimum wages rates specified in the MWO (Order 6 (a));

37.2. The restructured wages should not be less favourable than the employee's existing wages (Order 6 (b));

37.3. The restructured wages should not be less than the amount of wages earned by the employee as agreed in the contract of service before the restructuring of wages (Order 6 (c));

37.4. The restructuring of wages should only involve the payment for work done during the normal hours of work of the employee (Order 6 (e)); and

37.5. The restructuring of wages should not cause the employee to lose any remuneration specified under paragraphs (a) to (f) of the definition of 'wages' in section 2 of the Employment

Act 1955, section 2 of the Sabah Labour Ordinance and section 2 of the Sarawak Labour Ordinance which the employee would be entitled to under the contract of service (Order 6 (f)).

[38] The law had envisaged that the implementation of the minimum wage system must not in any way result in the employee getting anything less favourable than the employee's current wages. Neither could the basic restructured wages be less than the amount of wages earned by the employee pursuant to the contract of service.

[39] The concept of service charge had been discussed in the case of *National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v. Masyhur Mutiara Sdn. Bhd.* [2014] 1 MELR 286). The rationale for the introduction of the service charge in the hotel industry was to replace the practice of tipping which only benefited the guest service employees of the hotels but not others who were not in direct contact with the customers or patrons of the hotel. In order to provide a more equitable scheme to be enjoyed by the eligible employees, guest service or non-guest service alike, a collection system which could be shared by all eligible employees of the hotel was introduced by the leading hotel, known as Merlin Hotel and this had set the standard for other hotels to adopt. This service charge system had become the norm in the hotel

industry and become an important component of wages paid to hotel employees.

[40] The service charge, normally at 10% would be levied on the customer's bills which must be paid by these customers and subsequently channeled into a fund called service charge fund. 10% of the fund would be taken by the hotel and 90% would be distributed to eligible employees' subject to the service points allocation agreed by both parties. Under this scheme, the hotel is bound under the contract of employment to make payments based on their service charge points.

[41] The service charge scheme is unique, in that, the money does not come from the employer but collected from the customers of the hotel and placed in a fund jointly owned by the employer and employees. This fund is pure income of the employee which sum is paid to employees pursuant to the contract of service.

[42] The Privy Council had clarified that the money from which the service charge points were paid did not belong to the hotel (see *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd. & Another* [1986] 1 WLR at page 449).

[43] The rationale and concept for the introduction of the service charge in the hotel industry as highlighted above showed that the money collected and deposited into the joint account of the employee and the Hotel belongs to the eligible employees of the Hotel and the payment to the employees in accordance with the service points allocation is provided in the contract of employment, hence I agree with the Award made by the IC that the Hotel could not be permitted to meet its obligation to pay the minimum wage as envisaged by the NWCC and MWO by utilising the service charge paid by its customers or patrons. In view of the above, the 'clean wage' system proposed by the Hotel was rightly rejected by the IC."

The Shangri-La (Originating Summons [OS]) Decision

138. In the case of **Shangri La Hotel (KL) Bhd., Komtar Hotel Sdn. Bhd., Golden Sands Beach Resort Sdn. Bhd., Shangri La Hotels (Malaysia) Berhad & Tanjung Aru Hotel Sdn. Bhd. v. National Wages Consultative Council, National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia & National Union of Hotel, Bar & Restaurant Workers, Sabah (Supra)** wherein the plaintiffs had filed an Originating Summons in High Court for the following declarations:-

"(a) The Guidelines on the Implementation of the Minimum Wages Order 2012 issued by the 1st Defendant is intra vires the National Wages Consultative Council Act 2011 and is issued pursuant to the powers

and functions of the 1st Defendant under section 4 of the National Wages Consultative Council Act 2011;

(b) The Plaintiffs are entitled to use paragraph 3 (v) and Illustration No. 6 of the Guidelines on the Implementation of the Minimum Wages Order 2012 issued by the 1st Defendant as an aid of interpretation of the meaning of "minimum wage" and "basic wage" under the National Wages Consultative Council Act 2011 and Minimum Wages Order 2012 for the purposes of implementation of the Minimum Wages Order 2012; and

(c) The plaintiffs are entitled to convert all or part of the service charge meant for distribution to the employees to form part of the minimum wages for the purposes of the implementation of the Minimum Wages Order 2012."

