Privy Council Appeal No. 29 of 1984

Peter Anthony Pereira and Another *Appellants*

v.

Hotel Jayapuri Bhd. and Another *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Mackay of Clashfern**]*

This is an appeal, by special leave of His Majesty, the Yang di-Pertuan Agong, from a judgment dated 5th July 1983 of the Federal Court of Malaysia (Salleh Abas, C.J. (Malaysia), Mohamed Azmi and Syed Agil F.JJ dismissing an appeal from a judgment dated 3rd April 1981 (Vohrah, J.) holding that upon the true construction of section 2 of the Employees Provident Fund Act 1951 ("the Act") the first appellant and the first respondent are not liable in law to make monthly contributions to the second respondent in respect of service charges paid to the first appellant by virtue of his employment with the first respondent.

The first appellant ("Mr. Pereira") is employed as senior cook in a hotel owned by the first respondents ("the hotel company"). Mr. Pereira is an ordinary member of the second appellant ("the union") which is a registered trade union and recognised by the hotel company as the sole and exclusive bargaining body for the employees in their hotel. The second respondents the Employees Provident Fund Board ("the Board") are a body corporate established by the Act.

On 24th January 1979 the union and the hotel company signed a collective agreement to run for three years from 1st May 1978 to 30th April 1981. By section 17 of the Industrial Relations Act 1967 a collective agreement, which has been taken cognisance of by the Industrial Relations Court, shall be binding on the parties to the agreement, the members of a trade union to whom the agreement relates, and all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates and it shall be an implied term of the contract between the workman and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Industrial Court. The collective agreement has now been taken cognisance of by the Industrial Court with the consequences already set out and as so effective shall be referred to as "the agreement". Article 26 of the agreement contains provisions relating to the sharing of the service charge collected by the hotel company from its customers.

The following matters of fact are agreed. Service charges are demanded by the hotel company from their 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. The average monthly share of the service charge due and payable to Mr. Pereira is $230.00. He receives a basic monthly wage of $445.00 and a food allowance of $40.00 per month. His average total monthly income from his employment with the hotel company is $715.00. Contributions are presently paid in terms of the Act to the Board only in respect of the basic monthly wage and the food allowance. Service charge payments are normally paid by the hotel company to their employees on or before the tenth day of each month from the takings collected in the previous month. Even though a waiter or a cook may be working over-time for the service rendered to a customer, a service charge of 10% is added to the customer's bill. Whether service is given during normal working hours or during an over-time period, a service charge of 10% is imposed upon the customer's bill and goes to the common pool of service charges.

The question in this appeal is whether the hotel company and Mr. Pereira are obliged under the Act to pay contributions to the Board not only in respect of his basic salary and food allowance but also in respect of his share of the service charges collected from their customers by the hotel company. If that share is "wages" within the meaning of the Act,

contributions fall to be paid on it, otherwise they do not.

The Act provides:-

> "'wages' means the remuneration in money due to an employee under his contract of service or apprenticeship, whether agreed to be paid monthly, weekly, daily or otherwise -
>
> (a) in respect of the normal periods of work to be performed by the employee;
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> (b) where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee; or
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> (c) where payment is calculated in relation to the volume of work done, in respect of the work completed by the employee,
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> together with any allowance payable by the employer to the employee in respect, either explicitly or impliedly, of high cost of living."

There follows a proviso with which this case is not concerned. The Act further provides:-

> "'normal period of work' means the number of hours stated or implied in an employee's contract of service or apprenticeship to be the normal number of hours of work per week, or for any day in the week to be performed by him and includes any period of leave or holiday in respect of which no deduction is to be made under the contract of service from the remuneration due thereunder."

In practice the amount of contribution to be made by an employee and by his employer in respect of his employment for a particular period, say of a month, will be determined after the conclusion of that month. The total reward to which in terms of his contract the employee is entitled can then be determined in the light of what has occurred during that month, but the total remuneration in money which is due to the employee may not be subject to contributions under the Act. In a case to which paragraph (a) of the definition applies these contributions will apply only to such part of the remuneration as was due in respect of the normal periods of work to be performed by the employee as these are set out in the contract of service.

