INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 1/1-1594/17]

BETWEEN

KESATUAN PEKERJA-PEKERJA PEWTER DAN KRAFTANGAN SEMENANJUNG MALAYSIA

AND

COMYNS SDN BHD

AWARD NO. 1484 OF 2018

CORAM : YA TUAN EDDIE YEO SOON CHYE - PRESIDENT
EN. SAMSUDIN BIN USOP - EMPLOYEES' PANEL
EN. ABDULALIM BIN ZAKARIA - EMPLOYERS' PANEL

VENUE	**:**	Industrial Court Malaysia, Kuala Lumpur.
FILING OF FORM S	**:**	26.10.2017.
DATES OF MENTION	**:**	27.11.2017; 14.12.2018; 22.01.2018.
DATE OF HEARING	**:**	16.03.2018.
COMPLAINANT'S /UNION SUBMISSIONS FILED	**:**	24.04.2018.
RESPONDENT'S SUBMISSIONS FILED	**:**	30.03.2018, 14.05.2018 (Reply)
REPRESENTATION	**:**	*For the complainant - A Sivanathan; Malaysian Trades Union Congress* *For the union - Abd Hakim Abd Jabbar, Deputy President (Hashim Hamid, Secretary-General & Roslan Zakaria, Assistant Secretary with him)*

For the respondent - Edward Saw (Low Kok Kiong with him); M/s Josephine, LK Chow & Co

AWARD

The Application

[1] This is an application complaint of non-compliance filed in Form S pursuant to Rule 56 (1) Industrial Relations Act 1967 and Rule 24A (1) of the Industrial Court Rules 1967 in respect of the Collective Agreement (Cog. No. 295/2016) between **Comyns Sdn. Bhd.** and **Kesatuan Pekerja-Pekerja Pewter dan Kraftangan Semenanjung Malaysia** for the period from 1 December 2016 to 30 November 2019.

[2] By ruling of the Court on 16 March 2018, this application shall be heard together with the following applications in respect of the same parties:

Case No: 1/1-1593/17

Kesatuan Pekerja-Pekerja Pewter dan *Kraftangan Semenanjung Malaysia v. Royal Selangor Marketing Sdn. Bhd.* (Cog. No. 293/2016) for the period from 1 October 2016 to 30 September 2019.

Case No: 1/1-1595/17

Kesatuan Pekerja-Pekerja Pewter dan *Kraftangan Semenanjung Malaysia v. Royal Selangor International Sdn. Bhd.* (Cog. No. 294/2016) for the period from 1 October 2016 to 30 September 2019.

Statement of Agreed Facts and Issues

[3] The Union (Kesatuan Pekerja-Pekerja Pewter dan Kraftangan Semenanjung Malaysia) and the Companies (Royal Selangor Marketing Sdn. Bhd., Royal Selangor International Sdn. Bhd. & Comyns Sdn. Bhd.) are parties to the Collective Agreements Cog. No. 293/2016, Cog. No. 294/2016 & Cog. No. 295/2016 respectively.

[4] Article 19 (e) (i) of the respective Collective Agreements are identical and they state as follows:

> **ARTICLE 19 (e) (i)**
>
> "Seandainya Kerajaan Persekutuan Malaysia mengisytiharkan sesuatu hari kelepasan am sebagai tambahan kepada hari-hari kelepasan am yang diwartakan itu. Syarikat akan mematuhi hari kelepasan yang diisytiharkan itu."

[5] At the end of August 2017, there was a four day long weekend as follows:

(i)	31 August 2017	-	Merdeka Day
(ii)	1 September 2017	-	Hari Raya Haji
(iii)	2 September 2017	-	Normal Saturday
(iv)	3 September 2017	-	Normal Sunday

[6] In the evening on the eve of Merdeka Day i.e. 30 August 2017 and at the closing ceremony of the SEA Games, the Prime Minister declared 4 September 2017 (Monday) as an additional public holiday on account of Malaysia's success at the SEA Games.

[7] On 31 August 2017, the Companies sent an email to all employees which includes the following message:

> "Therefore, we would like all employees to resume work on September 4 as usual. However, Royal Selangor recognizes this *ad hoc* public holiday and **will add on one (1) day to each employee's annual leave as replacement for the said public holiday as a substitute.**"

[8] The Union responded to the email by whatsapp immediately on 31 August 2017 and subsequently by letter dated 25 September 2017 objecting to the Companies email. The Union contended that there had been non-compliance with the Collective Agreement.

[9] The agreed issues to be determined by the Court are as follows:

(i) whether the Companies' email on 31 August 2017 amounts to non-compliance of Article 19 (e) (i) of the Collective Agreements; and

(ii) in the event there is non-compliance, then whether of not Article 19 (e) (i) should be varied for special circumstances pursuant to s. 56 (2) (e) of the Industrial Relations Act 1967 or interpreted pursuant s. 56 (2A) of the same Act.