139. The High Court held that the NWCC has no power to issue the said Guidelines and that the same was ultra vires the NWCC Act, having no force of law. The Court held:-

"I would accept that none of the provisions cited by the Plaintiff expressly provide that the NWCC may issue Guidelines.

It was rightly pointed out by learned counsel for the 2nd and the 3rd Defendants that certain legislations such as section 126 of the Banking and Financial Institutions Act (BAFIA) 1989 (repealed by the Financial

Services Act 2013) and section 30B of the Environmental Quality Act 1974 (EQA) expressly provide for Bank Negara and Environmental Quality Council to issue Guidelines.

Given the absence of such express provision in the NWCC, in my view the NWCC Act, has no power to issue Guidelines.

Therefore, in my view the Guidelines issued by the NWCC are ultra vires the NWCC Act and do not have the force of law.

…

Her Ladyship further held that 'basic wage' does not include additional emoluments at p. 156 UBOA:

(See *Decor Wood Industries (Trengganu) Sdn. Bhd. v. Timber Employees' Union* [1990] I ILR 423 at 424 & OP Malhotra's The Law Of Industrial Dispute, 6th Edition (Volume 1).

Further the Court held that:-

The Guidelines stipulate that it is "subject to negotiation" which means that it cannot unilaterally imposed on the Unions.

This interpretation is consistent with paragraph 6 of the MWO 2012 which stipulates that any restructuring of wages is by way of "negotiation".

Therefore, the Hotel cannot force the Unions to accept the Top Up Structure if the Unions do not agree to the proposal otherwise it would render the clear words of paragraph 6 of the MWO and even paragraph 3 of the Guidelines redundant."

140. Notwithstanding, that this Court is fully au fait with the fact that we are ostensibly bound by the decisions above; it has been brought to our attention that the Honourable Superior Courts in the above said decisions did not have the benefit of the extensive and comprehensive evidence and submissions that was adeptly produced in this Court collectively by the respective parties for due consideration. In particular, we allude to the following, which was extensively discussed above:

a. The significance of the definition of "wages" in section 2 of the NWCC Act 2011:

Extensive arguments were put forward by parties as to whether service charge is included in the NWCC Act 2011 as the definition of ñwagesò in section 2 of NWCC Act 2011 was defined to have the same meaning as ñwagesò under section 2 of the EA 1955; which has not expressly excluded service charge as part of ñwagesò, which fact has been confirmed by the authorities canvassed above. As such the question that arises for a ruling by this Court is whether a purposive approach should be adopted in ascertaining the real and operative meaning of the terms ñwagesò and ñminimum wagesò under section 2 of the NWCC Act 2011 as relating to this case.

b. **The financial implications:**

i. The Hotelôs detailed evidence on the financial implications, if the Hotel were to use its own funds to top-up to form part of the minimum wages in order to comply with MWO 2011; goes to show that the Hotel would be heavily burdened with a high increase in its manpower costs, which in turn would adversely affect the Hotelôs continuing ability to manage its business cost-effectively;

ii. The evidence of COW2 on the financial implications to the Hotel industry and the effect on the economy of country if the hotel industry was to be saddled with an increase in its operational costs;

iii. The Hotelôs financial evidence has shown that if the Hotel were to use its own funds to top-up to make up the minimum wages; it would cause unfair labour practice which would not promote industrial harmony at the workplace; as the employees covered by the 5th CA would be receiving an upward revision to their basic wages as compared to the employees that were outside the scope of the 5th CA. Further it would also cause an irregular increment between the employees covered by the 5th CA; whereby employees with lower salaries would be given a larger increment to make out the RM900.00 per month, as compared to employees who have higher salaries who would get a smaller increment if their salaries were close to the RM900.00 threshold; or no increment at all if their salaries were above the said threshold. This would force the Hotel

to make salary adjustments across-the-board in order to keep industrial harmony amongst the employees of the Hotel; which would consequently result in additional and unreasonable financial burdens.

c. The Hotel's evidence that the Guidelines was an agreed document between the tripartite entities in the NWCC:

COW2's unchallenged and undisputed evidence that at the time when the Guidelines was issued by NWCC there was no objection from the Union, which was part of the MTUC; and that it was a unanimous decision of the NWCC to allow latitude to employers to convert part of the service charge to form the minimum wages. Therefore, it was the Hotel's contention that though the Guidelines do not have legal force and it is therefore not legally binding, nevertheless, this Court ought to give due consideration to the Guidelines as it is an explicit consensus relating to employment practices between the organisations' representative of employers and the union which was approved by the Minister as provided for under section 30(5A) of the IRA 1967.

