INDUSTRIAL COURT OF MALAYSIA

CASE NO. 13(26)/2 – 175/2012

BETWEEN

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

AND

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

AWARD NO. 875 OF 2014

BEFORE	:	**Y.A. TUAN EDDIE YEO SOON CHYE**	**- CHAIRMAN**
		ENCIK NG CHOO SEONG	**- EMPLOYEES' PANEL**
		ENCIK VETHAMUTHU A/L R. SAMYKANOO	**- EMPLOYERS' PANEL**

VENUE	:	Industrial Court Malaysia, Kuala Lumpur
DATE OF REFERENCE	:	16.02.2012
DATES OF MENTION	:	29.03.2012; 15.05.2012; 18.06.2012; 23.07.2012; 29.08.2012; 03.10.2013; 27.11.2013; 13.03.2013; 07.05.2013; 12.06.2013; 27.06.2013; 11.11.2013; 08.01.2014; 10.02.2014.
DATE OF HEARING OF APLICATION	:	23.01.2013
DATES OF HEARING	:	06.09.2013; 03.03.2014 (Oral Submissions).
DATES OF HOTEL'S SUBMISSIONS RECEIVED	:	02.12.2013; 29.01.2014 (Reply).
DATES OF UNION'S SUBMISSIONS RECEIVED	:	24.12.2013; 12.02.2014 (Reply).
REPRESENTATION	:	Mr. Lim Chooi Phoe, Industrial Relations Adviser of the National Union of Hotel, Bar & Restaurant Workers, Representative for the Union. Mr. N. Sivabalah (Ms. Parvathy Devi with him) of Messrs Shearn Delamore & Co., Counsel for the Hotel.

REFERENCE: This is a Ministerial reference made under section 26(2) of the Industrial Relations Act 1967 (Act 177) dated 16 February 2012 arising out of the trade dispute between **Crystal Crown Hotel & Resort Sdn. Bhd. (Crystal Crown Hotel Petaling Jaya) (hereinafter referred to as the "Hotel")** and **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia (hereinafter referred to as the "Union")**.

AWARD

1. This is a Ministerial reference made under section 26(2) of the Industrial Relations Act 1967 (Act 177) dated 16 February 2012 arising out of the trade dispute between **Crystal Crown Hotel & Resort Sdn. Bhd. (Crystal Crown Hotel Petaling Jaya)** ("the Hotel") and **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia** ("the Union").

2. This case was initially fixed for hearing before former Chairman Ahmad Terrirudin Bin Mohd Salleh of another division (Court 26) on 13 March 2013. The former Chairman was transferred to the State Legal Adviser's Office, Negeri Sembilan, Seremban as the Head of Prosecution on 15 March 2013. Thereafter the President of the Industrial Court directed that this case be transferred to this division (Court 13) on 22 March 2013. By Interim Award No. 354 of 2013 dated 22 February 2013, the Court in a unanimous decision allowed the Hotel's application to amend the Statement In Reply. The Court also granted leave to the Union to file the Rejoinder. Thereafter the Hotel filed the Amended Statement In Reply on 7 March 2013. On the mention date of 7 May 2013, the Union's representative, Mr. Lim Chooi Phoe, Industrial Relations Adviser of the National Union of Hotel, Bar & Restaurant Workers informs Court that an application to amend the Statement of Case with the Proposed Statement of

Case in Enclosure 32 was filed on 19 March 2013 and that the Hotel's counsel, Mr. N. Sivabalah of Messrs Shearn Delamore & Co. has no objections to the said application. The Amended Statement of Case was filed on 10 May 2013. On the mention date of 12 June 2013, it was placed on record that the Hotel is not filing any Further Amended Statement In Reply. The case was heard on 6 September 2013. The Hotel's Written Submissions was filed by Messrs Shearn Delamore & Co. on 2 December 2013 and the Submissions in Reply on 29 January 2013 and the Union's Written Submissions was filed by the National Union of Hotel, Bar & Restaurant Workers on 24 December 2013 and Submissions in Reply on 12 February 2014. The Court heard oral submissions by Mr. Lim Chooi Phoe, representative for the Union and Mr. N. Sivabalah, counsel for the Hotel before the Court comprising of the Chairman, Mr. Ng Choo Seong (Employees' Panel) and Mr. Vethamuthu a/l R. Samykanoo (Employers' Panel) on 3 March 2014.

3. The dispute is over the proposals submitted by the Union on 10 May 2013 relating to the terms and conditions for a 1st Collective Agreement for the period from 1 October 2011 to 30 September 2014 marked as U1(b). The articles in dispute to be adjudicated are **Article 2 "Effective Date and Duration", Article 10 "Salary Structure"** and **Article 12 "Service Charge"**. The **Agreed Articles** which forms part of the Award is annexed herewith.

AMENDED STATEMENT OF CASE

4. In paragraph 2A the Union contended that with effect 1 October 2013 and in compliance with the Minimum Wages (Amendment) Order 2012, the salary structure and annual increment of the employees is set out in Article 10 (e), (f) and Appendix B. The Union contended in paragraph 7 that the cost of living has risen sharply and its claims are therefore justified. The Union contended in paragraph 8 that the Hotel is having terms and conditions of employment less favourable than comparable hotels. The Union further contended in paragraph 9 that it is generally seeking improvement on the terms and conditions of employment as the legitimate expectations of the Union's members.

STATEMENT IN REPLY

5. The Hotel avers in paragraph 2, Statement In Reply that since this is the first collective agreement with the Union, the effective date be from the date of the Award. In respect of Article 10 (Salary Structure) the Hotel proposes in paragraph 6, Statement In Reply to introduce a clean wage system which incorporate an enhanced value of the currently allocated service charge points as well as an allowance which will act to offset the employee's EPF contribution on the additional basic wage. Should the Court decide that the service charge system to be implemented the Hotel proposes a revised Article 12(a).

THE UNION'S CASE AND SUBMISSIONS

6. The Union's witness is **Ahmad Faisal Ismail** (UW-1), the Hotel's Housekeeping Clerk. According to the Offer of Employment dated 29 October 2008 (UB, pages 2 – 4) signed by Meera Subramaniam, Human Resources Manager, UW-1 was employed as a Housekeeping Attendant assigned to work at Crystal Crown Hotel Petaling Jaya commencing from the even date and his salary will be RM 300.00 with 2.5 service points per month and subjected for review periodically. UW-1 was promoted to the position of Housekeeping Clerk with effect from 1 June 2012 with a basic salary of RM 515.00 with 2.5 service points. Preceding his promotion, UW-1 was given annual salary increment. UW-1 is currently receiving 2.75 service points commencing 1 July 2012. UW-1 in his evidence categorically states that he is in agreement with the present system of basic salary with service points.

Article 2: Effective Date and Duration

7. The Union submits that the effective date of the Collective Agreement commenced from **1 October 2011** as the Ministerial Reference was dated 16 February 2012 and when backdated to six (6) months will be 16 August 2011 and that the effective date is within the purview of section 30(7) of the Industrial Relations Act 1967 *(Written Submissions, paragraph 3.3)*.

Article 10: Salary Structure

8. The Union is disputing Article 10 Clauses (c), (e) read with Appendix B and (f). The Union submits that with effect from 1 October 2013 the basic salary and service charge of the employees are as listed in Appendix B of U1(b). The National Wages Consultative Council Act 2011 (Act 732) does not allow the Hotel to include service charge into the basic salary *(Written Submissions, paragraph 4.26)*. As clean wage is not in conformity with Act 732 and the Order, the Union's proposal of basic wages and service charge must be adopted *(Written Submissions, paragraph 4.46)*.

9. The Union submitted in paragraph 4.23 of the Written Submissions the minimum wages of RM 900.00 per month ought to be paid by the Hotel irrespective of its capacity to pay and it cannot include any other components. In the case of **Hindustan Hosiery Industries v. F.H. Lala** (1974) 4 SCC (Supreme Court Cases) 316 the Supreme Court hearing the appeal from the Industrial Court Maharashtra, cited the passage from the case of **Kamani Metals and Alloys Ltd v. Workmen** AIR 1967 SC 1175 as follows:

> "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.

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 near the lower level of the fair wage, but the contents of this concept must ensure for the employee not only his sustenance and that of his family but must also preserve his efficiency as a worker."

In **Unichem Laboratories Ltd. v. Workmen** (1972) 3 SCC 552, 570 this Court observed as follows:

"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."

10. The Industrial Court in the case of **Decor Wood Industries (Trengganu) Sdn. Bhd v. Timber Employees' Union** (1990) 1 ILR 423 at page 424 decided as follows:

"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."

11. The Union submitted in paragraph 4.38 of the Union's Written Submissions that since service charge is wages under the law, it must be computed in the overtime. The Union referred to the case of **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran, Semenanjung**

Malaysia v. Hotel Equatorial (M) Sdn Bhd [2008] 3 ILR 590 at page 605 where the Industrial Court decided as follows:

> "[48] Based on the findings as stated above, it is the majority decision of the court that the service charge element has to be taken into account when computing ORP (ordinary rate of pay) for purposes of calculating overtime pay and pay on rest days and public holidays."

12. The National Wages Consultative Council Act 2011 (Act 732) does not allow the Hotel to include service charge into the basic salary *(Written Submissions, paragraph 4.26)* and the Union's proposal of basic wages and service charge to be adopted *(Written Submissions, paragraph 4.46)*. The Union urged the Court to look at the principal Act and the Minimum Wages (Amendment) Order 2012 and not the Guidelines on the Implementation of the Minimum Wages Order 2012 issued by the Secretariat of the National Wages Consultative Council Ministry of Human Resources on 6 September 2012 which has no force of law *(Written Submissions, paragraph 4.48)*.