THE UNION'S SUBMISSIONS

[10] The Complainant submits that the wording of Article 19 (e) (i) of the Collective Agreement is clear that for the additional public holiday declared, the Company has to comply with it. The action by the Company is unilateral and run contrary to Article 19 (e) (i) of the Collective Agreement when the public holiday declared on 4 September 2018 was not declared as a public holiday as the Company add on one day to the employees' annual leave as replacement for the said public holiday. The Company's action is fortified by email on 30 August 2017 that the Company would like all employees to resume work on 4 September 2017 as usual which means the said day is a normal working day.

[11] The employees who work on 4 September 2017 should be paid double the normal rate as it is declared a public holiday. The other category of employees are those who did not report for work on 4 September 2017 and had enjoyed the public holiday under Article 19 (e) (i) of the said Collective Agreement. The Complainant submits that the Company's contention to vary Article 19 (e) (i) on special circumstances does not arise in this case. The Complainant prays for an order of compliance in respect of Article 19 (e) (i) of the Collective Agreement.

THE COMPANY'S CASE & SUBMISSIONS

[12] The learned Company's counsel submits in a nutshell as follows:

(i) that it had complied with Article 19 (e) (i) of the Collective Agreements;

(ii) if the non-compliance is established, then there are special circumstances to justify a variation of Article 19 (e) (i) of Collective Agreement by adding the words "with the exception of those declared based on sports activities and political matters" at the end of the clause in order to be consistent with Article 19 (e) (ii) in exercise of the Court's powers under s. 56 (2) (c) of the Industrial Relations Act 1967; and

(iii) to interpret and vary Article 19 (e) (i) & (ii) of the Collective Agreement to give the Company a right to substitute a declared holiday with any other day. This is consistent with Articles 19 (d) & (f) of the Collective Agreement.

[13] It is clear from the provision of Article 19 (e) (i) that the obligation imposed on all the three Companies was to comply with any holiday declared by the Federal Government which is in addition to the gazetted public holidays. The Company must regard the holiday declared as a public holiday. In this instant case, the email sent by the Companies recognises the *ad hoc* public holiday and therefore it is clear that the Companies have complied with Article 19 (e) (i).

[14] The parties left the matter open ended when the employees are required to work on 4 September 2017. The question is whether the employees to be paid two times their rate of pay if they work on such a public holiday or can the Companies substitute the declared public holiday with one added day of annual leave. If the parties had intended to work on the public holiday to be compensated in a certain manner they would have expressly provided for it as they have done in Article 19 (f) & Article 19 (i) of the Collective Agreement. By simple reading of Article 19 (i), the provision clearly provides that compensation for work at the rate of two times the rate of pay is confined only to the four public holidays (Federal Territory Day, Labour Day, King's birthday & National Day) as listed in the said Article.

[15] Where there is an application for non-compliance under s. 56 (1) of the Industrial Relations Act 1967, the function of the Industrial Court is to inquire into and to determine the question whether the Union had proved the provisions

of the Collective Agreement that the Company had not complied. If there is a non-compliance of the provisions of the Collective Agreement then the Court could consider exercising the statutory powers contained in s. 56 (2) (c) of the Industrial Relations Act 1967 and subject to the Company to prove 'special circumstances'.

[16] The Industrial Court in the case of *Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn. Bhd.* [2017] 2 ILR 260 at p. 264 decided as follows:

> "The court is mindful that the phrase 'special circumstances' must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common. There are countless situations that could constitute special circumstances with each case depending on its own facts. And the list of factors constituting special circumstances is infinite and could grow with time."

[17] The public holiday on 4 September 2017 constituted 'special circumstances' based on the following reasons:

(i) 4 September 2017 (Monday) was declared a public holiday as a result of Malaysia's success and medals haul at the SEA Games;

(ii) The holiday declared by the Prime Minister at the end of the closing ceremony of the SEA Games on 30 August 2017, the eve of Merdeka Day;

(iii) The nation was already enjoying a 4 day weekend from Thursday (31 August) to Sunday (3 September); and

(iv) The timing of the declaration by the Prime Minister on 30 August 2017 left the Companies with absolutely no choice to provide and adjust for this additional holiday and its effect towards their production and work schedule for Monday.

[18] The Company submits that the Companies had substituted the declared public holiday on 4 September 2017 with one day of annual leave to be added to

the employee's annual leave entitlement. The Union's complaint should be dismissed.

The Law

[19] The Company's counsel referred to the case of *Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn. Bhd.* [2017] 2ILR 260 at p. 262 where the Industrial Court referred to a decision by the Supreme Court case of *Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 CLJ 133 in relation the application of section 56 of the Industrial Relations Act 1967 as follows:

> "Now, section 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognisance of by the court under section 17 after a complaint has been lodged as to its non - compliance. The non-compliance of term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its power contained in subsection (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. There must be satisfactorily established by the complainant."

