SITUATIONS WHERE THERE'S NO CLEAR-CUT LEGAL PROVISION TO COVER A SPECIAL CASE

By

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QUESTION

This is a case: where the Collective- Agreement (CA) between the Workers Union & the Employer has expired and the new Collective-Agreement is still pending. The Union wants the Employer to comply and honour a certain "Festive Bonus payment clause" but the employer has refused to comply, on the basis that the expired CA has no binding effect. Is the employer right in refusing compliance?

ANSWER

There is a lacuna *(or a gray area where there is no clear cut statutory provision or a clear law to cover a special situation or case)* in this situation.

Should or should not the employer comply the provisions of the said expire CA?

My views are that the employer should comply:

1. In the case of ***Viking Askin Sdn Bhd v National Union of Rubber Products Employees***, the High Court has stated in situations where there is a lacuna the courts can create new rights or give effect to new rights by adopting or following guidelines of the EA, CA, common law norms, and the code of practice for industrial harmony (The Code). In this particular case, the CA did not spell out whether or not employees should be paid half wages on Sundays and public holidays during plant-shutdown periods. The CA said that the company only pays half wages during plant shut-down periods. The CA did not address this issue for Sundays & public holidays, neither was this situation covered by the EA. As such, the industrial court looked into and **adopted a customary practice** to rule that employees should be paid full wage and not half wage for Sundays and public holidays.

2. Furthermore, the High Court also highlighted section 30 of the IRA 1967, where it empowers the court to give effect to rights by adopting norms, statutes, codes, customary practices, etc in lacuna situations.

3. The case of ***Dunlop Malaysian Industries Bhd v Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia*** *(Industrial Court Award No 76/72)*. In that case, there was a trade dispute between a company and the union concerned arising out of the former's action in requiring its employees not to come to work for periods of 4 to 12 days, as it was producing more tyres than it could sell. All the affected employees did not report for work on the dates stated and the equivalent of the wages on the days they did not work was treated as a loan to the employees it being an interim measure pending determination of the dispute. The question for decision therefore was whether the employees should be paid during the period they were required not to work. On behalf of the union concerned it was said that the employees should be paid during the period they were not required to work. On the other hand, on behalf of the company concerned it was said that the employees were not entitled to wages during the period of absence from work. But, in order to alleviate hardship, the company concerned proposed that its employees take their annual leave with pay during the material period.

   Harun J (as he then was) speaking for the court found that the leave proposal of the company concerned, whether paid or unpaid, was an attempt to avoid the real issue. The court further found that all the employees being monthly rated, the effect of the proposal was to deduct from salaries for the month in question sums equivalent to the number of days they were not required to work although there was no provision in the collective agreement concerned or the Employment Act 1955 which authorized the company concerned to do so. Having said that, the court noted, in passing, that the Legislature seems to have intended that the rates of compensation to workmen during periods of temporary lay-off should be negotiated between employer and employee and incorporated in a collective agreement.

   In conclusion, the court whilst recognizing that it was not fair that the company concerned be required to pay full wages to its employees during periods of cut back in production when the employees did no work at all, took the view that there being no provision in the collective agreement concerned for part payment of salary or for salary deduction during periods of temporary lay-off, it could not order the deduction from salaries, and therefore the employees were entitled to keep their salaries in full for the month in question.

4. In the case of S. Prai Textile & Garment Industry Employees' Union v. Dragon & Phoenix, Penang & Anor, an argument was considered as to what should be the correct law or the correct deciding factor, in the event a certain law or code of practice has no legal force or sanction over the issue in concern; in our case. The court answered this by

saying that it can …."receive into its jurisprudence agreed practices…" In this case, the argument was that the **Code of Industrial Harmony** has no legal force or sanction to bind an employer. But the Industrial Court adopted some of its practices to give effect as a binding law.

Now coming to this case, since the new CA has not come into effect and is still pending, then the courts will have to rely on norms or practices which normally shows that companies and unions usually rely on the last CA so practiced. And what's why in every C/A there's a standard clause something to this effect;

CLAUSE x - COMMENCEMENT AND DURATION
Except as otherwise provided herein, this Agreement shall -

(a) have effect from the 1st day of Month & Year; and

(b) remain effective up to and including the 31st day of the Month & Year; and

(c) thereafter continue in force until it is replaced by another Collective Agreement or until it is determined on the expiry of three or more months from the date on which the one party gives to the other written notice of the termination hereof and, without notice of the termination hereof and, without prejudice to paragraph (b) of this Clause, the said notice may be given not earlier than the 30th October 2006, and not after the expiry of the period mentioned in the said paragraph (b).

Now the foregoing would be a standardize norm in all & every CA. Even in instances where this clause does not exist in a CA, the Industrial Court is still empowered by section 30 of IRA 1967 to read into such a defective CA the aforesaid norm and order the employer compliance accordingly.

Now the abovesaid is also applicable to lacuna cases where an employee is not covered by the Employment Act 1955 neither does terms of his employment contract covers such matter.