13. Service charge is paid by the customers and it does not derive from the Hotel's funds. In the case of **Peter Anthony Pereira & Another v. Hotel Jayapuri Bhd. & Another** [1986] 1 WLR 449 at page 455, the Privy Council in the judgment of their Lordships delivered by Lord Mackay of Clashfern decided as follows:

"The judge and the Federal Court concluded that the employee's share of the service charge was not "wages" within the meaning of the Act of 1951. The reason which led them to this conclusion was that, as the board and the employer 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 employer's money but was money paid by the customers for the employees and passed to them through the employer. Even if this be a correct analysis of the position, it is plain that the employee's entitlement to his share of the service charges collected by the employer arises under his contract of service with the employer and therefore, even if the employer 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 employer, that money is due to them by the employer under their contracts of service as a reward for the service which the employees render under their contracts of service to the employer itself. Accordingly, the share of service charge is properly to be regarded as due to the employee under his contract or service as remuneration and for the reasons already given it is in respect of the normal periods of work."

Rationale of service charge

14. Service charge was introduced to replace tipping so that every employee within the Collective Agreement enjoys a fair share of it as tipping goes to guest-contact employees such as waiters. The Industrial Court in the case of **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v. Hotel Equatorial (M) Sdn Bhd** [2008] 3 ILR 590 at page 601 decided as follows:

" [29] The rationale behind the introduction of service charge was a combination of a desire to replace cash tips given by hotel and restaurant patrons to employees for services rendered as well as a need to ensure that employees other than front line employees and those who come into direct contact with patrons and customers would also receive their fair share of the tips. "

15. The object of service charge is to replace tipping. In the case of **Peter Anthony Pereira & Another v. Hotel Jayapuri Bhd. & Another** [1986] 1 WLR 449 at page 451, the Privy Council decided as follows:

"The following matters of fact are agreed. Service charges are demanded by the employer from its customers who have to pay them since they form part of the bill. The object of the service charge is to replace tipping which only benefited those who had personal contact with the customers like waiters and waitresses."

16. In the case of **National Union of Hotel, Bar & Restaurant Workers v. Federal Hotel Port Dickson Sdn. Bhd.** [1981] 1 ILR 300, the Industrial Court President The Honourable Mr. Justice Harun Hashim in the Interim Award No. 96 of 1981 decided on the service charge as follows:

" 9. The question then is whether it is proper, at this stage of the proceedings, to make an award as to service charge. It is an accepted practice in the hotel industry that the remuneration of hotel employees consist of wages and a share of the 10% service charge. We are also of the view that the Federal Hotel at Port Dickson belongs to that class of hotels where guests will normally expect to be charged the 10% service charge on their bills. We, therefore, can find no reason why the Company should not impose such a charge. "

17. The Industrial Court in the case of **Hotel Grand Central (KL) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers** [1982] 1 ILR 278 decided decided that Hotel Grand Central shall impose a 10% service charge on all bills and receipts as follows:

> "**ARTICLE 25 - SERVICE CHARGE**
>
> (a) The Hotel shall impose a ten percent (10%) gross service charge on all bills and receipts.
>
> (b) The Hotel shall retain 10% out of the 100% gross service charges. The remaining 90% gross service charges shall be fully distributed to all employees covered within the scope of this Award as per Appendix 'B'. "

18. In the case of **Hotel Grand Central (KL) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers** [1982] 2 ILR 99 the Industrial Court granted the the application under s. 33A of the Industrial Relations Act 1967 on the questions of law on service charge as follows:

> "**Question No: 5**
>
> **"Service Charge – Article 25**
>
> (a) Whether, having regard to the right of an employer to organize and manage his business, the Industrial Court was correct in law in directing that the Applicant "shall impose a 10% gross Service Charge on all bills and receipts".
>
> The objection here is that the Hotel's power of discretion has been removed and therefore the Award has interfered with the right of the employer to regulate his business.

> The Court had before it the Union's proposals and the Hotel's counter-proposals. It adopted the Union's proposals after argument. The result is a reduction of income of new employees. We are of the view that Question No: 5 complies with section 33A of the Act. "

19. The High Court in the case of **Hotel Grand Central (Kuala Lumpur) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers** (High Court Civil Appeal No: 32 of 1983) on 1 October 1985 dismissed the appeal on the questions of law and ordered that Award No: 125 of 1982 handed down by the Chairman of the Industrial Court of Malaysia on 19 June 1982 be upheld.

20. The Union's submits that the withholding of annual increment for late-coming is bad in law. In support of this proposition, the Union referred to the case of **Malaysia Milk Sendirian Berhad v. National Union of Drink Manufacturing Industry Workers** [1983] 2 ILR 382 at pages 385 and 386 where the Industrial Court decided that as a general principle increments should be granted automatically and cannot be withheld on grounds of inefficiency as follows:

> "The Company contended that the intention of this provision is to withhold the normal annual increment only for those employees who did not give satisfactory work performance. It was not intended to victimize or discriminate against any employee. We disagree with the Company's views, for where incremental scales have been established, the general principle is that increments should be granted automatically. They cannot be withheld on grounds of inefficiency – see case of *Syarikat Kenderaan Melayu (S.M.) Berhad v.*

Transport Workers Union (Award No. 32/67). They may be withheld for misconduct, in which case Section 14 of the Employment Act, 1955 must necessarily be invoked. For those reasons, we make no award on the Company's proposal."

THE HOTEL'S CASE AND SUBMISSIONS

21. **COW-1 (Khoo Hui Keam)** 36 years old is the Chief Operating Officer of Crystal Crown Hotel & Resort Sdn. Bhd. and her evidence-in-chief was produced as COWS-1. The Company manages the Crystal Crown Hotel Petaling Jaya which commenced operations in January 1995. The dispute is over the terms to be incorporated into the 1st Collective Agreement between the parties. The articles in dispute are Article 2 (duration and effective date), Article 10 (salary structure) and Article 12 (service charge). With regards to Article 2 COW-1 states in Question 5 that the impetus for the parties to enter into a collective agreement is to ensure compliance with the Minimum Wages Order 2012 effective 1 January 2013. COW-1 referred in Question 7 to Appendix A, COB, page 3 on the "Comparison Table Hotel's Current Cost against Hotel's New Cost." The affected employee's new remuneration package which incorporates a proposal allowance, indicates that he will not be worst off from what he is currently getting. Further, COW-1 states in Question 8 that apart from the yearly increments which take effect from January 2012, the Company provided for other adjustments. In February 2011, the Company accorded salary adjustment of between RM 65.00 to RM 200.00 to cater for increased cost of living. The

lowest paid employee who received RM 65.00 was earning RM 300.00 at that material time and hence received an adjustment of more that 20%.

22. COW-1 said in Question 15 that the service points is now shared by a smaller number and this would result in a disproportionately high value for each point to be enjoyed by the said 70 – 80 staff. Conversely, the remaining 40 – 50 staff who do not fall within the scope of the 1st Collective Agreement will receive a lesser take home pay as they will be deprived from being allocated service charge points. In order to ensure these categories of staff are no worse off and receiving comparable wages to their colleagues, the Company would be compelled to compensate them from its own pocket as the balance 10% collected is insufficient to cover these categories. In the event the practice of service charge is to be retained, then it cannot be limited to those who fall under the scope of the 1st Collective Agreement and proposed to revise Article 12(a) as follows:

> "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 and contract workers except managers, executives, part-timers, temporary and casual employees. For employees within the scope of this Agreement the service charge allocation shall be as set out in Appendix B. Employees and contract staff outside the scope of this Agreement shall not exceed the maximum service charge allocation in Appendix B."

Article 2: Effective Date of the Collective Agreement

23. The Hotel submitted that the effective date of the collective agreement should be from the date of the Award to ensure that there be a running period of 3 years and there is no basis for the collective agreement to have a retrospective effect *(Written Submissions, paragraphs 4 and 11).* The Hotel referred to the case of **Fima Bulking Services Sdn. Bhd. v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan** [1996] 2 ILR 1690 at page 1695 where the Industrial Court decided as follows:

> "The union has asked for a 15% increase with effect from 1 July 1993. However in calculating the increase in the cost of living the union had calculated the increase right to September 1995. Assuming for the moment it was right to take 1990 as the base year there is no justification to make the award effective from 1 July 1993 as the increase in cost of living has been calculated up to September 1995. In this case it will be fair not to backdate the award at all. Both parties have asked the Court to take into account factors which can affect the decision on salary revision that occurred up to 1996. The union had calculated the increase in CPI to 1995 and the company had asked the Court to consider the salary revisions granted in 1995 and 1996. Therefore on the issue the effective date of this award the Court rules that it will be effective from the date of the award."

Article 10: Clean Wage System

24. The Hotel submits in paragraph 12 that the Company has proposed the implementation of a clean wage system in relation to Article 10. The Hotel outlined the historical basis for service charge in the Written

Submissions, paragraphs 14 – 16. The Hotel industry in Malaysia has for decades practised a dual remuneration system consisting of basic pay/wages and service charge. Due to the fluctuating business and occupancy rates, a hotel could not afford the payment of a high salary as there would be periods of low occupancy and a high salary would be financially disastrous to the hotel. Due to these challenges, the concept of service charge was introduced. With the service charge, the basic wages would be kept low but the workers would be cushioned by the income they obtained from the service charge. With the increases of room rates and improved business, the value of each service charge point has increased drastically and it is not uncommon for workers to now receive more in service charge than their wages.