[20] The Supreme Court decided in the case of *Dragon & Phoenix Berhad v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil & Pakaian Pulau Pinang & Anor.* [1990] 2 ILR 515 at p. 616 as follows:

> "In a complaint of non-compliance with any term of a collective agreement or award under section 56 of the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is purely enforcement function."

Decision

[21] In the case of *Goodyear Malaysia Berhad v. National Union of Employees in Companies Manufacturing Rubber Products* [Award No. 1949 of 2005] Case No. 15/1-663/05 at p. 10 where the Industrial Court decided as follows:

> "18. A compulsory starting point in the relationship between management and union is strict adherence to the principle of *pact sunt servanda*. The Court on its part will jealously guard the sanctity of collective agreements and will be quick in enforcing terms contained therein. Otherwise the very foundation of our system of industrial relations will be derailed. And that will set back the country's progressive march towards the status of an industrialised nation."

[22] The issue for the determination and decision of this Court is whether or not there was a non compliance of the terms of the Collective Agreement (Cog. No. 293/2016) between Royal Selangor Marketing Sdn. Bhd. and Kesatuan Pekerja-Pekerja Pewter dan Kraftangan Semenanjung Malaysia; Collective Agreement (Cog. No. 295/2016) between Kesatuan Pekerja-Pekerja Pewter dan *Kraftangan Semenanjung Malaysia v. Comyns Sdn. Bhd*. and Collective Agreement (Cog. No. 294/2016) between Kesatuan Pekerja-Pekerja Pewter dan *Kraftangan Semenanjung Malaysia v. Royal Selangor International Sdn. Bhd*.

[23] The Company had highlighted in their submissions that the Court had requested category of employees who may be affected by an Award of this Court in the event there is non compliance and the Court is minded to make any one of the orders under s. 56 (2) of the Industrial Relations Act 1967 as follows:

No.	**Catergory of Employees**	**Pax**
1.	Employees who did not come to work on 4.9.2017	114
2.	Employees who came to work on 4.9.2017	126

3.	Employees who came to work on 4.9.2017 and have utilised all their leaves for 2017 (which includes the day in substitution on 4.9.2017)	88
4.	Employees who came to work on 4.9.2017 but have leave carried forward to 2018.	38

[24] The Court notes that any order to be made under s. 56 (2) (a) or (b) of the Industrial Relations Act 1967 should only affect the 38 employees in the 4th category of employees stated above. In this respect, the Union submits that for employees who came to work on 4 September 2017, the consequential action for these employees who worked on the said date should be paid double the rate is devoid of any merits.

[25] The Company had issued a request by "Notification on Sept 4 Ad-Hoc Public Holiday" dated 31 August 2017 (CO-1) as follows:

> "At last night's SEA Games closing ceremony our Prime Minister announced that September 4 (Monday) is a public holiday. This is *ad hoc* holiday declared under the Holidays Act 1951.
>
> As this holiday is sudden and unexpected, it would derail our productivity as planned.
>
> Therefore we would like all employees to resume work on September 4 as usual. However, Royal Selangor recognises this *ad hoc* public holiday and will add on one (1) day to each employees' annual leave as replacement for the said public holiday as a substitute."

[26] Those who turned up for work have had one day of paid annual leave added to their annual leave entitlement and for those employees who did not turn up for work on 4 September 2017 are treated as having taken the public holiday and are therefore not entitled to the additional one day of paid annual leave. The said employees have not under any circumstances been treated as being absent from work on the even date.

Conclusion

[27] 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. In arriving at this decision, the Court has acted with equity and good conscience and the substantial merits of the case without regard to the technicalities and legal form as stated under section 30 (5) of the Industrial Relations Act 1967.

[28] The Court is of the unanimous view that the Union failed to prove satisfactorily the existence of a breach and non-observance the Article 19 (1) (e) of the Collective Agreement and accordingly finds that there was compliance of the said provision of the Collective Agreement. Accordingly, the application for an order of non-compliance is dismissed.

HANDED DOWN AND DATED THIS 2ND JULY 2018

(EDDIE YEO SOON CHYE)
PRESIDENT
INDUSTRIAL COURT MALAYSIA

Case(s) referred to:

Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn. Bhd. [2017] 2 ILR 260

Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers [1988] 1 CLJ 133

Dragon & Phoenix Berhad v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil & Pakaian Pulau Pinang & Anor. [1990] 2 ILR 515

Goodyear Malaysia Berhad v. National Union of Employees in Companies Manufacturing Rubber Products [Award No. 1949 of 2005] Case No. 15/1-663/05

Legislation referred to:

Industrial Relations Act 1967, ss. 30 (5), 56 (1), (2) (a), (b), (c)

Industrial Court Rules 1967, r. 24A (1)