In this context, it appears to their Lordships that the word "remuneration" means payment or reward for service rendered by the employee to his employer and therefore to determine whether or not any particular sum due to an employee as remuneration under his

contract of service is in respect of the normal period of work by the employee, one has to ask whether it is a reward for work required to be done by the contract of service in the normal period stipulated for in that contract or is reward for work done in any other period or periods. It is clear that the answer to this question must depend upon the terms of the contract of service and to the terms of Mr. Pereira's contract of service as embodied in the agreement to which their Lordships now turn.

Article 7 provides that for a person in Mr. Pereira's position the total working hours per week shall be 48 hours inclusive of meal and tea breaks. Article 24 headed "Salaries Revision" provides that all newly confirmed employees shall be paid in accordance with Appendix C which sets out a salary scale for the different departments in the hotel and for the different job designations within these departments, the figures provided being, it is agreed, figures of monthly salary. Clause (b) of Article 24 provides that upon the signing of the agreement, every confirmed employee covered by it and who commenced employment before 1st May 1978, is to be paid an immediate increment of $25.00 to his basic salary backdated to 1st May 1978. Clause (c) provides:-

> "In the event that new positions which are under the scope of the Agreement are created the Company together with the Union shall negotiate to determine the salary scale and service points pertaining to such positions. The same shall refer to positions which are inadvertently left out."

Clause (d) provides for annual increments to basic salary during the duration of the agreement. Article 25 provides that the company shall pay by the end of January each calendar year, a bonus to confirmed employees, the amount depending on the length of service, and that an employee who takes unpaid leave of absence for a total period longer than seven days in the aggregate in any calendar year shall suffer a deduction from his bonus. Article 26 makes provisions in relation to the service charge, and since it is vital to the decision of this case, their Lordships set it out in full:-

> "Clause (a) The company shall share in the full 10% service charge collected up to one hundred and twenty-three (123) service points and the rest is to be fully distributed to all employees as specified in Appendix 'B'.
>
> Clause (b) The current Restaurant Supervisor and Beverage Supervisor shall continue to

be qualified for 9 points on the basis of personal-to-holder only.

Clause (c) (i) An employee while serving his probationary period on promotion on a higher category, the service points applicable to him shall be that specified in Column 'C' of the higher category.

(ii) On confirmation of promotion in the higher category, the employee shall qualify for the service points as specified in Column 'D'.

Clause (d) The Company shall furnish to the Union with two (2) copies of monthly statement of account of service charge payable to employees as follows:-

(i) the total service charge collected;

(ii) the total number of service points increased and decreased;

(iii) the total number of service points of all the employees;

(iv) the value of service charges per service point;

(v) the name, designation, individual service points and department."

Article 9 makes provisions in relation to over-time. Clause (a) provides:-

"In addition to his ordinary rate of pay for that day an employee who works in excess of the normal working hours shall be paid at twice his hourly rate of pay or a minimum of two dollars and fifty cents ($2.50) per hour whichever is the greater."

There are in addition provisions for weekly rest days, for public holidays and for various types of additional payment, such as for example, matrimonial leave which need not be specially noticed except to remark that these provisions contain stipulations for additional payment over and above the ordinary rate of pay where, for example, an employee works on a public holiday.

Against this background, Mr. Pereira and the union argue that his share of the service charge collected by the hotel company is remuneration to him in respect of his 48 hours of work per week, that is to say, his normal period of work. Where he has worked in any week for 48 hours only he is entitled under his contract to remuneration consisting of two parts, his basic wage and his share of the collected service charge. Therefore his share of the collected service charge is remuneration due to him in respect of his normal 48 hours period of work per week. To qualify for that payment he needs do nothing more than his normal period of work.

In response, on the hearing of this appeal, the hotel company and the Board maintained, first of all, that the service charge is nothing more than a compulsory levy exacted from the customers and passed over to the employees retaining that character unrelated to any particular period of work performed or to be performed by Mr. Pereira. In amplification of this argument, it was pointed out very plainly and forcefully, that the service charge might be payable on a bill for service which had been rendered by an employee who, at the time of giving the service, was working on over-time and that if it was related to any period of work so far as that employee was concerned it must be to that over-time period.