141. In relation to the doctrine of *stare decisis* raised by the Union, the question that needs to be addressed at this stage is whether this Court is empowered to arrive at a different conclusion without breaching the said principle on the issue of whether the Hotel was entitled to restructure the employees'wages by converting part or whole of

the service charge payable, to be included with the basic wages to comply to the MWO 2012. In the case of **Paari Perumal v. Abdul Majid Hj Nazardin & Ors [2000] 4 CLJ 127** the High Court held that:

> **"[6] Although the Federal Court cases of *KC Mathews v. Kumpulan Guthrie Sdn. Bhd. and V Subramaniam & Ors v. Craigielea Estate* which followed the Indian case of *Express Newspapers (P) Ltd. v. Labour Court* are binding upon this court, this court is entitled to make its own decision without breaching the principle of *stare decisis.*"**

And at page 141 His Lordship referred to:

> **"Lord Morris of Borth-y-Gest in *Conway v. Rimmer* [1968] AC 910 held that:**
>
> > **... though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a <u>departure from precedent is in the interests of justice and the proper development of the law</u>.**
>
> **The courts, therefore, should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago."**

And at page 142 His Lordship stated:

"In conclusion I am of the view that there is a need today in Malaysia for the court to adopt a proactive stand in order to create a win-win situation for both employers and employees. The employers and the employees are the pillars of the country's economic and social developments. I think I am fortified by the following statements made by Mr. Justice G.H. Walters, Supreme Court of South Australia in a paper entitled "*Archaism in the Courts*", (see November 1977 MLJ p. lxxiv):

> **Adherence to precedent is one of the fundamental conceptions of our legal system. Not infrequently, the first question a judge will ask himself when confronted with a case, especially in the field of civil law, is whether there is any previous decision capable of serving as a precedent, or, at least, an analogue for the case in hand. In this process, the judge searches for a major premise to govern the case before him; he may use all sorts of comparisons, analogues or distinctions in guiding him in the determination of the issues falling for decision. This exercise will no doubt be undertaken in the quest for certitude; and no less an authority than Viscount Simonds stressed "the importance, ... The paramount importance of certainty of the law" (*Jacobs v. London County Council* [1950] AC 361, 373)). But if I may respectfully say so, a stringent adherence to the doctrine of precedent, to**

innumerable earlier judicial utterances, tends to place less importance upon basic principle and to make the judge something of a legal historian, rather than a theoretical jurist expanding deductive legal principles consonant with the changes that fit existing social and economic circumstances and meet new situations. "The more precedents there are, the less occasion is there for the law; that is to say, the less occasion is there for investigating principles:

(Boswell, *The Life of Samuel Johnson*, 1906 vol. 1, p. 416, cited by Lord Devlin, op. cit., at p. 6)

…

As I see it, the dominant purpose of all precedents must be to subserve in the construction, enunciation, and application of legal principles. Even a searching analysis of precedents cannot always be an illumination for the future. If judges' decisions are made to depend upon cases decided in their own or other jurisdictions, may we not find ourselves landed in the situation of having "a heap of unrelated instances which those come after may or may not find to be consistent with one another" (Sir Frederick Pollock, *Judicial Caution and Valour* [1929] 45 LQR 293, 296)). I ask, therefore, whether the stage has not been reached where judges "sacrifice their sense of reason and justice upon

the altar of the Golden Calf of precedent" (*Van Kleeck v. Ramer* ([1916] 156 Pac. 1108, per Scott J. at p. 1121); where, by application of our system of case law to the formulation of law acceptable to modern society, we make a lesser contribution to legal thinking and bind ourselves too rigidly to the fetters of the past.

