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SPECIAL ALERT !

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Trade Unions' Representative Capacity

AHMAD FAZDARUL & 5 ORS v BRAHIM'S SATS FOOD SERVICES SDN BHD

(Award No.: 1708 of 2024)

It is settled law that upon recognition, a trade union has the power to contract on behalf of its members, where any agreement between a trade union and the employer binds the employees within the trade union's representation. In this case, it was never disputed that all the Claimants, being permanent employees of the Company, were represented by *Kesatuan Pekerja-Pekerja Brahim's SATS Food Services Sdn Bhd* ("**Union**") and hence, were subject to the terms of a Collective Agreement.

On 11 March 2020, the World Health Organisation declared the COVID-19 outbreak a pandemic in recognition of its rapid spread across the globe. Subsequently, on 16 March 2020, the Malaysian government imposed several levels of Movement Control Order ("**MCO**") starting from 18 March 2020 to curb the spread of the COVID-19 outbreak in Malaysia. The COVID-19 outbreak also resulted in, among others, precautionary measures imposed in various countries all over the world, including travel restrictions, lockdowns, and social distancing. The Company was also required to take the necessary precautionary measures to curb the COVID-19 outbreak at its workplace.

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Since the beginning of 2020, the global economy, particularly the aviation industry, has faced uncertainties due to the unprecedented COVID-19 pandemic. The travel restrictions and border closures implemented by countries around the world also led to a significant fall in the demand for air travel. This adversely impacted the Company's financial performance and cash flow, in view of its business being the principal inflight catering services provider at both the Kuala Lumpur International Airport and Penang International Airport. Hence, the Company had no choice but to undertake capital and cash flow management, including cost-cutting measures to ensure its survival.

Importantly, prior to implementing any cost-cutting initiatives, particularly involving temporary pay cuts, layoffs, or reduction / stoppage of allowances, the Company had accordingly discussed the same with the Union, being the sole joint consultative body representing its permanent employees and obtained their consent via various memorandums of understandings. Further, the Company conducted multiple townhall sessions to explain to all its employees each phase of its contingency plan and to keep the employees up to date about its status.

In fact, after each townhall session and each memorandum of understanding was signed between the Company and the Union, a circular would be issued to all employees to recap the discussions held during the townhall, specifically on its contingency plan and the agreement entered with the Union. When the Malaysian government announced that interstate travel would be allowed and tourist destinations would be reopened with effect from 11 October 2021 as Malaysia entered its recovery stage of the COVID-19 pandemic, the management had decided to recall all its employees back to duty with a 15% to 20% pay cut whilst continuing with its costs management initiatives.

Accordingly, the employees who were on unpaid leave, including the Claimant were informed, among others, that they were to prepare to report for duty as and when instructed to do so. The Claimants however, requested to extend their unpaid leave period based on personal reasons. Upon being notified that the Company could not allow their requests due to its operational requirements, the Claimants refused to report for duty and claimed that they had been unlawfully forced to be placed on unpaid leave. In deciding that the Claimants had in fact abandoned their employment with the Company, the Industrial Court found, among others, as follows:

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a) As the Company's business was closely and intricately connected with the aviation industry, the Company's earnings and cash flow were severely affected. This can be seen from the Company's financial statements which proved significant losses suffered by the Company, demonstrating the extent to which the COVID-19 pandemic and the ensuing movement control orders had caused tremendous hardship to the Company and its business operations.

b) In view of the financial hardship placed upon it, the Company had no choice but to implement austerity measures, including reduction of working hours and working days, stoppage of overtime, and stoppage of payment of allowances, putting its employees on unpaid leave, pay cuts and temporary layoffs. Based on the evidence presented before the Court, the Company had done everything that was right and in compliance with the prevailing laws to stay afloat and simultaneously ensure that its employees do not suffer retrenchment. Therefore, the Company cannot be faulted for its decision to embark on austerity measures in order for its business to survive.

c) The Company, in its implementation of the austerity measures, did not demonstrate any bad intention as it had kept its employees informed of its hardship through various townhall sessions. Additionally, the Claimants in this case were members of the Union, and the Company had already obtained agreements from the Union via the six Memorandums of Understandings before implementing the cost-cutting measures. Further, the Union never objected to or raised any complaints with the various departments under the Ministry of Human Resources.

d) As the Claimants were unionised, all their terms of employment, benefits, and rights were covered under the various collective agreements between the Union representing them and the Company. Therefore, any issues relating to a breach of their rights covered under the collective agreements would have become a trade dispute or at least a non-compliance issue on the terms of the collective agreements. However, in this case,

there were no trade disputes or any complaints on any purported non-compliance with the collective agreements.

e) As the Company had implemented the cost-cutting measures in line with accepted standards, and upon consultation with the Union and after notifying the Labour Department, the Court does not find anything sinister or unreasonable about the Company's actions. Evidently, when the country transitioned to a recovery phase, the Company's employees, including the Claimants, were told to be prepared to report back to work in stages. The Claimants were then instructed to report back to work with a temporary reduced salary of 15%. However, they failed to comply with the said instructions. Despite show-cause letters, warning letters, and reminders sent to the Claimants, the nevertheless failed to turn up for work.

f) In view of the above, the Company issued letters to each of them, respectively, informing them that their failure to report for duty was a breach of their employment contract pursuant to Section 15 (2) of the Employment Act 1955. The Claimants had indeed abandoned their employment, due to there being no plausible excuse for their absence. The Claimants' contentions that they had been issued termination letters or were forced and/or pressured to resign by the Company are unsupported by any evidence.

g) Further, their pleadings have also not particularised any circumstances leading to the alleged forced resignation. From the evidence, it is amply clear that the Claimants refused to turn up or report for work despite being instructed to do so and failed to turn up without any reasonable excuse for more than two days. They have all acted in breach of Section 15(2) of the Employment Act 1955 and have clearly abandoned their employment with the Company.

Conclusion

It is clear that despite continuing to suffer substantial losses, the Company was not quick to resort to retrenching the Claimants and demonstrated utmost reluctance and restraint

by continuously undertaking various cost-containment exercises. The Company embarked on salary reductions and unpaid leave as cost-cutting measures in the interest of its employees and their right to livelihood, in order to keep them in employment.

The primary purpose of a trade union of employees is to act in a representative capacity for and on behalf of the persons they represent. The Company, on the other hand, deals in good faith with the Union as a body and not directly with the individual workers. Therefore, once a trade union is accorded recognition, it contracts on behalf of all employees within its scope of representation, and the contracting rights of individual employees are effectively taken away from them and transferred to the trade union representing them.

In this case, the Court affirmed such a representative capacity of the Union as it recognised the Company's effort to obtain the Union's consent before embarking on its austerity measures, rather than obtaining individual consent from each union member.

The employer was represented in the Industrial Court by Partner Shariffullah Majeed and Senior Associate Arissa Ahrom, of Lee Hishammuddin Allen & Gledhill.

The Industrial Court Award can be found here.

If you have any queries, please contact Senior Associate, **Arissa Ahrom** (aa@lh-ag.com), or her team Partner, **Shariffullah Majeed** (sha@lh-ag.com).

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