25. Service charge played an important role in the remuneration of the staff due to the low basic wages as reflected in the following cases. The Hotel referred to the case of **Hotel Grand Central (KL) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers** [1982] 2 ILR 99 where the Industrial Court decided as follows:

> "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 only entitled to a share of the service charge that is **actually** collected. Some hotels exempt the payment of service charge either on particular items or in respect of particular guests. The objection here is that the Hotel's power of

discretion has been removed and therefore the Award has interfered with the right of the employer to regulate his business."

26. The Hotel referred to the case of **Pudu Sinar Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia** [2002] 1 ILR 833 at page 836 where the Industrial Court decided as follows:

> "It is common knowledge that basic wages of employees of hotels and restaurants are low because the service charges are taken into account. It is a good system. It promote productivity. The better the service provided the more the employer receives by way of sales and employees are rewarded for the better service."

27. In the case of **National Union of Hotel, Bar & Restaurant Workers v. Sea View Hotel, Pulau Pangkor** [1980] 1 ILR 222 the Industrial Court decided as follows:

> "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 a proportion of 9:1 in favour of the employees who depend on that income, without relying any longer on tips from customers."

28. The Hotel's counsel highlighted COW-1 confirming that as employees' salaries are low, the service charge system was introduced to supplement their income and the staff are currently allocated between 2.5 to 4.0 service points *(Written Submissions, paragraph 20)*. With the advent of the Minimum Wages Order 2012 the issue of employees in the hotel industry still earning low wages no longer arises. The need for service charge to cushion

or supplement the basic wages become a non-issue *(Written Submissions, paragraph 21)*.

Minimum Wages Order 2012

29. Order 4 of the Minimum Wages Order 2012 provides that the minimum wages payable to an employee in Peninsular Malaysia is RM 900.00 a month. With such a high minimum wage, there is no longer any justification for the service charge system. The practice of the Industrial Court in the past whereby it would not disturb past practice is not applicable in this case as there is now the supervening factors i.e. the Minimum Wages Order 2012 which could not have been taken into account then *(Written Submissions, paragraphs 23 and 24)*. The Hotel submits that this Court is obliged to ensure that its decision will not only result in financial hardship to the Company but also to other hotels within the industry. The Court must ensure that the Award handed down is fair and equitable to all parties involved *(Written Submissions, paragraphs 28 and 29)*.

30. The High Court in the case of **Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor** [1998] 2 CLJ Supp. 53 decided that section 30(4) of the Industrial Relations Act 1967 in its terms by reason of the words "the Court shall have regard to..." in the section and hence obligatory and accordingly strict

compliance of its provision is called for and thus failure to adhere to the provision renders the impugned award erroneous in law. The relevant portion of the said decision is as follows:

> "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."

31. The High Court in the case of **Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan** [1998] 1 LNS 354 decided as follows:

> "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. This section is a statutory safeguard which the Industrial Court is obliged to have regard to in making the award relating to a trade dispute."

Equity Leans Against Double Portions

32. The Hotel submits that in the event that the staff are allowed to have their basic salaries increased to RM 900.00 a month and the staff are

allowed to retain their service charge points this would be in contravention of the maxim ***"equity leans against double portions"***, consistent with the established principle of unjust enrichment.

33. The Industrial Court in the case of **Talasco Insurance Sdn. Bhd. v. Mohd. Anuar bin Abu Kassim** [1991] 1 ILR 169 at page 176 decided as follows:

> "Broadly speaking computation of compensation should neither be too low nor too generous and a balance is required to be struck between the two competing claims. Compensation in each case will depend on the peculiar facts, circumstances and substantial merits of each of each case and assessed in accordance with equity and good conscience under s. 30(5) of the Act. This court therefore makes the following award, also bearing in mind the principle that equity leans against double portions."

34. The High Court in the case of **Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd** [2001] 8 CLJ 180 at page 187 decided as follows:

> "The Industrial Court applied the equitable principle that equity leans against double portions when making the two deductions earlier discussed. I think it is important to remind ourselves that a "workman cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers" the principle having been approved by the Court of Appeal.

35. The Hotel submits that *a fortiori*, the principle is applicable to the situation where an employee would be receiving double benefit that is the

increased salary following the Minimum Wages Order 2012 and the retention of the service charge points. The Court of Appeal in the case of **Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor** [2000] 3 CLJ 758 at pages 766 and 767 decided as follows:

> "The principles that govern an award of backwages are conveniently summarised in vol. 2 of the 4th edn of *The Law of Industrial Disputes* by Malhotra. It is a leading textbook on the subject. It is highly regarded by our courts. There is a useful passage at p. 961. It reads as follows:
>
> > A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful acts of the employers."

Service Charge is not Mandatory

36. The Hotel's counsel submits that contrary to the law that there must be a minimum basic wage, the payment of service charge is not required under any law. It is merely a practice and not a policy mandated by any legislation. The amount of the service charge to be paid is not contractual and the value allocated to each point is subject to the Company's discretion *(Written Submissions, paragraphs 43 and 44).*

37. The Hotel submits that in the event the Court is of the view that the practice of service charge should be maintained, the Court has the power

and jurisdiction to determine the manner of its imposition and the Court has the power to order such restructuring to enable the service charge (or part thereof) to be utilised to increase the basic salary of RM 900.00. The Industrial Court in the case of **Colgate Palmolve (M) Sdn Bhd v. Yap Kok Foong** [1998] 2 ILR 965 at page 978 decided as follows:

> "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 of 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."

38. The Court of Appeal in the case of **Colgate Palmolve (M) Sdn Bhd v. Yap Kok Foong & Another Appeal** [2001] 3 CLJ 9 set aside the High Court orders and the award of the Industrial Court in respect of each respondent is restored to file.

THE LAW

39. In the the case of **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran Semenanjung Malaysia v. Hotel Equatorial (M) Sdn Bhd** [2010] 2 ILR 463 at page 474, the Industrial Court was guided by the principles enunciated in the case of **Penfibre Sdn Bhd, Penang v.**

Penang & S. Prai Textile & Garment Industries Employees' Union [1986] 1 ILR 323 at page 329 as follows:

> "It is well established in Industrial Law that in deciding on the question of wage structure and wage increases, the court has to take into account the following factors:
>
> (a) Wages and salaries prevailing in comparable establishments in the same region;
>
> (b) Any rise in the cost of living since the existing wages or salaries were last revised; and
>
> (c) The financial capacity of the company to pay the higher wages/increases."

40. In the the case of **Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan v. Network Food Industries Sdn Bhd** [2013] 4 ILR 644 at page 663 where the Honourable President of the Industrial Court referred to the High Court decision in the case of **Sarawak Commercial Banks Association v. Sarawak Bank Employees' Union** [1990] 1 LNS 19; [1990] 2 MLJ 315 at page 319 as follows:

> "It is to be noted that the Act does not specify the formula for the computation on the rates of pay and the legislature thought it best to leave it to the Industrial Court to find the basis for such computation as can be seen from s. 30 (4) and (5) which read:
>
> (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."

Concept of service charge

41. The Industrial Court in the case of **National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. Masyhur Mutiara Sdn. Bhd.** [2014] 1 MELR 286 heard the complaint by the Union that the hotel in calculating the retirement benefits under Art. 27 cl. (b) (iii) had not taken into account the aggrieved retiree's entitlement to the service charge point. The Hotel contended that the aggrieved retiree could not claim the benefit of the service charge as it was not remuneration under her contract of service with the hotel. The Court outlined the concept of service charge at page 291 as follows:

"[4] Mr. Lim Chooi Phoe who appeared as a representative of the union recounted how service charge came to be introduced in Malaysia. He said that in the old days, the leading hotel in Kuala Lumpur was the Merlin hotel, which set the standard for other hotels. The hotel practised tipping and so did other hotels. But it was found that it was not very equitable as only the guest service employees benefited and other employees such as the cook did not receive anything although they had indirectly provided service to the guests. Hence the hotel introduced a more equitable collection system called the service charge. He said the concept was taken from France, where it was called "tronc" meaning a collection box. Thereafter the service charge was adopted by the other hotels and

today it has become the norm in the hotel industry. In point of fact, it has become a very important component of the wages paid to hotel employees.

[11] Before we proceed to determine the issues raised, we need to understand the concept of service charge. Prior to the introduction of the service charge as was stated earlier, the hotels practised the "tipping system". Under this system, the customer paid any amount he liked to show his appreciation and generosity and it was not mandatory. Hence, it was gratuitous in nature. Further, only a certain group of employees enjoyed the bounty. As the hotel industry modernised, a more equitable system was introduced which ensured a fair distribution of the customers' generosity to all employees irrespective of their duties. Today a fixed service charge (normally 10%) is levied on the customers' bills, which must be paid. The money is paid into a fund called the service charge fund. What started off as a trade practice has now been incorporated into collective agreements whereby 10% of the fund is taken by the hotel to defray the administrative costs incurred for the maintenance of the fund and the remaining 90% is distributed to the eligible employees in accordance with the service points allocation under the collective agreement. Hence the hotels today are contractually bound to make monetary payments to the employees based on their service charge points.

[12] The service charge system is unique to the hotel industry. We must note two important features of the system. One is that the money does not come from the employer but collected from the customers of the Hotel and put in a fund. The fund is jointly owned by the hotel and its employees. The second is that it is pure income for the employee and it is paid to the employee under his contract of service with the hotel.

[18] The case of *Peter Anthony Pereira (supra)* dealt with the issue of whether service charge was part of wages within the meaning of s. 2 of the Employees' Provident Fund Act 1951. The answer was in the affirmative. The government had to step in and pass the Employee's Provident Fund [Amendment] Act 1986 to exclude

service charge from the definition of wages under the said Act. The Privy Council put paid to the submission that the money from which the service charge points were paid did not belong to the hotel.