<u>But if the answer to the question I have just posed be – nay, then no matter how time-honoured the concept of judicial precedent may be, it must not be blindly followed. Like all legal doctrines, it must be applied with an eye to justice. "The common law would be sapped of its life blood if stare decisis were to become a god instead of a guide"</u> (*Fox v. Snow* ([1950] 76 A 2d.877, per Vanderbilt CJ at p. 883)). <u>*Stare decisis* must not become a fetish, for slavish adherence to precedent, when new conditions require new rules of conduct, can only bring the administration of justice into disrepute</u>. "Uniformity ceases to be good when it becomes uniformity of oppression" (Justice Cardozo: *The Nature of the Judicial Process* [1921] at p. 113)." [emphasis added]

142. On appeal to the Court of Appeal in the case of **Abdul Majid Hj Nazardin & Ors v. Paari Parumal [2002] 3 CLJ 133 at page 137,** the Court of Appeal upheld the High Courtôs reasoning where it stated:

"At the risk of repetition, we emphasise that an appellate court does not exceed its function if, in an appropriate case, it reverses conclusions of fact which are inconsistent with the fair inferences that are to be drawn from proved or admitted facts. We are satisfied that the learned judge did not exceed the bounds of this principle. …"

And further stated:

"It follows that the authorities strenuously advanced before us namely *KC Matthews v. Kumpulan Guthrie Sdn. Bhd*. [1981] 1 CLJ 40; [1981] CLJ (Rep) 62 *and V. Subramaniam & Ors v. Craigielea Estate* [1982] 1 MLJ 317 do not apply to the facts and circumstances of the present instance. In those cases, there was not the kind of conduct that is to be found here. They are therefore readily distinguishable." [emphasis added]

143. In the Supreme Court case of **Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng [1994] 1 CLJ 313 at p. 319,** Haji Mohd. Azmi bin Datoô Haji Kamaruddin SCJ said:

"... Without any intention of undermining the principle of *stare decisis* as laid down by Lord Scarman in *Duport Steel Ltd. v. Sirs* [1980] 1 AER 529 at 551(C), it is important that decided cases should not be followed blindly. As stated by Lord Halsbury in *Quinn v. Leathem* [1901] AC 495 at 506:

Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, <u>but governed and qualified by the particular facts of the case in which such expressions are found.</u>" [emphasis added]

144. Applying the above mentioned principles to this case and with the greatest of respect to our Superior Courts in the Crystal Crown and the Shangri-La (OS) decisions, this Court, in accordance to the nature and extent of the facts and evidence, both documentary and oral, presented before us; which is readily distinguishable from the facts and evidence alluded to in the two cases just cited above; perceives it as its bounden duty to act in accordance to equity and good conscience, and to present an alternative viewpoint in distinguishing this decision from the stated perspectives in those decisions. Our concluding findings in the instant case are as follows:

<u>FINDINGS</u>

145. This Court appreciates that the whole purpose and design of NWCC Act 2011 was contained in the statute itself; and the fundamental function of the Industrial Court is to discern the true and equitable intention of Parliament; and to take an approach that promotes the purpose or object underlying the Act with regard to minimum wages; whilst at the same time being mindful of the essential objective of the IRA 1967; which is to promote and maintain industrial harmony. The vital question in the instant case is what indeed was the primary purpose of introducing this notion of õminimum wagesö? In

answer to that pertinent question we humbly refer to what was stated in the Parliamentary Hansard reduced above ~ which provided that it was to assist lower income earners to boost their spending power to face the escalation in the cost of living; and to address the issue of poverty; as well as to increase their social protection.

146. The Hotel industry unlike any other industry, is a unique one which has this special creature called the ñService Chargeò. No other industry has this distinctive feature. ñService Chargeò, as explained above, was a vehicle used to replace the ñTipping Systemò, which was in due course made into a contractual clause under collective agreements. Though these service charges were collected from customers, there are a plethora of cases that have decided that this service charge formed part of the wages, as it was a payment made to employees for **work done under their contract of employment**; and therefore was **included** under the definition of wages under section 2 of the EA 1955.