The second argument was that the basic salary and the service charge are treated entirely differently in the agreement. The basic salary, it was argued, is paid by reference to normal periods of work, but to qualify for his share of service charges, a person need be nothing more than an employee at the time at which the distribution entitlement arises. It was pointed that there was no provision for deduction from the service charge if an employee took unpaid leave such as was found in relation to the annual bonus in Article 25(b). It was also pointed out that the basic salary is calculated by reference to normal periods of work, whereas, it was said, the service charge is calculated apart from such normal periods and takes account of other matters altogether. Finally, it was submitted that the basic salary is not payable unless the work is performed for the full period of normal hours, whereas, it was suggested, the service charge is payable even if no work is done.

There is no doubt that the terms of entitlement to share in the service charge do not mention expressly the obligation to perform the normal work as a pre-requisite of entitlement, but this is equally true of the entitlement to basic salary. The obligation to work for 48 hours, his normal period, is stipulated for separately from both the provisions for basic salary in Article 24 and for a share of service

charge in Article 26, although clause (c) of Article 24 deals with both the determination of the salary scale and service points pertaining to new or omitted positions.

In substance, both arguments advanced for the hotel company and the Board amount to saying that the service charge is payable simply because a person has the status of an employee, whereas the salary is payable in respect of work done. Neither the basic salary nor the service charge are expressly said to be payments in respect of the work which the employee under the contract undertakes to perform, but their Lordships consider that, where a contract provides that the employee is bound to work for a certain period and provides for two distinct payments to which he shall be entitled as an employee, the proper conclusion to draw is that both payments are due to the employee in respect of the work which he has bound himself to perform. Where, as in Mr. Pereira's contract of service, there is a provision for additional remuneration if he does work over and above that which he has bound himself by his contract to perform, the additional amount he receives in consequence of an application of that provision will not be wages within the meaning of the Act, but all remuneration to which he is entitled in terms of his contract if he performs only the work which he is bound to perform must, in the absence of special provisions, be properly regarded as remuneration in respect of the normal periods of work to be performed by him.

The learned judge and the Federal Court concluded that Mr. Pereira's share of the service charge was not "wages" within the meaning of the Act. The reason which led them to this conclusion was that, as the Board and the hotel company have argued here, the service charge is money collected from the customers for distribution according to the points system and therefore, so ran the reasoning, was never the hotel company's money but was money paid by the customers for the employees and passed to them through the hotel company. Even if this be a correct analysis of the position, it is plain that Mr. Pereira's entitlement to his share of the service charges collected by the hotel company arises under his contract of service with the hotel company and therefore, even if the hotel company in terms of that contract is acting as his agent to collect for him and the other employees from the hotel's customers, the service charges which they pay to the hotel company, that money is due to them by the hotel company under their contracts of service as a reward for the service which the employees render under their contracts of service to the hotel company itself. Accordingly, the share of service charge is properly to be regarded as due to Mr. Pereira under his contract of

service as remuneration and for the reasons already given it is in respect of the normal periods of work. That money, once in the hands of the hotel company, is due by them as employer to Mr. Pereira in terms of his contract of employment and the provisions of the Act entitling the employer to relief from the employee for the employee's share of the contribution under the Act, entitles the hotel company to deduct that contribution, not only from the basic salary, but also from the money due under his contract to Mr. Pereira in respect of his share of the collected service charges. Their Lordships are therefore of the view that the reasoning of both the Federal Court and the learned judge, with great respect, does not negative the conclusion which has been already stated.

For these reasons their Lordships conclude that the argument for Mr. Pereira and the union should prevail and that the appeal should be allowed, that a declaration should be made in the terms sought by Mr. Pereira and the union, that upon the true construction of section 2 of the Employees Provident Fund Act 1951, Mr. Pereira and the hotel company are liable to make monthly contributions to the Board in respect of service charges paid to Mr. Pereira by virtue of his employment with the hotel company and that such monthly contributions be paid by Mr. Pereira and the hotel company to the Board from the date of this judgment. Their Lordships will advise His Majesty the Yang di-Pertuan Agong accordingly, and that Mr. Pereira and the union are entitled to their costs against the hotel company and the Board in respect of the proceedings before the judge, before the Federal Court and in respect of this appeal.