[19] In conclusion, the term "wages" under art 27 cl (b) of the Collective Agreement based on the reasoning of above authorities would mean basic wage plus the service charge points. It did not matter that the service charge collected by the hotel did not belong to it. What is material is that the aggrieved retiree's charge of the service charge collected by the hotel arose under her contract of service with the hotel and it was paid to her under the said contract as a reward for her services as a cook. Hence, it would be inequitable and unconscionable to now say that it was not remuneration under her contract of service with the hotel. "

Definition of "wages"

42. The definition of "wages" is found in section 2 of the Employment Act 1955 as follows:

"wages" means basic wages and 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 housing 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 of retirement; or

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

43. The words in section 2 of the Employment Act 1955 was explained succinctly by the Supreme Court in the case of **Lee Fatt Seng v. Harper Gilfillan (1980) Sdn. Bhd.** [1987] 1 MELR 25 at pages 27 and 28 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."

44. The Court of Appeal (David Wong JCA delivering judgment of the Court) in the case of **Funk David Paul v. Asia General Asset Bhd** [2014] 1 MLJ 681 at page 689 decided as follows:

> "Wages in our view is a term referring to payments for service or works rendered on a regular basis; hence we have the terms or saying "my weekly or monthly wages" in ordinary parlance. This meaning would explain the exclusion of (a) service charge (b)

overtime payment (c) gratuity or (d) retirement benefit from the definition of 'wages' in s. 2 wages is but one species of remuneration."

Decision

Article 2: Effective Date and Duration

45. The provision on the commencement of a collective agreement is found in s. 30 (7) of the Industrial Relations Act 1967 which reads as follows:

> "An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:
>
> > Provided that the retrospective date of the award may not, except in the case of a decision of the Court under section 33 of an order of the Court under section 56 (2) (c) or an award of the Court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the court."

46. The High Court in the case of **Sarawak Commercial Banks Association v. Sarawak Bank Employees' Union** [1990] 1 LNS 19; [1990] 2 MLJ 315 at pages 317 and 318 decided as follows:

> " For myself I would read the word 'may' as discretionary and at most, directory and I say so for the following reasons:
>
> (a) The restriction imposed on the power to make the award retrospectively is applicable only in respect of cases where the

parties do not agree on the effective date of the agreement. This is obvious as if the parties took time to settle the dispute on some substantial matters but agreed on the date of its implementation and thereby finally referred the dispute under s. 26(2) of the Act to the Minister of Labour late, then the whole scheme will be defeated especially in view of the fact that this agreement is to be a continuation of the previous agreement. In my view this will be in conflict with s. 30(5) which reads:

The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Here the Industrial Court has the power to make a retrospective order of the award though restricted to not earlier than six months from the date on which the dispute was referred to the Industrial Court. "

47. The Union referred to the case of **Bukit Jambul Hotel Development Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia** [2005] 2 ILR 927 where the Industrial Court decided as follows:

" Mr. Lim Chooi Phoe for the Union has argued that since the dispute was referred to the court by the Honourable Minister on 19 April 2004, then following the provisions of s. 30(7) the court cannot order a retrospective date earlier than six months from the date the dispute was referred. Thus the earliest date that can be given is 20 October 2003. And here the Union has asked for an effective date from 1 November 2003 to 31 October 2006.

Where the ideal situation does not materialise, a situation will arise where the court will have to determine the effective date of the new

collective agreement. In so doing the court is bound by the provision of s. 30(7) of the Industrial Relations Act 1967.
This case is not one that falls within the exception to the proviso to s. 30(7) of the Industrial Relations Act 1967. As the date of the Ministerial Reference is 19 April 2004, then, to keep within the time frame provided in that section the court cannot order a retrospective date any earlier than 20 October 2003.

In coming to a decision as regards the effective date the court has considered the company's arguments for a prospective implementation date. The court has carefully weighed the merits of such argument, namely greater stability in the relationship between the parties and computational difficulties *vis-a-vis* the rights of the workmen to have a new collective agreement in force upon the expiry of the previous one. The court has also considered that a prospective implementation date may also have the undesired effect of making it unattractive and acting as a disincentive for the hotel to speedily conclude negotiations for a new collective agreement. "

48. The Industrial Court in the case of **National Union of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn. Bhd., Penang** [1981] MLLR 233 decided as follows:

> "Be that as it may, once the dispute is referred to us the Court is bound by the provisions of Section 30(7) IRA which limits backdating to not more than six months from the date of reference by the Minister."

49. The Hotel had averred in paragraph 2 of the Statement in Reply that since this is the first Collective Agreement with the Union, the effective date be from the date of the Award. The Union submits for the first Collective Agreement between the Union and the Hotel to commence from **1 October**

2011 even though the Ministerial Reference was dated 16 February 2012. The Court take cognisance of the Union's submissions in paragraph 3.8 that "the parties have amicably resolved all the articles except Articles 2, 10 and 12 and if the effective date is prospective, then the employees will not benefit on the leave and allowances agreed upon." The Hotel's counsel in paragraph 7 of the Submissions in Reply reiterated that "the Company had been constantly adjusting the salaries during the interim period. In line with the foregoing, there are no arrears for which a retrospective date is intended to cover". The Court had considered both the submissions by the Union's representative and the Hotel's counsel on Article 2 (a) in respect of the Effective Date and Duration. Accordingly, the decision made would be in the best interest of the parties and it augurs well for industrial harmony between the Union and the Hotel to have the effective date retrospective commencing from 1 October 2011 within the purview of section 30(7) of the Industrial Relations Act 1967.

50. **Article 2 (a)** shall read as follows:

> This Agreement shall be deemed to have come into force on 1st October 2011 and shall continue to remain in force until 30th September 2014 and thereafter unless superseded by a new collective agreement or award.

Article 10: Salary Structure

51. The Court agrees with the Union's proposal in respect of Article 10 Salary Structure Clauses (a) to (f).

Article 10: Salary Structure

Clause (a) With effect from 1st October 2011 every employee shall be given an immediate increment of ten percent (10 %) of his basic salary as at 30th September 2011, rounded off to the higher Ringgit.

Clause (b) New employees who join the Hotel on or after 1st October 2011 shall follow the salary structure as per Appendix A, except part-timers, temporary, casual and retired employees.

Clause (c) In the event of a creation of a new position which is within the Scope of this Agreement, the Hotel together with the Union shall negotiate on the salary and **service charge points** pertaining to such position.

Clause (d) **Annual Increment**

An employee shall be entitled to his annual increment on his anniversary date of employment as follows:

(i) An employee drawing less than RM400.00 basic salary per month, shall be entitled to RM40.00 annually;

(ii) An employee drawing RM400.00 basic salary per month or more but less than RM500.00 basic salary per month, shall be entitled to RM45.00 annually;

(iii) An employee drawing RM500.00 basic salary per month or more but less than RM600.00 basic salary per month, shall be entitled to RM50.00 annually;

(iv) An employee drawing RM600.00 basic salary per month or more but less than RM700.00 basic salary per month, shall be entitled to RM55.00 annually;

(v) An employee drawing RM700.00 basic salary per month or more shall be entitled to RM60.00 annually.

Clause (e) With effect 1 October 2013, every employee shall follow the salary structure correspondingly as per Appendix B except part-timers, temporary, casual and retired employees.
(Appendix B is annexed herewith)

Clause (f) **Annual Increment**

An employee shall be entitled to his annual increment on his anniversary date of employment commencing from 1 October 2013 as follows:

Basic Salary		**Annual Increment**
Less than RM 1200	-	RM 60
RM 1200 to less than RM 1400	-	RM 70
RM 1400 to less than RM 1600	-	RM 80
RM 1600 to less than RM 1800	-	RM 90
RM 1800 and more	-	RM100

52. The Minimum Wages Order 2012 came into effect from 1 January 2013 with the implementation of the rate of the minimum wages of RM 900.00 a month in Peninsular Malaysia. Since the Hotel is a member of the Malaysian Association of Hotels, the date of implementation commences on 1 October 2013 under the Minimum Wages (Amendment) Order 2012.

Salary adjustments

53. In relation to Article 10 on the salary structure, COW-1 states in Question 6 on the quantum of the salary adjustment to be imposed whereby the Company proposed salary scale indicating a total of 18 steps (Appendix B, COB, page 1) based on the fact that this is only the 1st collective agreement and the Hotel has only been in operation for about 17 years. It is the Union's contention that in paragraph 4.54, Written Submissions that Article 10 Clause (e) read with Appendix B is in line with the Minimum Wages (Amendment) Order 2012 and the Union is seeking a 20-steps salary structure.

Annual Increments

54. Article 10 Clause (f) Annual Increment: The Union's proposed annual increment corresponds with the Hotel's proposal of 5%. The annual increment is being calculated on the same breadth with Appendix B which sets forth the minimum wages of RM 900.00 with a graduated salary structure of 20-steps as annual increment is paid as an added value to the employee's skill and experience.

55. The Industrial Court in the case of **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia v. Kampung Tok Senik Resort Sdn Bhd (Kampung Tok Senik Resort**

Langkawi) [2012] 2 LNS 0787, Award No. 787 of 2012 at pages 3 and 4 decided as follows:

> "The court after carefully perusing the contentions put forward by both parties, unanimously agreed with the Union's argument that the annual increment should be paid as an added value to the employee's skill and experience and not based on the company's profit. In this matter the court refers to the case of *Langkawi Island Resort Sdn Bhd Kedah v. National Union of Hotel, Bar & Restaurant Workers* (1988) 1 ILR 460 at page 465 whereby Industrial Court held as follows:
>
> > We also tend to agree with the Union's contention that the Company's counter proposal, on the manner in which annual increment was granted, was against the principles of granting annual increment as annual increment is given as an added value to employee's skill and performance if it is to be granted based on Company's profit, then it is not annual increment but a kind of incentive based on profits."