147. Section 2 NWCC Act 2011 defined ñminimum wagesò to mean ñbasic wagesò to be or as determined under section 23 of the said Act. Section 23 however is a section determining the minimum wages rate, i.e. at the material time RM900.00 per month in Peninsular Malaysia. The NWCC Act 2011 and MWO 2012 however did not define ñbasic wagesò, neither did it describe the composition of ñbasic wagesò, nor the components that made up ñminimum wagesò. Nevertheless, section 2 of NWCC Act 2011 went on to define ñwagesò to have the same meaning as the term ñwagesò in section 2 of the EA 1955. This inclusion, to our mind, was done deliberately and in

accordance to the purposive approach; and not as a ñmischiefò, as suggested by the Union, as we have discussed above. Therefore, it is our considered view that the NWCC Act 2011 does not exclude service charge from being a component part of ñminimum wagesò.

148. Moreover, COW1 testified that the Hotel had 168 employees (as of payroll in December 2016 ï COB2 pages 4-9) and 172 employees (as of payroll in December 2015 ï COB1 pages 5-7) who earned basic salaries of less than RM900.00 per month each. These employees are obviously ñscheduled employeesò who come within the ambit of the EA 1955; and therefore the meaning of ñwagesò under section 2 EA 1955 would undoubtedly apply to them.

149. Further, and as discussed previously, all the decided cases cited above have shown that service charge has been taken into account as part of ñwagesò. Importantly, in the Hotel Equatorial case (supra), the Court of Appeal confirmed the decision of the Labour Court in that service charge, food allowance and shift allowance were not ex-gratia payments; but payments made in connection with the contract of service and therefore **should be <u>included with the basic wages</u> to compute the ordinary rate of pay**. The importance of this case to the instant case is really the phrase just quoted, i.e. the inclusion of the service charge with the basic wage to compute the ordinary rate of pay. It therefore follows that even the Court of Appeal has clearly recognised and affirmed that service charge is to be considered part of what is understood by the term ñwagesò and can therefore be included with ñbasic wagesò for all intents and purposes.

150. Therefore, it is our considered view that applying the purposive approach under section 17A of the Interpretation Act (which was discussed at length above); and taking the view that the NWCC Act 2011 did not exclude service charge (as the meaning of wages was as per the EA 1955); and after considering all the authorities as discussed hereinbefore, that had decided that service charge is payment for work done in connection with the employees contract of service; **service charge should therefore be included with the basic wages to form the minimum wages.**

151. We are also of the view that the above said finding is in line with the intention of Parliament. At the risk of repetition, as it was reflected in the Hansard discussed above, the purpose of introducing the minimum wages was to help face the increase in the cost of living by lower income earners and to address the issue of poverty. The evidence from COW1 and COW2 clearly shows that the wages that were received by employees covered under the 5th CA was already way above the minimum wages determined under the MWO 2012; as the employees in the Hotel were being paid service charge under their contract of employment as part of their wages; and thus could not in all honesty be considered lower income earners.

152. It is also the view of this Court that the intention of the NWCC members representing the union, the employers and the Government was essentially shown in the Guidelines. Paragraph 3 of the Guidelines states as follows:-

"3. METHOD OF RESTRUCTURING OF WAGES

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;

(ii) the restructuring of the wages only involves payments in cash as defined in the definition of "wages" under section 2 of the Employment Act 1955, the Sabah Labour Ordinance [Chapter 67] or the Sarawak Labour Ordinance [Chapter 76];

(iii) non-wages payments that are excluded in the definition of "wages" under section 2 of the Employment Act 1955, the Sabah Labour Ordinance [Chapter 67] or Sarawak Labour Ordinance [Chapter 76] shall not be restructured as minimum wages. The non-wages payments are as follows:

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity, or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other

fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus.

(iv) allowances paid specifically due to the nature of work such as heat allowance, dust allowance, noise allowance, standing allowance and similar kind of allowances that are provided to specific employees are not advisable to be restructured;

(v) <u>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</u>;

(vi) for the plantation sector where the Special Gratuitous Payment of RM200 is implemented, the employer may convert all or part of the payment as part of the minimum wages. Any terms and conditions relating to the eligibility for such payment shall be void. However, if there is balance

owed, the terms and conditions pertaining to such eligibility for the remaining payments shall continue to apply;

(vii) for the security services sector where security incentive is payable to employee as provided for in the Wages Council Order (Wages Regulation Order) (Statutory Minimum Remuneration of Private Security Guards in Peninsular Malaysia) in 2011 and the Wages Council Order (Wages Regulation Orders) (Statutory Minimum Remuneration of Private Security Guards in Sabah and Sarawak) 2011, the incentive may be restructured as part of the minimum wages;

(viii) housing allowance may be restructured as part of the minimum wages provided that the allowance is not a replacement of a value of benefit provided by the employer, but as a cash payment based on the contract of service; and

(ix) the restructuring of wages shall not reduce the total wages received by the employee before the restructuring."

