



## **AWARD**

This is a reference by the YB Minister of Human Resource under section 56(1) of Industrial Relations Act, 1967. The issue is between Bumiputra-Commerce Bank Bhd. Executive Staff Union, Peninsular Malaysia (“the Union”) which lodged a complaint of non-compliance against Bumiputra-Commerce Bank Bhd. (“the Bank”) alleging that article 20 of the Collective Agreement (Cognizance No. 1 of 2003) had not been complied with by the Bank.

### **Union’s Case**

The issue here is on article 20 of the Collective Agreement about the bonus for year 2003. The Bank had issued a letter dated 19.3.2004 declaring bonus for the year 2003. The said letter however excluded seven categories of staff, namely:-

1. Staff Under the Retail Sales Incentive Programme
2. Staff Under the Treasury Incentive Programme
3. Unconfirmed Staff (Will be paid if subsequently confirmed)
4. Staff on No Pay Leave (Pro-rated based on the period worked)
5. Staff on Prolonged Illness Leave (Pro-rated based on the period worked)
6. Staff presently under suspension, until their cases are resolved.
7. Staff who have not completed their Performance Appraisal for 2003.

The Union replied to the Company's letter vide their letter dated 23.3.2004 stating the Union was not consulted on the removal of the categories of workers excluded from the bonus payment. The Union was particularly concerned on the first and second categories in the list, they are staff under the retail sales incentive programme and staff under the treasury incentive programme. The Union does not agree on the removal of these officers from the bonus payment. The Bank replied to the Union's letter saying the above officers were entitled to the bonus payment from January to August 2003 only. Those officers were not entitled to the bonus payment from September to December 2003 only because effective September they received retail sales incentives and treasury incentives. So the only issue here is the bonus payment from September to December 2003.

The word in article 20 is "declare" based on profit. Once the Bank declared the bonus, all the staff should be paid. The Bank should not exclude any categories of staff. The Union's learned counsel quoted the case of **All Malayan Estates Staff Union v. Petaling Rubber Estates Bhd. South Estate, Carey Island. Award No. 25/80.**

The bonus scheme here is a profit bonus and as such all staff should be paid.

The other case cited is **Kulai Young Estate v. All Malayan Estates Staff Union. Award No. 357 of 2005.**

### Company's Case

The Company's learned counsel submitted that the case of All Malayan Estates Staff Union cited by the Union was a profit bonus but the present case is a discretionary bonus, so they are different.

In the case of Kulai Young Estate, the decision is being challenged in the High Court. In the Kulai Young Estate, the issue was a trade dispute under section 26 and is not an issue of non-compliance.

In article 20, the question is whether it is a valid complain of non-compliance. The Court must confine to that. There is a dispute of fact of the case, whether the Bank can elect to pay part bonus and part sales incentives. Company refers to the case of **Industrial Oxygen Incorporated Bhd./Segamat Estates Johor/MAPA v. All Malayan Estates Staff Union.**

In the present case the Bank did not get the minimum of RM500 million profit and therefore the whole of article 20.1 is not valid because the basis of the article is not achieved. So the whole issue here is a discretionary bonus. The Company referred to the case of **Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan v. Dan Kaffe (M) Sdn. Bhd.**

The question for the Court to consider is that where there is no entitlement for bonus under article 20.1 the profit was less than RM500 million, can the Bank be found to be in non-compliance of article 20. If the Bank cannot introduce the scheme, the Bank might as well withdraw the bonus totally.

### **Decision**

This is a complaint of non-compliance by the Union on article 20 of the Collective Agreement. The article states:-

*“ARTICLE 20: BONUS*

*20.1 An Officer who is confirmed in his appointment and still in service at the end of the Bank’s financial year is eligible for a bonus payment, if declared, on the following basis:-*

- |   |          |   |
|---|----------|---|
| <i>(a) Profit Before Tax (PBT) of RM500 million to RM800 million.</i> | <i>-</i> | <i>Minimum of one (1) month bonus.</i>  |
| <i>(b) Profit Before Tax (PBT) of more than RM800 million.</i>        | <i>-</i> | <i>At the Management’s discretion, subject to a minimum of one (1) month bonus.</i> |