Service Charge

56. **Article 12: Service Charge** reads as follows:

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 A, except part-timers, temporary, casual and retired employees.

Clause (b) The Hotel shall furnish to the Union Head Office not later than the seventh (7^{th}) day of the following month, a copy of the monthly statement of accounts of the service charge of the preceding month and to extend the same to the House Committee as follows:

(i) The total service charge for each outlet;
(ii) The grand total service charge;
(iii) The total number of service charge points of the employees;
(iv) The total number of service charge points increased or decreased;
(v) The value of service charge per point;
(vi) The names, designation, department, date of employment and individual service charge point together with the individual value.

Clause (c) The Union shall have every right to check and inspect all accounting books, bills, documents or accounts relating to the 10% service charge of any period of time on serving seven (7) days written notice.

Clause (d) The service charge points shall on no circumstances whatsoever be deductible when an employee is on any type of paid leave.

57. **COW-1** explained the basis for the service charge system (Question 10) and states as follows: "As the employees' salaries are low, the service charge system was introduced to supplement their income. As a result the system is implemented Across The Board and is not performance linked. This is why even the back room staff are allocated the service charge points even though they do not deal directly with the Hotel's guests but indirectly contribute to the service to our guests. To purport that service charge is connected to motivation is a fallacy and without basis. Even though it is not disputed that the service charge system had been introduced into the Hotel from the beginning, it is not the entitlement of the staff. The Company's proposal for a clean wage system will not result in the affected staff being worst off that they are now." COW-1 states in

Question 11 that the conversion to a clean wage system would stabilise the employees remuneration. The same levels of take home pay cannot be maintained for the staff as the service charge system is dependent in part on the Hotel's income. The clean wage system whereby the basis salary is maintained will serve to protect the staff from any drastic changes. On the value allocated to each service point, based on COB, page 28 "Service Charge Point For The Years 2006 – 2012" the overall average is RM 339.48 per service point. The Company had topped up the average to RM 355.00 as indicated in Appendix A, COB, page 3 (Question 12).

58. In arriving at a fair and just decision in respect of Article 12, this Court revisits the Offer of Employment letter of Ahmad Faisal Ismail (UW-1) dated 29 October 2008 exhibited in UB, page 2 employed as a Housekeeping Attendant assigned to work at Crystal Crown Hotel Petaling Jaya commencing from the even date and the relevant extract of the letter in respect of the service charge as one of the essential and fundamental terms and conditions are as follows:

> "*Further to your employment and subsequent interview, we are pleased to offer you employment with Crystal Crown Hotels & Resorts Sdn. Bhd. on the following terms and conditions:*
>
> ***4. Salary***
> *Your salary will be* ***RM300.00*** *with* ***2.5*** *service charge points per month and subjected for review periodically. "*

59. The Court is of a unanimous decision that the fundamental terms and conditions on the salary with service charge points per month as offered in the Offer of Employment letter of UW-1 cannot be unilaterally changed and that the Hotel is bound by the fundamental terms of his contract of service on his salary plus service charge. In the case of **Yee Lee Corporation Bhd. v. Mohd Rashid Abd. Karim** [1997] 1 ILR 771 at page 776, the Industrial Court decided as follows:

> "In *Tractors Malaysia v. Kesatuan Pekerja-pekerja Perdagangan Sabah* (Award 176/85) it was held, "It is important that the essential and fundamental terms ... are spelt out clearly in the first instance in the letter of appointment. These terms must be communicated to the employee to be binding upon him. Such important and fundamental terms cannot be implied in the letter of appointment."

Share of service charge (Allocation of service charge)

60. In paragraph 6 of the Amended Statement in Reply, the Hotel stated that should the Court decide that the service charge system and not the clean wage system is to be implemented, the Hotel shall retain 10% of the 100% service charge imposed on all bills monthly and as a matter of *ex abundanti cautela* the Union will just respond as reflected in the Written Submissions in paragraph 5.4. In the case of **National Union of Hotel, Bar & Restaurant Workers v. H.M. Shah Enterprises Sdn. Bhd** [1981] 1 ILR 192 the Industrial Court decided on the share of service charge that the proportion of 9:1 is now the standard in the hotel industry as follows:

" **2. Share of service charge:**

The Union claimed that the service charge should be divided in the proportion of 9:1 whereas the Company said that the share should be 7:3. The Court is of the view that the proportion of 9:1 is now standard in the hotel industry and it should apply to this Company also. "

61. In the case of **Bukit Jambul Hotel Development Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia** [2005] 2 ILR 927 at page 943, the Industrial Court decided as follows:

" The court is of the view that the ratio of 9:1 should, unless for good and cogent reasons, be maintained. Over the years this has become the norm in the hotel industry. Even before the landmark case of *Hotel Equatorial (M) Sdn. Bhd. v. Thomas George MJ George (Rayuan Sivil No. R2-16-6-95)* it had become somewhat accepted that the compensation package would be boosted by the service charge factor. The minimum wage for the various groupings as seen in Appendix B is pitifully small and unless complemented by the service charge element would be woefully inadequate.

Since the court of appeal has decided, *inter alia*, that service charge is a part of wages, it does not behove this court to decide that a portion of that wages should be given to the employer so that they can, in turn, use it to pay the employees. "

62. The High Court in the case of **Bukit Jambul Hotel Development Sdn. Bhd. (Hotel Equatorial Penang) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia & Mahkamah Perusahaan Malaysia** (Semakan Kehakiman No. R2-25-146-

2005) heard the application for an order to quash the decision of the Industrial Court in relation to: (i) service charge (Article 12) that is the ratio of 9:1 for the distribution of service charge is to be maintained and (ii) service charge points allocation (Appendix C) that the existed service charge points allocation on a graduating scale should be maintained. The High Court dismissed the application to quash the decision of the Industrial Court at pages 12 and 13 as follows:

> " As pointed out by counsel for the 1st Respondent COW 1 has further admitted during cross-examination that with the 7:3 ratio, an employee stands to lose out by 20%. He had this to say:-
>
> > "Yes, we are proposing to take 30%, but only initially. The rest is to refunded.
> >
> > The average is RM400 per point on the basis of 9:1. A 20% drop from RM400 = RM320 per point. So, the banquet supervisor with 3.5 points will lose RM260.00 per month".
>
> From the evidence I am of the same view with the Industrial Court Chairman that unless the terms proposed by the Applicant are more favourable the existing ratio should be maintained so as to maintain industrial harmony. I also find that the Industrial Court was correct in its decision that 9:1 ratio is the norm in the hotel industry. "

63. Since a collective agreement can only apply to employees within the scope of the collective agreement, it cannot be made to apply to employees who are outside the scope of the collective agreement. In **Hotel Continental (Penang) Sdn. Bhd v. National Union of Hotel, Bar &**

Restaurant Workers [1984] ILR 34 at pages 34 and 35 the Industrial Court decided as follows:

> "Award 36/83 made two changes in the allocation of the service charge viz:
>
> (a) The Hotel was allowed to retain only 10% of the service charge collected; and
>
> (b) The remaining 90% of the service charge collected is to be distributed to employees who are within the scope of the Award only.
>
> The Union's complaint is that the Hotel continued to pay shares of the service charge to employees in the executive, confidential and security capacities after 1 March 1983.
>
> We find that that was done by agreement between the parties. We doubt, however, whether it was proper since a collective agreement can only apply to employees within the scope of the collective agreement. It cannot be made to apply to employees who are outside the scope of the collective agreement and more particularly to employees who by section 9 of the Industrial Relations Act, 1967 are specifically excluded (prohibited) from the scope of such agreements: see also Award 88/82. Be that as it may, we find that Award 36/83 has not included these categories in a share of the service charge pool with effect from 1 February 1983."

64. The Industrial Court in the case of **Hotel Perdana Sdn. Bhd., Kota Bharu, Kelantan v. National Union of Hotel, Bar & Restaurant Workers** [1984] ILR 748 at page 752 decided as follows:

> "The issue of whether or not employees outside the scope of the Award should be given a share of the service charge has already

been discussed and determined in (1) *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* **(Award No. 88/82)**; (2) *Hotel Continental (Penang) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* **(Award No. 217/82)**. In **Award No. 88/82**, the Court at paragraph 6 said:-

> "The Company says that the Award is discriminatory in that it excludes 51 categories of employees of the Hotel from a share of the service charge. An Award on terms and conditions of employment, is, in fact, in lieu of a collective agreement. It follows that the employees bound by an award could only be employees who could be bound by a collective agreement. Section 9 of the Act excludes employees in managerial, executive, confidential and security capacities. The 51 categories of employees excluded by the Award belong to the Section 9 categories. As the exclusion is by law, it cannot be said to be discriminatory. It may well be that it is desirable in the interests if productivity that the excluded employees be given incentives but that is not the concern of a collective agreement or award in lieu thereof."

And in **Award No. 271/82**, the Court also held that the provisions of a collective agreement/award can only apply to employees within the scope of the collective agreement or award. In paragraph 3 of the Award, the Court said:-

> "The Hotel's explanation is that it was continuing the old practice which was in existence since 1970 with the full knowledge and consent of the Union. In fact, the Court in Award 114/77 after excluding employees in managerial,executive, confidential and security categories from the provisions of the 1977 collective agreement between the parties allowed those categories to continue receiving their share of the service charge pool. We find that that was done by agreement between the parties. We doubt, however, whether it was proper since a collective agreement can only apply to employees within the scope of the collective agreement. It cannot be made to apply to employees who are

outside the scope of the collective agreement and more particularly to employees who, by Section 9 of the Industrial Relations Act, 1967, are specifically excluded (prohibited) from the scope of such agreement: See also Award 88/82".