[emphasis added]

153. To say again, this Court is quite aware and fully agrees that the Guidelines have no legal force and therefore is not binding. However, in the instant case, the uncontroverted evidence before this Court has established that the Guidelines are an **agreed document** between the union and the employers; and which had been endorsed by the Minister, for and on behalf of the Government of Malaysia. As such,

this Court ought to give due consideration to it under section 30(5A) of the IRA 1967. It is interesting to note that the parties had agreed (i) that the restructuring of the wages would **only involve payments in cash as defined in the definition of 'wages'** under section 2 of the EA 1955; (ii) and that the **non-wages payments that are excluded** in the definition of ñwagesò under section 2 of the EA 1955 **shall not be restructured as minimum wages**; and finally (iii) for the hotel industry, where service charge collection is implemented, the employer **may convert all or part of the service charge** meant for distribution to the employees, t**o form part of the minimum wages**. Whilst we fully appreciate that all the above conditions are upon negotiation between the employer and employee, nevertheless, it demonstrates the clear intention of the respective parties that service charge ought to be included in the calculation of the minimum wages. This is consistent with the evidence of COW2 who had informed this Court that the said tripartite entities had in fact agreed to include service charge to form part of the minimum wages. It is not evenhanded, nor remotely equitable, for the union now to deny and withdraw what they had already agreed upon earlier. It is, after all, a rule well known to *'Equity'*, as a concept and gloss over the *'Common Law'* ~ that *"He who comes into equity must come with clean hands"*, and so be it the ruling of this Court, in this case.

154. Therefore, based on the intention manifest by the wordings in the Guidelines as stated above, and in applying the purposive approach, this Court has come to an observation that the clear and unambiguous intent of the parties to it, was that service charge ought to be included in the calculation of minimum wages.

155. Further, Order 6 of the MWO 2012, has allowed the employer and employee or trade union to negotiate the restructuring of wages. This Court is mindful that such negotiation for restructuring of wages must have been done before the MWO 2012 came into operation. However, what would again be interesting to note here is the intention of the Government in having this provision in MWO 2012. For ease of reference Order 6 states as follows:

> **"Negotiation for restructuring of wages**
>
> **6. Nothing in this Order shall be construed as preventing the employer and the employee, or the trade union, as the case may be, from negotiating on the restructuring of wages under section 7B of the Employment Act 1955, section 9B of the Sabah Labour Ordinance or section 10B of the Sarawak Labour Ordinance, as the case may be, before this Order comes into operation in relation to the employer concerned provided that –**
>
> **(a) the restructured basic wages to be paid to the employee shall be in accordance with the minimum wages rates specified in this Order;**
>
> **(b) the restructured wages shall not be less favourable than the employee's existing wages;**
>
> **(c) the restructured wages shall not be less than the amount of wages earned by the employee as agreed in the contract of service before the restructuring of the wages;**

(d) the restructuring of the wages shall only involve the payment for work done during the normal hours of work of the employee; and

(e) the restructuring of the wages shall not cause the employee to lose any remuneration specified under paragraphs (a) to (f) of the definition of "wages" in section 2 of the Employment Act 1955, section 2 of the Sabah Labour Ordinance and section 2 of the Sarawak Labour Ordinance which the employee would be entitled to under the contract of service."

[emphasis added]

156. The above provisions explicitly displays that the **restructuring of "basic wages" could be allowed**, as long as the restructured basic wages are paid in accordance to the minimum wages rates specified in MWO 2012; and that the restructured **wages shall not be less favourable** than the employeeôs existing wages; and that the restructured **wages shall not be less than the amount of wages** earned by the employee as agreed in the contract of service before the restructuring of the wages; and that the restructuring of the **wages shall only involve the payment for work done** during the normal hours of work of the employee. Therefore, Order 6 clearly demonstrates that the intention and purpose of this legislation was to allow a restructuring of basic wages, meaning that other components such as service charge could be included with the basic wages structure to form the minimum wages.