*20.2 Notwithstanding the above, Officers who retire or are medically boarded out to ill-health or disablement or died whilst in service during the financial year are entitled to payment of proportionate bonus, if declared.*

*20.3 Where a confirmed officer has less than 12 months service as at the end of the financial year, he will be entitled to a proportionate amount of bonus, if declared.*

*20.4 Where an officer is still on probation at the end of a financial year, he will be paid a proportionate amount of bonus if declared, based on his salary as at the end of the said financial year, only when he is subsequently confirmed in his appointment.*

*20.5 In the event the above profit before tax target is not achieved, the Bank may still declare bonus at its discretion.*

*20.6 Such bonus payment will be based on the Officer's basic salary drawn as at 31<sup>st</sup> December of the current year."*

Article 20 is about the payment of bonus by the Bank to its employees. Article 20.1 is plain and clear that if the Bank achieve profit before tax of a minimum RM500 million then a minimum bonus of one month is due to the employees. Article 20.5 in the event the above profit before tax is not achieved, the Bank may still declare bonus at its discretion.

In the present situation the Bank has not achieved the required minimum profit before tax of RM500 million, the Bank however decided to declare bonus to the employees. The Bank had acted according to article 20.5 to give discretionary bonus to the employees. The question here is

whether the Bank could exclude some categories of employees from the payment of bonus.

The bonus in this case is at the discretion of the Bank. The Bank need not declare any bonus which means the present dispute would not have arisen at all. To quote **G.R. Rubin, “Wages and Salaries”** at page 18:-

*“A bonus is an extra payment which may be paid regularly or rarely. It may be in the form of a productivity bonus, a good attendance bonus, a no-strike bonus or a Christmas bonus. The crucial question is whether the employer is legally obliged to pay the bonus, both where it is conditional, as in the case of a productivity bonus, or unconditional as with a Christmas box. The answer will depend on whether the bonus is treated as a gratuity, a gift which it is in the discretion of the employer to pay or not; or whether the bonus is contractual, and part of the consideration (see Chap. 2) to be given by the employer in exchange for the employee fulfilling his side of the bargain. If the former interpretation applies, then the bonus may be withdrawn by the employer at will.”*

The Court should now look at what is meant by the word “discretion”. According to Webster’s New Ideal Dictionary meaning of “discretion” as:-

- (1) Individual choice or judgment.
- (2) Power of free decision or latitude of choice.

From the shorter English Dictionary, Third Edition defines “discretion” as:-

- (1) The liberty or power of deciding; or
- (2) Of acting according to one’s own judgment.
- (3) Uncontrolled power of disposal.

From the above facts the Court is unanimous that the Bank has unfettered power to decide whether or not to declare any bonus. In tandem with the declaration of bonus the Bank would also have the same power to decide on the amount and the categories of employees to be given or excluded. The Bank must have the power to decide since the bonus is a discretionary bonus.

The Union’s contention that once the bonus is declared the Bank must make payment equally to all employees. The Court has a different view to the issue because the Bank should have the liberty of deciding how much to pay and to which categories of staff. The Court would agree with the Union’s argument that all staff should be paid if the bonus becomes mandatory. The bonus would become mandatory only if the Bank achieved a minimum of RM500 million profit.

The Court has also to consider the future relationship between the Bank and its employees. If the Bank is not given the liberty to decide on the

payment of bonus the Bank may not consider paying discretionary bonus in the future. In the present case the Bank had given to the excluded categories of staff in the form of sales incentives. To these staff the Bank also paid the bonus from January to August 2003 and they were not entitled to bonus only from September to December 2003 as they were paid the incentives for those months. This is the Bank's choice of payment to the staff and the Bank has the right to do this since this is a discretionary bonus.

The word discretion in article 20 is not ambiguous from the meaning given in the dictionaries. The Bank has absolute power to decide on the manner of the bonus payment.

Under the circumstances the Union's application is dismissed.

**HANDED DOWN AND DATED THIS 7<sup>TH</sup> DAY OF SEPTEMBER 2007.**

**( HAJI SYED AHMAD RADZI BIN SYED OMAR )  
CHAIRMAN  
INDUSTRIAL COURT MALAYSIA  
KUALA LUMPUR**