

Consent to Restructure Service Charge to Meet the Minimum Wage

In the recent related appeals of **Le Meridien Kuala Lumpur Owned By Daito Asia Development (M) Sdn Bhd¹ v Zulkarnain Bin Hussin²** and **Le Meridien Kuala Lumpur Owned By Daito Asia Development (M) Sdn Bhd v Fairul Azwan Bin Mohd Ali³**, the High Court considered the issue whether the Labour Court was correct in allowing the claims of 27 former employees and ordering the company — which operates the Le Meridien Kuala Lumpur Hotel — to pay RM644,884.10 in relation to the service charge which was deducted and used to “*top up*” the basic salary to meet the minimum wages requirement.

The background to the dispute was that with the coming into effect of the Minimum Wages Order 2012⁴, the Property had decided to implement the MWO 2012 by restructuring the employees’ wages.

By letter dated 1 October 2013, the Property had informed eight Respondents⁵ of the implementation of the MWO 2012. Meanwhile, for the remaining 19 Respondents⁶, the Appellant had informed them of the addition to their basic salary in accordance with the implementation of the MWO 2012 in the relevant years. All 27 Respondents had accepted the letter and the terms contained therein by virtue of their signature at the acceptance portion of the respective letters.

The Respondents thereafter filed claims at the Labour Court for the deductions made to their service charge. The Director General of Labour handed down a decision dated 23 May 2023 whereby the Property was ordered to pay the Respondents the balance of the service charge allegedly due to them.

The Property appealed against the decisions of the Labour Court and argued that since the Respondents claimed that the Property had underpaid their service charge, the burden of proof was on the Respondents to establish the following key elements:

- i. they were entitled to three service charge points;
- ii. evidence reflecting the value of each service charge point in respect of each month they claimed for; and

Employment & Administrative Law update

MAY 2024

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- iii. that the amounts claimed by them were actually deducted from their wages.

The Property contended that the Respondents failed to prove the requisite elements of their cases and their claims should accordingly be dismissed.

In addition to the foregoing, the Property also submitted that the Director General of Labour failed to appreciate that eight Respondents had *expressly consented* to the terms contained in the letter dated 1 October 2013 and that the remaining 19 Respondents had *consented by conduct* to the restructuring of their wages.

The Property further submitted that the restructuring of the Respondents' wages in this matter was not done *unilaterally* which is why the decision of the Federal Court in the **Crystal Crown** case (which did not allow for the service charge to be used to meet the minimum wage) could be distinguished from facts in the instant matters.

The Property also highlighted that during the proceedings before the Labour Court, some claims were filed outside the time limit and the payslips produced were incomplete, yet the Labour Court proceeded to allow the Respondents' claims.

The Property further highlighted that despite the Labour Court's attention being drawn to its own earlier decision in **Wan Noor Rizal Bin Ali v Le Meridien Kuala Lumpur Owned by Daito Asia Development (M) Sdn Bhd**⁷ whereby another division of the Labour Court dismissed the claims of the complainants who filed similar claims.

The High Court delivered its judgment on 13 May 2024 and concurred with the Property's submissions and ruled as follows:

- i. The deduction of the Respondents' service charge entitlement to meet the minimum wage rate was done with their consent;
- ii. The Director General of Labour erred in law in allowing the Respondents' claims as some claims were filed outside the time limit and the payslips produced were incomplete; and
- iii. The Director General of Labour failed to consider the decision in **Wan Noor Rizal**, whereby the Labour Court in that case held in favour of the Property on the same main issues that were ventilated.

This decision underscores the importance of understanding the burden of proof and how the issue of consent impacts the burden of proof and the requisite evidence which needs to be presented during trial. Essentially, the burden of proof rests on the party making the claim to provide evidence in supporting their allegations. When parties have consented to specific terms or actions, they bear the burden of proving compliance or adherence to those terms.

Conversely, if consent is disputed or absent, then the burden may shift to the party alleging non-compliance to prove their case. On the aspect of sufficient evidence, when consent is clearly established, evidence supporting the existence and scope of consent may be sufficient to satisfy the burden of proof.

It is pertinent to note that although the instant decisions only involved 27 former employees, the implications were much wider as the decisions could potentially have affected all the employees of the Property as a similar practice was adopted.

The Property was represented by Vijayan Venugopal and Jamie Goh, who are Partners of the firm in our Employment and Administrative Law Practice Area.

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¹ Hereinafter referred to as *“the Property”*.

² WA-16-12-06/2023.

³ WA-16-13-06/2023.

⁴ Hereinafter referred to as *“MWO 2012”*,

⁵ Hereinafter referred to as *“the eight Respondents”*.

⁶ Hereinafter referred to as *“the remaining 19 Respondents”*.

⁷ Director General of Labour Summons Case No: KBR/11401/2020/0281.