157. COW1ôs evidence had unambiguously shown that the restructured wages of the Hotelôs employees after the conversion of the service charge to form part of the minimum wages was no less favourable than the employeeôs existing wages; and that the restructured wages were not anything less than the amount of wages earned by the employee as stipulated in their contract of service. Further, service charge is payment made for work done under their contract of service. To explain this, COW1 referred to an employeeôs salary slip at UBD1 page 3, to show that after the conversion of part of the service charge to form the minimum wage, the employee still earned the same amount of RM1,241.24. We agree that the employees will be enjoying no less favourable wages than what they were earning prior to the restructuring of the wages. The restructuring of the wages was therefore not to the detriment of the employees. Though the Union had argued that the employees should get the basic salary of RM900.00 without any conversion of their service charge, this Court is of the opinion that it was not the intended purpose and objective of the NWCC Act 2011 and MWO 2012 to enrich employees inordinately; which in turn would cause an adverse and large financial impact upon the Hotel in particular, the Hotel industry, as a whole; and related industries (e.g. tourism), in general.

158. This Court finds that the evidence on the financial implications of the Hotel has aptly demonstrated that the Hotel would be saddled with a very high increase in its manpower costs, if the Hotel had to use its own funds to top up to form the minimum wages of RM900.00 per month. The Hotel made a loss in 2013; however, the proportionality of the profit earned by the Hotel in 2014 and 2015 would not be

significant if the minimum wages top up was used from the Hotelõs funds. An increase in the operating costs would mean a decrease in the Hotelõs GOP; which would likely adversely affect the Hotelõs continuing ability to manage its business cost-effectively. It is to be noted that the Union did not rigorously dispute nor challenge the financial position of the hotel at the trial. This Court is of the opinion that no one party should be put at a disadvantage for the sake of the other; as this was not the true and intended purpose of the NWCC Act 2011, MWO 2012 and most certainly the IRA 1967.

159. The evidence had also shown that if the Hotel were to use its own funds to top-up to make up the minimum wages; it would increase the operating costs of the Hotel. This, as a consequence, could cause far-reaching financial implications on the hotel industry as a whole; and thus affect the economy of the country, in general; as hotels would have to raise their room rates and F&B charges to increase their GOP; which could make the hotels in the country less competitive and therefore, in turn, affect the tourism industry of the country. Surely, this again was not the true intent and purpose of the NWCC Act 2011, MWO 2012 and the IRA 1967.

160. It was also our observation that the hotel industry as compared to other industries has the lowest basic salary (COB pages 4-18). As discussed above, this was due to the unique practice in the hotel industry which has service charge to buffer the low salary. Therefore, the hotel industry would have to bear a higher cost in order to pay the difference between the low basic salary and the RM900.00 threshold under the MWO 2012. This would mean that the financial burden for the hotel industry would be

much higher than any other industry in complying with the MWO 2012. This is consistent with COW2ôs evidence that the employers in the hotel industry had initially objected to the minimum wage of RM900.00, because it would cause a high increase in manpower costs in the hotel industry which would have an adverse effect in the hotels financial ability. This is reflected in Order 6 of the MWO 2012 and paragraph 3 of the Guidelines where it indicates that the NWCC had the intention to allow the employers in the hotel industry to convert part or the whole of the service charge payable, to be included with the basic wage to form the minimum wages, to overcome this peculiar circumstances prevalent in the hotel industry.

161. It was also observed that if the Hotel was to use its own funds to top-up to make up the minimum wages without recourse to the service charge, this would entail unjust enrichment to only certain employees. Some of these employees who are much junior in service and rank would receive a larger increment as compared to senior employees. The Hotelôs employeesôsalary costs for December 2015 (COB1 pages 5-7) indicated that the lowest salaried employee (junior employee who joined in 2015) of the Hotel received a basic salary of RM380.00 per month and the highest salaried employee (senior employee who joined in 2002) received RM855.00 per month. Under MWO 2012 the Hotel (if using its own funds) would have to pay the junior employee an increment of RM520.00 to make up the minimum wage of RM900.00; which is a 136.84% increase in salary. Whereas, for the senior employee, the Hotel (if using its own funds) would have to pay the employee an increment of RM45.00 to make up the minimum wage of RM900.00; which is only a mere 5.26% increase in salary. It is also to be noted that the