We reiterate the reasoning in **Award No. 88/82** and **Award No. 217/82** and accept the Union's contention that only employees within the scope of the Award are entitled to a share of service charge. And we so order accordingly. "

65. In the case of **Riviera Bay Resort & Condo Management Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia** [2004] 2 ILR 326, the Industrial Court decided as follows:

" This was a trade dispute between the union and the hotel over the terms and conditions of employment to be incorporated into the first collective agreement for workmen within the scope of the collective agreement. The focus was limited to arguments and considerations of two disputed articles: art. 2 (effective date and duration) and art. 12 (service charge) in the agreed collective agreement.

Held [award handed down]:

[2] Under the union's proposed art. 12, the hotel would retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% would be fully distributed to all employees covered under the agreement. On this issue, there was no reason to depart from previous awards where it was ordered that the hotel be allowed to retain 10% whilst the remaining 90% to be distributed to those employee within the scope of the collective agreement. Thus art. 12 of the agreed collective agreement was accepted and accordingly adopted. "

66. In the case of **Riviera Bay Resort & Condo Management Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia** [2004] 2 ILR 326 at page 332, the Industrial Court decided as follows:

> " Under the proposed art. 12, the hotel would retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% would be fully distributed to all employees covered within the scope of the agreement.
>
> The hotel's objection to art. 12 as it stands stems from the fact that management and executive groups had been given the benefit of the service charge. Fadzil had submitted that if the service charge were excluded from being given to these two groups it would cause financial hardship to the company.
>
> In response Lim Chooi Phoe for the union had argued that s. 9(1) of the Industrial Relations Act 1967 does not allow the union to seek recognition for those outside its scope especially in this case, those employees employed in a managerial and executive capacity. It was also pointed out that the hotel had started giving the service charge to those outside the scope of the proposed collective agreement from July 2002 and not from the time the hotel had started operations. This is a relevant factor as the hotel would have known from the commencement of negotiations in early 2001 that following s. 9(1) of the Act, those employed in a managerial or executive capacity would have been outside the scope of any proposed agreement and would not have been entitled to that portion of the service charge meant for the distribution to employees within the scope of the agreement. "

CONCLUSION

67. In conclusion, the Court in handing down the Award is unanimous in its decision having taken into account the totality of the submissions by both parties and bearing in mind section 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. The Court in making its decision has been guided by the principles in section 30(4) of the Industrial Relations Act 1967 having regard to the public interest, the financial implication and the effect of the Award on the economy of the country and on the industry concerned and also the probable effect in related or similar industries.

HANDED DOWN AND DATED THIS 18 JULY 2014.

(EDDIE YEO SOON CHYE)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA
KUALA LUMPUR

ARTICLE 1 PARTIES TO THE AGREEMENT

The parties bound by this Agreement are Crystal Crown Hotel & Resort Sdn Bhd. trading as Crystal Crown Hotel Petaling Jaya having its registered office at No: 12, Lorong Utara A, Off Jalan Utara, 46200 Petaling Jaya (hereinafter referred to as 'the Hotel') and its successors, assignees or transferees of the one part and the National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia, having its registered office at 44-4C, Jalan Sultan Ismail, 50250 Kuala Lumpur (hereinafter referred to as 'the Union') of the other part.

ARTICLE 2 EFFECTIVE DATE AND DURATION

DISPUTED

ARTICLE 3 LEGISLATION

Clause (a) In the event of any legislation being introduced which is less favourable than those benefits in this Agreement, then the benefits in this Agreement shall continue to remain in force.

Clause (b) If the benefits in the legislation are more favourable than those in this Agreement, then the provisions of the legislation shall supersede the benefits in this Agreement.

ARTICLE 4 SETTLEMENT OF DISPUTE

Clause (a) Recognising the value and the importance of the full discussion in clearing up misunderstanding and every reasonable effort to preserve harmony, the Hotel and the Union shall dispose of any complaint from the employee at the lowest possible level.

Clause (b) The following procedure shall be followed in dealing with any complaint save interpretation, variation or of non-compliance with this Agreement.

Clause (c) Any grievance or complaint which is wilfully not presented by an employee to his Departmental Head within fourteen (14) days of the occurrence on the alleged grievance or complaint shall be considered as null and void.

Stage 1 Any employee alleging that he has any complaint may immediately lodge it with his immediate Superior or Department Head.

Stage 2 If within three (3) days, no solution has been resolved to the satisfaction of both parties, the matter shall be referred to the

Human Resources Manager and the employee shall be represented by the House Committee.

Stage 3 — If within five (5) days, no solution has been resolved with the Human Resources Manager, the Union and its Branch shall step in together with the House Committee and the employee concerned to resolve the matter with the General Manager.

Stage 4 — If no solution results within seven (7) days, the matter may then be referred to the Department of Industrial Relations, Ministry of Human Resources for conciliation or mediation.

ARTICLE 5 RECOGNITION AND SCOPE OF AGREEMENT

Clause (a) — The Hotel recognises the Union as the exclusive bargaining principal in respect of and on behalf of such categories of employees who are eligible for membership thereof employed by the Hotel excluding the following:

(i) Managerial employees
(ii) Executive employees
(iii) Confidential employees
(iv) Security employees
(v) Probationary employees on their first appointment

Clause (b) — The Union recognises the rights of the Hotel to operate its business and that the members will cooperate with the Hotel in working for the advancement of the Hotel's business. However, the Hotel in the exercise of its rights to manage its business shall not violate any of the express or implied terms of this Agreement, nor shall it be used to victimize any of the members of the Union.

Clause (c) — Non-Union members who are within the Scope of this Agreement, shall not in anyway whatsoever be entitled to better or more favourable benefits than Union members.

ARTICLE 6 CHECK OFF

To be removed

ARTICLE 7 UNION'S NOTICE BOARD

The Hotel shall provide at its expense a Union Notice Board together with lock and key at a suitable place.

ARTICLE 8 **PROBATION AND CONFIRMATION**

Clause (a) An employee who is engaged for employment by the Hotel shall serve a probationary period of not exceeding three (3) months and this period may be extended to not exceeding one (1) month.

Clause (b) An employee shall be notified in writing by the Hotel not later than the seventh (7^{th}) day of completing his probationary period, initial or extended, whether he has been confirmed or not. If the Hotel fails to notify him within the stipulated duration, he shall be deemed to have been confirmed.

Clause (c) On confirmation of a probationer, his service with the Hotel shall be deemed to have commenced from the date of his first appointment as a probationer and he shall be deemed to have emplaced on the salary structure applicable to confirmed employees with effect from that date.

ARTICLE 9 **NOTICE OF VACANCY AND PROMOTION**

Clause (a) The Hotel shall affix on the Staff Notice Board seven (7) days in advance of all vacancies it intends to fill.

Clause (b) The policy for promotion from the lower post to the higher post shall be based from the lower salary to the higher salary and shall be from within. In the event of an existing employee is found unsuitable, the vacancy may then be filled from without.

Clause (c) An employee selected for promotion shall serve a trial period of not exceeding three (3) months. If he is not confirmed in the higher post, he shall be reverted to his previous post with the same salary and service charge points prior to his promotion.

Clause (d) An employee shall be notified in wiring by the Hotel not later than the seventh (7^{th}) day of completing the trial period whether he has been confirmed or not. If the Hotel fails to notify him within the stipulated duration, he shall be deemed to have been confirmed.

Clause (e) The annual incremental date of the employee shall be on 1^{st} January of each year, which shall not be affected in anyway whatsoever by his promotion.

Clause (f)

(i) On promotion, if an employee's last drawn basic salary is less than the minimum salary of the higher post, he shall be paid the minimum salary of the higher post or two (2) annual increments of his present salary prior to his promotion, whichever is greater.

(ii) An employee who is currently earning a similar or higher salary than the minimum of the higher post, shall be entitled to two (2) annual increments of the higher post.

ARTICLE 10 **SALARY STRUCTURE**

DISPUTED

ARTICLE 11 **ANNUAL BONUS**

The Hotel may at its discretion pay an annual bonus at the end of each financial year.

ARTICLE 12 **SERVICE CHARGE**

DISPUTED

ARTICLE 13 **FESTIVAL SALARY ADVANCE**

The Hotel shall pay salary advance seven (7) days before Chinese New Year, Hari Raya Puasa, Christmas or Deepavali to employees celebrating that particular festival and if the festival occurs within the fifteenth (15^{th}) day of the month, one-half month basic salary shall be paid and if the festival occurs on or after the fifteenth (15^{th}) day of the month, a salary advance equivalent to one (1) month's basic salary shall be paid.

ARTICLE 14 **HOURS OF WORK**

Clause (a) The total normal hours of work per week inclusive of one (1) hour meal break per day, shall be as follows: -

(i) forty-four (44) hours in respect of clerical and administrative employees; and

(ii) forty-eight (48) hours in respect of other categories of employees.

Clause (b) An employee shall not be required to work more than one (1) straight shift or one split shift within a period of 24 hours beginning from the time of commencement of the last shift.

ARTICLE 15 **OVERTIME**

Clause (a) In addition to his ordinary rate of pay for that day, an employee who works in excess of the normal hours of work, shall be paid one and half (1½) times his hourly rate of pay or Ringgit Malaysia Three (RM3.00) per hour whichever is greater.

Clause (b) The minimum overtime shall be one hour and part thereof shall be calculated to the nearest higher hour.

ARTICLE 16 **WEEKLY REST DAY**

Clause (a) Every employee shall be entitled to a rest day in each week as follows :

(i) thirty (30) hours for employees on shift work; and

(ii) twenty-four (24) hours for employees on non-shift work.

Clause (b) A duty roster with every particular recorded therein including the rest days of each and every employee shall be posted up in a conspicuous place in the Hotel seven (7) days before the commencement of the month.

Clause (c) An employee who works on a rest day regardless that the period of work is less than his normal hours of work on that day, shall be paid two (2) days' wages at his ordinary rate of pay.

Clause (d) An employee who works in excess of his normal hours of work on a rest day, shall be paid two (2) times his hourly rate of pay or Ringgit Malaysia Three and Sen Fifty (RM3.50) per hour whichever is greater.

ARTICLE 17 **PUBLIC HOLIDAYS**

Clause (a) Every employee shall be granted thirteen (13) paid public holidays in each calendar year as specified below at his ordinary rate of pay as gazetted by the State or Federal Government.

(i) Birthday of the Yang Di Pertuan Agong
(ii) Selangor Sultan's Birthday
(iii) National Day
(iv) Labour Day

(v) Malaysia Day
(vi) New Year's Day
(vii) Chinese New Year (2 days)
(viii) Hari Raya Puasa (2 days)
(ix) Deepavali
(x) Maal Hijrah; and
(xi) Christmas.

In addition to the above, any day declared as a public holiday under Section 8 of the Holidays Act 1951.

All clerical and administrative employees shall be entitled to all paid public holidays as gazetted by the State or Federal Government in any one calendar year.

Clause (b) The Hotel is prohibited from substituting the public holidays of (a) (i) to (v) for any other day;

Provided that by agreement between the Hotel and the employee, any other day may be substituted for the remaining gazetted public holidays.

Clause (c) An employee may be required by the Hotel to work on any of the public holidays as specified above, and in such event he shall, in addition to the holiday pay he is entitled to for that day, be paid two (2) days' wages at his ordinary rate of pay regardless that the period is less than his normal hours of work on that day.

Clause (d) An employee who works in excess of his normal hours of work on any of the public holidays, shall be paid three (3) times his hourly rate of pay.

Clause (e) If any of the specified public holidays falls on a rest day, the employee shall be granted the working day following immediately thereafter as a paid holiday in substitution therefor.

Clause (f) If any of the specified public holidays or any other days substituted therefor falls within the period during which an employee is on sick leave, annual leave or during the period of temporary disablement under the Employees Social Security Act, the employee shall be granted another day as paid holiday in substitution therefor.

Clause (g) If any two of the specified public holidays coincide and falls on the same day, the employee shall be granted another day as a paid holiday in substitution therefor.

ARTICLE 18 **ANNUAL LEAVE**

Every employee shall be entitled to paid annual leave as follows :

Clause (a) An employee who has completed less than two years service, shall be entitled to eight (8) working days.

Clause (b) An employee who has completed two years service or more but less than five years service shall be entitled to twelve (12) working days.

Clause (c) An employee who has completed five years service or more shall be entitled to seventeen (17) working days.

Clause (d) Every employee shall apply for his annual leave seven (7) days in advance and the Hotel shall notify him in writing within four (4) days of receiving his application whether his annual leave has been approved or otherwise. If the Hotel fails to notify him within the stipulated duration, his annual leave shall be deemed to have been approved. The Hotel shall make every effort to grant him annual leave and shall not unreasonably reject his application.

Clause (e) An employee who is on paid annual leave becomes entitled to sick leave or maternity leave while on such annual leave, shall be granted the sick leave or the maternity leave, as the case may be, and the annual leave shall be deemed to have not been taken.

Clause (f) The paid annual leave to which an employee is entitled, shall be in addition to his rest days and public holidays.

ARTICLE 19 **MATERNITY LEAVE**

Clause (a) Every female employee shall be entitled to paid maternity leave of two (2) months' wages for a period of not less than sixty (60) consecutive days in respect of each confinement.

Clause (b) The maternity leave may commence from any day within a period of thirty (30) days in immediately preceding her confinement or not later than the day immediately following her confinement:

Provided that by certification by the Hotel's appointed doctors, any registered medical practitioner or medical officer as determined in advance, the female employee as a result of her advanced state of pregnancy is unable to perform her duties

satisfactorily, may be required to commence her maternity leave at any time during a period of fourteen (14) days preceding her confinement.

Clause (c) A female employee shall within a period of sixty (60) days immediately preceding her expected confinement notify the Hotel of it and the date from which she intends to commerce her maternity leave.

Clause (d) Leave of absence from work owing to any illness or miscarriage prior to the twenty-eight (28^{th}) week of her pregnancy shall be considered as normal sick leave.

Clause (e) If a female employee commences her maternity leave of sixty (60) consecutive days and dies during this period, her wages calculated from the day she commenced her maternity leave to the day immediately preceding her death, shall be paid to her nominee, or if no nomination has been made, to her personal representative.

ARTICLE 20 MATRIMONIAL LEAVE

Every employee shall be entitled to:

Clause (a) Three (3) working days as paid matrimonial leave on the occasion of his first legal marriage whilst in the service with the Hotel.

Clause (b) One (1) working day as paid matrimonial leave in each calendar year on the occasion of the marriage of his children.

Clause (c) In addition to his matrimonial leave, and where any of the specified public holidays falls on his matrimonial leave, shall be granted an immediate extension of each day of the paid public holiday.

ARTICLE 21 PATERNITY LEAVE

Every employee shall be entitled to one (1) working day as paid paternity leave for each birth by his first legal wife. Such leave shall be confined to five (5) children only.

ARTICLE 22 BEREAVEMENT LEAVE

Every employee shall be entitled to:

Clause (a) On the death of his parents, spouse or children, the paid leave shall be three (3) working days for each death.

Clause (b) On the death of his brother, sister, parents-in-law, grand-parents, the paid leave shall be two (2) working days for ach death.

Clause (c) In addition to his bereavement leave, and where his annual leave or any of the specified public holidays falls on his bereavement leave, shall be granted an immediate extension of each day of his annual leave or paid public holiday, as the case may be.

ARTICLE 23 PAID LEAVE FOR TRADE UNION COURSES

Clause (a) An employee nominated by the Union to attend Trade Union Courses organised by the Union, Malaysian Trades Union Congress, National Productivity Corporation or the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (I.U.F.), shall be granted leave without abatement of wages:

Provided that:

(i) the Union notifies the Hotel in writing of one (1) week before the commencement of such courses;

(ii) not more than two (2) employees are away from the Hotel on such courses at any one time; and

(iii) such paid leave shall not exceed a total of five (5) days in each calendar year.

ARTICLE 24 SICK LEAVE AND HOSPITALISATION

Clause (a) Every employee shall after being examined and certified by the Hotel's appointed doctors or, if having regard to the nature or circumstances of the illness, the services of the Hotel's appointed doctors are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer, be entitled to paid sick leave in each calendar year at the Hotel's expense as follows:

(i) An employee who had completed less than two years' service, shall be entitled to fourteen (14) working days;

(ii) An employee who has completed two (2) years service or more but less than five (5) years service, shall be entitled to eighteen (18) working days;

(iii) An employee who has completed five (5) years service or more, shall be entitled to twenty-two (22) working days.

Clause (b) In addition to the sick leave provided for above, an employee shall be entitled to sixty (60) working days without abatement of wages if hospitalization is necessary.

Clause (c) An employee shall also be entitled to paid sick leave after examination by a dental surgeon as defined in the Dental Act, 1971.

Clause (d) An employee who is certified by the Hotel's appointed doctors, any registered medical practitioner or medical officer to be ill enough to be hospitalized but is not hospitalized for any reason whatsoever, shall be deemed to be hospitalized for the purpose of this Article.

Clause (e) An employee who has been recommended by the Hotel's appointed doctors, any registered medical practitioner or medical officer, shall be entitled to hospitalization as per the Hotel's hospitalization policy. (Appendix)

Clause (f) The Hotel shall not be liable for:

(i) Medical, surgical or other appliances;
(ii) Dentures or dental treatment
(iii) Spectacles, lenses or optician's fees;
(iv) Expenses incurred as a result of confinement, pregnancy, miscarriage, illness or disease arising from misconduct or exposure to any unjustifiable hazards;
(v) Expenses incurred as a result of proven attempted suicide, injury arising from the performance of any unlawful act, provoked assault or breach of peace except endeavouring to save human life;
(vi) Treatment arising from the unlawful use of drugs and narcotics, venereal disease;
(vii) Expenses incurred for the treatment of any mental illness;
(viii) Participation or attending hazardous sports, pursuits or past time of their own; and
(ix) Treatment or medicine as a result of excessive consumption of alcohol on the part of the employee.

ARTICLE 25 **DEATH IN SERVICE**

Clause (a) If an employee dies whilst in the service with the Hotel, he shall paid in accordance with the Hotel's insurance policy (Appendix)

Clause (b) The payment shall be made to his nominee, or if no nomination has been made, to his personal representative upon production of the Letter of Administration from such personal representative.

ARTICLE 26 **SPLIT SHIFT ALLOWANCE**

TO BE REMOVED

ARTICLE 27 **RETRENCHMENT AND RETRENCHMENT BENEFITS**

Clause (a) An employee who is terminated for retrenchment by reasons of redundancy shall be entitled to retrenchment benefits as follows:

(i) Ten (10) days wages for every year of service if he has served less than two (2) years of service;

(ii) Fifteen (15) days wages if he has served two (2) years or more but less than five (5) years of service;

(iii) Twenty-five (25) days wages if he has served for five (5) years or more.

An incomplete year shall be calculated on a pro-rata basis to the nearest month.

Clause (b) The Hotel shall give written notice of retrenchment to employee not later than two (2) months or wages in lieu of notice before the date on which his employment is to be terminated. The industrial principle of "last in first out" shall be followed within each category of employees according to the individual's anniversary date of employment.

Clause (c) In the event of any vacancy arising within twelve (12) months of retrenchment, the Hotel shall give preference to applications from employees declared redundant previously.

ARTICLE 28 FREE DUTY MEAL

The Hotel shall provide every employee on duty with a meal, being lunch or dinner or supper, whichever is applicable.

ARTICLE 29 FREE TRANSPORTATION

The Hotel shall provide free transportation to all employees who finish work at twelve (12.00) midnight and to any time at or before six (6) a.m. In the event that free transportation is not provided, a transport allowance of Ringgit Malaysia Eight (RM8.00) shall be paid on each occasion.

ARTICLE 30 UNIFORM, LAUNDRY AND SHOES

Clause (a) An employee who is required to wear uniform shall be provided with two (2) sets of uniform together with a pair of shoes annually.

Clause (b) The Hotel shall arrange for and meet the cost of laundering of uniform on its own arrangement. The laundering of uniform shall be at the expense of the Hotel.

Clause (c) The Hotel shall repair or replace any uniform or footwear which is worn out without limitations during the year.Shoes supplied by the Hotel are not to be taken out of the Hotel premises by the employee.

ARTICLE 31 INDIVIDUAL AGREEMENT

Any individual agreement entered into between the employees and the Hotel, insofar as the terms of this Agreement is concerned, shall be superseded by this Agreement and shall be treated as null and void.

ARTICLE 32 MEDICALLY BOARDED OUT

TO BE REMOVED

ARTICLE 33 **PAID TIME-OFF**

Clause (a) The Hotel shall provide paid time-off to all House Committee and shall not restrain, prohibit, inhibit, restrict or refrain them from attending any meeting irrespective of the hours of work:

(i) between the Union and the Hotel;
(ii) between the House Committee and the Hotel.
(iii) **TO BE REMOVED**

Clause (b) The Hotel shall provide paid time-off to three (3) House Committee and shall not restrain, prohibit, inhibit, restrict or refrain them from attending any Court hearing between the Union and the Hotel irrespective of the hours of work.

ARTICLE 34 **EXAMINATION LEAVE**

An employee who wishes to sit for an examination which is beneficial to his employment shall be granted two (2) working days leave without abatement of wages in each calendar year.

ARTICLE 35 **SHIFT ALLOWANCE**

Every employee shall be entitled to a shift allowance of Ringgit Malaysia Three and Sen Fifty (RM3.50) for each third shift performed from 11.00 p.m. to 7.00 a.m. or from twelve (12) midnight to eight (8) a.m.

ARTICLE 36 **REST ROOM**

The Hotel shall provide a rest room with the necessary and adequate facilities for the employees to rest:

(i) in between shifts;

(ii) in between meal breaks;

(iii) before reporting for work; or

(iv) after work if there is rain.

ARTICLE 37 **OUTSIDE CATERING ALLOWANCE**

Clause (a) In addition to his ordinary rate of pay, an employee who performs outside catering within his normal hours of work for

that day shall be paid Ringgit Malaysia Fifteen (RM15.00) per occasion excluding board and lodging.

Clause (b) Board and lodging shall be provided by the Hotel at its expense.

Clause (c) The Hotel shall provide at its expense the transportation for the employee to and from the place of outside catering.

ARTICLE 38 SPECIAL PAID LEAVE

FIRE OR FLOODS

Clause (a) An employee shall be granted one (1) working day leave without abatement of wages for him to attend to his needs or his family if the house is burnt or damaged as a result of floods.

Clause (b) In the case of fire, the Hotel shall pay him a sum of Ringgit Malaysia two hundred (RM200.00).

ARTICLE 39 ENTITLEMENT OF AGREEMENT

Upon this Agreement being taken cognizance of by the Industrial Court, every employee covered within the Scope of this Agreement shall be given a copy of this Agreement by the Hotel (with amendments therein, if any) and to be given to new employee on the commencement of his employment.

ARTICLE 40 EXISTING BENEFITS

Notwithstanding the provisions of this Agreement, any existing benefits not covered by or in excess of the provisions of this Agreement shall continue to remain in force.

ARTICLE 41 RETIREMENT/RETIREMENT BENEFITS

Clause (a) The retiring age for female and male employees shall be fifty-five (55) years.

Clause (b) An employee who has been in service for five (5) years or more, shall be entitled to retirement benefits of eight (8) days wages for every year of service

ARTICLE 42 **PROHIBITION ON UNFAIR LABOUR PRACTICE**

The Hotel shall act strictly in accordance with the principles of natural justice on dismissal and shall not exercise any discrimination against any employee with respect to employment, promotion, lay-off, suspension, retrenchment, retirement, working conditions or not granting annual increment on the ground that the employee is a member of the Union.

ARTICLE 43 **SEVERANCE PAY**

Clause (a) In the event of the closure of the Hotel, an employee whose service is terminated, shall be entitled to severance pay as follows:

(i) Ten (10) days wages for every year of service if he has completed less than two (2) years service.

(ii) Fifteen (15) days wages for every year of service if he has completed two (2) years of service or more but less than five (5) years of service.

(iii) Twenty Five (25) days wages for every year of service if he has completed five years of service or more.

An incomplete year shall be calculated on a pro-rata basis to the nearest month.

Clause (b) The Hotel shall give written notice of closure to employees not later than two (2) months or wages in lieu of notice before the date on which his employment is to be terminated.

ARTICLE 44 **INTERPRETATION AND IMPLEMENTATION**

Clause (a) Reference to the masculine gender shall where appropriate include the feminine gender and words importing the singular shall include the plural and vice versa.

Clause (b) Any dispute relating to the interpretation, implementation, variation or of non-compliance unless settled by negotiation between the Hotel and the Union shall be referred to the Industrial Court in accordance with the provisions of the Industrial Relations Act, 1967.

Clause (c) The Hotel shall implement the terms of this Agreement and pay to all the employees the arrears of wages, allowances and any

other monetary benefits not later than one (1) month from the date of this Agreement.

Clause (d) If this Agreement is translated into any language in addition to English, the English version shall prevail.

Dated this 6th September **day of ~~August~~ 2013**

.....	.....
Rusli ~~Ahmad~~ Affandi	Khoo Hui Keam
General Secretary of	Chief Operating Officer
National Union of Hotel,	Crystal Crown Hotel & Resort Sdn Bhd
Bar & Restaurant Workers,	trading as Crystal Crown Hotel Petaling Jaya
Peninsular Malaysia	

APPENDIX B

SALARY STRUCTURE AND SERVICE CHARGE POINTS DISTRIBUTION FOR EMPLOYEES COVERED WITHIN THE SCOPE OF THIS AGREEMENT EXCEPT PART-TIMERS, TEMPORARY, CASUAL AND RETIRED EMPLOYEES.

POSITION	MIN SALARY RM	MAX SALARY RM + 20 STEPS	A	B	C
DRIVER	900		2.0	2.5	3.0
CHAMBERMAID			2.0	2.5	3.0
ROOMBOY			2.0	2.5	3.0
LINEN/UNIFORM ATTENDANT			2.0	2.5	3.0
HOUSEMAN			2.0	2.5	3.0
PUBLIC AREA MAID			2.0	2.5	3.0
APPRENTICE			2.0	2.5	3.0
STEWARD			2.0	2.5	3.0
BELLBOY			2.0	2.5	3.0
WAITER/WAITRESS			2.0	2.5	3.0
BARTENDER	950		2.0	2.5	3.0
OUTLET CASHIER	1000		2.0	2.5	3.0
FRONT OFFICE CASHIER			2.0	2.5	3.0
STORE ASSISTANT			2.0	2.5	3.0
RECEIVING CLERK			2.0	2.5	3.0
HOUSEKEEPING CLERK/ RECEPTIONIST			2.0	2.5	2.5
FRONT OFFICE ASSISTANT			2.0	2.5	3.0
TELEPHONE OPERATOR			2.0	2.5	3.0
RESERVATION CLERK			2.0	2.5	3.0
FOOD & BEVERAGE CAPTAIN			2.0	3.0	3.5
COMMIS			2.0	2.5	3.0
MAINT-TECHNICIAN SCALE 3			2.0	2.5	3.0
MAINT-TECHNICIAN SCALE 2	1050		2.0	3.0	3.5
ASSISTANT ARTIST	1100		2.0	2.5	3.0
ACCOUNTS CLERK			2.0	2.5	3.0
HEAD HOUSEMAN			2.0	3.0	3.5
ASST CHIEF TEL-OPERATOR			2.0	3.0	3.5
BELL CAPTAIN			2.0	3.0	3.5

POSITION	MIN SALARY	MAX SALARY	A	B	C
CHIEF CASHIER	1150		3.0	3.5	4.0
NIGHT AUDITOR			3.0	3.5	4.0
LINEN SUPERVISOR			3.0	3.5	4.0
FLOOR SUPERVISOR			3.0	3.5	4.0
HOUSEMAN SUPERVISOR			3.0	3.5	4.0
FRONT OFFICE SUPERVISOR			3.0	3.5	4.0
RESERVATION SUPERVISOR			3.0	3.5	4.0
CHIEF TELEPHONE OPERATOR			3.0	3.5	4.0
F & B SUPERVISOR			3.0	3.5	4.0
DEMI CHEF			3.0	3.5	4.0
CHIEF STEWARD			3.0	3.5	4.0
MAINT-TECHNICIAN SCALE 1			3.0	3.5	4.0
EDP CLERK	1300		2.0	2.5	3.0

KEY

A The total number of service charge points an employee is entitled to during his probation, confirmation and his first year of service.

B The total number of service charge points an employee is entitled to on completion of one (1) year's continuous service.

C The total number of service charge points an employee is entitled to on completion of two (2) years' continuous service.