senior employee who had worked for 13 years would only receive an increment of 5.26% as compared to the junior employee who had only joined in 2015 who would be receiving a 136.83% of increment. Those employees who are much more senior who are earning more than RM900.00 would not receive any increment at all (COB 2 pages 4-9). Without having much to explain, it was explicitly clear that this would cause serious dissatisfaction and disharmony among the employees of the Hotel; which is not at tandem with the true intended purpose and objective of the NWCC Act 2012, MWO 2012 and especially IRA 1967 that promotes industrial harmony; which is of paramount concern in the sphere of industrial jurisprudence.

162. This Court deems that the conversion of part or all of the service charge by Hotel does not tantamount to unilateral variation of Article 12 of the 5th CA. For the reason as discussed above, the service charge could be included with the basic wage to form the minimum wages. Further we agree with the learned Counsel for the Hotel that there was no reduction to the service charge allocation of 90% paid to the relevant staff, as confirmed by COW1, and as provided for by Article 12 of the 5th CA.

163. Most significantly, and something that is often inadvertently overlooked, this Court, as the Court of first instance, is vested with the powers under section 30(4), (5) & (6) and section 17(2) of the IRA 1967; and as decided by the Federal Court in the case of **Dr. A. Dutt v. Assunta Hospital [1981] (supra)** ~ to vary and/or create new rights and obligations beyond what was contractually agreed by the parties. This power is singularly absent in our Civil Courts. Therefore, this Court has wide powers to find an

equitable and fair solution for the parties in settling **trade disputes**, which the Court considers essential for keeping industrial peace and harmony (see earlier section in this Award concerning the powers and duties of the Industrial Court).

164. In order to achieve an equilibrium between the parties, this Court cannot just adopt a narrow view in coming to its decision. It is the duty of this Court to evaluate all the evidence that was adduced before this Court and act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as provided for under section 30(5) of the IRA 1967. "Equity and good conscience" mandates this Court to evaluate the whole of the intended purposes and objectives of the relevant provisions of NWCC Act 2011, MWO 2012, the Guidelines, together with the IRA 1967; and to read all the provisions harmoniously to reflect the intention of Parliament in relation to the implementation of minimum wages; whilst taking into account public interest and the financial implications on the Hotel, the impact on the economy of the country and on the industry concerned to achieve the fundamental principle i.e. to promote and maintain the industrial harmony between parties in the settlement of trade disputes. In making this decision this Court is mindful that no one party should be at a greater advantage than the other. By allowing so, it would disrupt the industrial harmony in the Hotel and the industry at large. This Court is also mindful of its mandatory duty under section 30(4) and 30(5) of the IRA 1967 as decided in cases of **Mersing Omnibus Co. Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor (supra); Lam Soon (M) Bhd. v Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan (supra); and Paper**

and Paper Products Manufacturing Employees' Union v. Tri-Wall (Malaysia) Sdn. Bhd. (supra).

165. It is the considered view of this Court that by disallowing the Hotel to convert part or all of the service charge to form part of the minimum wages, it would cause enormous industrial disharmony in the Hotel and to that industry at large. It would also cause an uneven distribution of wages amongst the employees within and outside the scope of the 5th CA; and it could cause the Hotel to incur great adverse financial implications that could risk the ability of the Hotel to sustain its business. Such a decision would not be in tandem with the spirit of sections 30(4) and 30(5) of the IRA 1967 as discussed above.

CONCLUSION

166. This Court in handing down this Award had considered the aforesaid reasons, took into account the evidence adduced by the parties, all the relevant laws and its applicable provisions including section 30(4) of the IRA 1967 which requires this Court in making its award in respect of a trade dispute, to have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries, and bearing in mind section 30(5) of the IRA 1967 which requires the Court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. In the circumstances, this Court is unanimous in its decision; and hereby orders that the Hotel is entitled to restructure the

wages by converting part or the whole of the service charge payable, to be included with the basic wage to form the minimum wages of RM900.00 per month in compliance to the MWO 2012.

HANDED DOWN AND DATED THIS 13TH DAY OF JULY 2018

-signed-

(JAMHIRAH ALI)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR