

**INDUSTRIAL COURT OF MALAYSIA**

**CAS NO.1/2 - 280/01**

**BETWEEN**

**SARAWAK COMMERCIAL BANKS ASSOCIATION (SCBA)**

**AND**

**SARAWAK BANK EMPLOYEES' UNION (SBEU)**

**AWARD NO. 798 OF 2002**

**BEFORE** : ENCIK YUSSOF BIN AHMAD - PRESIDENT  
PUAN BARBARA@SALVIA - EMPLOYER'S  
EDWARD PANEL  
ENCIK LAWRENCE VUN - EMPLOYEE'S  
PANEL

**VENUE** : Industrial Court, Kuching,  
Sarawak

**DATE OF REFERENCE** : 24.3.2001

**REPRESENTATION** : Messrs. R Sivagnanam & Associates, Solicitors for  
the Sarawak Commercial Bank Association.  
  
Encik Abdul Jalil bin Mohamad (Encik Draham  
Jaladin, Secretary of SCBA with him) representing  
Sarawak Commercial Bank Association.  
  
Encik Andrew Lo, General Secretary of Sarawak  
Bank Employees' Union (Cik Maureen Chua with  
him) for the Union.

**REFERENCE** : The Honourable Minister of Human Resources  
referred to this Court under Section 26(2) of the  
Industrial Relations Act 1967 ("the Act") a trade  
dispute between **Sarawak Bank Employees'  
Union ("the Union")** and **Sarawak Commercial  
Banks Association ("the Banks")**. The dispute is  
over the terms and conditions of employment to be  
incorporated into the Sixth Collective Agreement  
between the parties.

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## A W A R D

The Honourable Minister of Human Resources referred to this Court under section 26(2) of the Industrial Relations Act 1967 ("the Act") a dispute between **Sarawak Bank Employees' Union ("the Union")** and **Sarawak Commercial Banks Association ("the Banks")**. The Subject matter of the dispute is the terms and conditions of employment to be incorporated into the Sixth Collective Agreement between the parties.

2. The Union filed its Statement of Case and the Bank filed a Statement in Reply. On the first day of hearing the Union tendered:

i.) a Bundle of Documents

ii.) a Bundle of Authorities

and the Banks tendered:

i) two Bundles of Documents

ii) Four volumes of Bundle of authorities

Both parties have also filed their Comparison Tables.

The Court heard submissions of the parties for two days and also received written submission from the parties.

3. The Banks in Malaysia have three regional associations namely the Malayan Commercial Banks Association (for Peninsular Malaysia), the Sabah Commercial Banks Association and the Sarawak Commercial Banks Association. The bank employees likewise have three Unions. The Malayan and the Sabah Banks and their employees Unions have concluded their Collective Agreements. However the Sarawak Banks and the Union failed to conclude theirs.

4. The Union's claim as in **Exhibit SBEU 7** annexed to its Statement of Claim is for better terms and conditions of employment.

The Banks in their Statement In Reply state that Union's claim for:

i) enhanced starting salaries

ii) adjustment in salary

iii) enhanced annual increments

iv) enhanced employments benefits

v) the introduction of new benefit

are unduly excessive in view of the current economic situation.

The Banks made their counter proposals as in Appendix CO.1 attached to the Statement In Reply.

5. At the commencement of the hearing the Court was informed that the following Articles have been resolved: Articles 4, 5, 12, 13, 18, 33, 36 and 39. During the hearing a few more Articles were agreed to. They are as follows:-

i) Article 1 - Parties

The Banks agree to the Union's proposal to include Finance Companies in the Agreement provided that they are members of the Banks Association and have accorded recognition to the Union.

The Union also dropped Article 1(3).

The remaining dispute under Article 1 is only the Union's proposal in Article 1(2) to include a position of Senior Special Grade employee as a new category.

ii) The parties have reached further agreements on the following Articles.

a) **Article 15** - the parties agree to follow the same Article in the Sabah Agreement

b) **Article 17** - the parties also agree to follow the same Article in the Sabah Agreement.

However for Article 17(2)(a) and (c) the Company accepts the Union's proposal.

c) Article 20 - Bonus

The Union drops its claim and agree to retain existing provisions.

d) **Article 29** - same as above

e) **Article 32** - same as above

f) **Article 24** - Medical Benefits

(1)(e) - Union reverts to RM200/-

(3)(b) - Company accepts the Union's proposal

## 6. DISPUTED ARTICLES

### 1. Article 1(2)

The Union's proposal as stated earlier is for the creation of a new category of employees to be known as "Senior Special Grade" and to be included in the Agreement. The Banks are opposed to this.

The Union's grounds are that employees have assumed more responsibilities. It does not ask the Banks to promote staff to this position but only to create the position. Some of the Banks have paid special allowance to employees who perform extra duties. The Union wants this to be formalized so that these allowances are not later withdrawn as the current memorandum of understanding governing this is of no legal effect.

The Banks in their submission state that the creation of a new grade is the function of the management. With regard to the Union's fear that these allowances may be withdrawn the Banks' reply is that withdrawal of allowances not provided for in an agreement but granted by way of existing benefits is indeed permissible under Article 36(1)(a) & (b).

The Court agrees with the Bank's submission. It is a management prerogative whether or not to create a new category of employees. The Union's fear of withdrawal of the allowances is groundless as there is protection in Article 36(1)(a) & (b).

## **2. Article 2 - Effective Date**

The existing Agreement continued to remain in force until 31 December 1999 and thereafter until superseded by a new Agreement.

The Union proposed that the Agreement to awarded by the Court should commence from 1 January 2000 and remain in force until 31 December 2002 and thereafter until superseded by a new Agreement.

The Banks on the other hand proposed that the effective date of the Agreement should be 1 September 2000.

The Union is aware of the provision of section 30(7) of the Act which provides:

*An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:*

*Provided that the retrospective date of the award may not, except in the case of a decision of the Court under section 33 or an order of the Court under section 56(2)(c) or an award of the Court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the Court.*

but contends that by awarding 1 January 2000 to be the effective date the Court is not contravening section 30(7). The said section by using the word "may" does not make it mandatory that the retrospective date be only six months from the date on which the dispute is referred to the Court.

It also contends that the parties have already agreed to this effective date during the negotiation and signed a memorandum of understanding. It referred the Court to Exhibit 4 in its Statement of Case. It provides:

*"2. The Banks and the Union agree that the Agreement when concluded will be effective from 1st Jan. 2000."*

*In the event of a deadlock and the matter is referred to the Industrial Court the Banks and the Union agree the said effective date will be 1st January 2000. Any arrears will also be from this date".*

The Banks argued that the memorandum was part of the various proceedings that took place during negotiations. The negotiations did not reach a fruitful conclusion and there was no intention on the part of either party to give effect to the memorandum. The Banks also raised the issue that the memorandum was not deposited for cognizance under section 16 of the Act. They cited the cases of ***Beecham Products (Far East) Sdn. Bhd. v. National Union of Petroleum and Chemical Industry Workers (1990) 2 ILR 588*** and ***Socfin Co. (Minyak Estate, Batang Berjuntai) v. National Union of Plantation Workers (1986) 1 ILR 1020***. The issue before the Court is the validity of the memorandum of understanding in which the parties had agreed that "in the event of a deadlock and the matter is referred to the Industrial Court the effective date will be 1st January 2000", and not a variation of a Collective Agreement. The memorandum is admissible under section 54(1) of the Act which provides:

*Where a trade dispute relates to matters as to which negotiation or conciliation proceedings have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation thereto agreed to and signed by the parties to the dispute.*

In the opinion of the Court such memorandum being admissible under section 54 clearly shows the intention of the party to be bound by it. It had specifically addressed the issue of what would happen if the matter is referred to Court when negotiation breaks down. It will be contrary to equity and good conscience to allow the Banks to go back on their words. The Court would also agree that section 30(7) of the Act gives the Court a discretion on the backdating of the award. By using the word "may" section 30(7) of the Act is not mandatory.

The decision of the Court is supported by a decision of the High Court in this case between the same parties reported in (1990) 2 MLJ 315 where at page 317 Haidar J held:

*"Mr. Varughese, counsel for the applicant, urged the Court to read the word 'may' as 'shall' thereby making sub-section 7 a mandatory provision....."*

*"For myself I would read the word 'may' as discretionary and at most directory and I say for the following reasons:*

*(a) The restriction imposed on the power to make the award retrospectively is applicable only in respect of cases where the parties do not agree on the effective date of the agreement. This is obvious as if the parties took time to settle the dispute on some substantial matters but agreed on*

*the date of its implementation and thereby finally referred the dispute under section 26(2) of the Act to the Minister of Labour late, then the whole scheme will be defeated especially in view of the fact that this agreement is to be a continuation of the previous agreement. In my view this will be in conflict with section 30(5) which reads:*

*The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".*

In the circumstances the Court agrees with the Union that the award shall be retrospective from 1st. January 2000 as agreed in the memorandum of understanding between the parties. Therefore the Collective Agreement between the parties shall be deemed to be from 1st. January 2000 to 31st. December 2002.

### **3. Articles 7, 8 and 9**

It is contention of the Banks that the Union's proposals in these articles are not trade disputes. Therefore the Court has no jurisdiction to deal with them. Article 7 is on leave on trade union business, Article 8 is on inter-relations committee and Article 9 is on Notice Boards. Trade dispute is defined in section 2 of the Act as follows:-

*"trade dispute" means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen.*

The Banks quite rightly pointed out the difference between trade dispute and matters that can be included in a Collective Agreement. A Collective Agreement is defined in the same section 2 of the Act as:

*"Collective Agreement" means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties.*

Accordingly the Banks contend that while parties are free to negotiate any and every matter governing terms and conditions of employment and matters affecting their relations during collective bargaining, when a dispute arises and the same is referred for adjudication the Court can only look at matters which are trade disputes.

The Court agrees with the Banks' contention. The subject matters of Articles 7, 8 and 9 are the relationship between the Banks and the Union and are not connected with employment or terms of employment or conditions of work.

If an authority is required it is the decision of the then Federal Court in *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaysia Glass Factory Bhd (1985) 1 MLJ236*, in which the Court held that "check off" is not a trade dispute.

Therefore the Court declines to make an award on these matters.

#### **4. Articles 10, 14 and 16**

Article 10 deals with Probation. Here the Union seeks to retain the existing provision which specifies the probation period and other matters. It also seeks to introduce a new sub-article which determines the probationers' salaries.

Article 14 is on Temporary and Part-time Employees. The Union seeks to retain the existing provisions which spells out the Banks' right to appoint them in abnormal circumstances and provide for their terms and conditions of employment.

The Union now seeks to impose an important condition under this Article as follows:-

(c) Other than permanent, temporary or part-time employees, all other forms of employment (including outsourcing) shall require the prior agreement with the Union before implementation.

The Court believes that this is one of the issues which the Union feels very strongly that prevents the parties from concluding their collective bargaining amicably.

Article 16 deals with Promotion. Again the Union makes proposal governing promotion to Senior Special Grade Clerical.

The Bank seeks to amend the existing provisions so that the Article does not offend against section 13(3) of the Act.

The Banks submit that the Union's proposals in these Articles contravene section 13(3) of the Act which provides as follows:-

*(3) Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the matters, that is to say -*  
*(a) the promotion by an employer of any workman from a lower grade or category to a higher grade or category;*

*(b) the transfer by an employer of a workman within the organization of an employer's profession, business, trade or work, provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employment;*

*(c) the employment by an employer of any person that he may appoint in the event of a vacancy arising in his establishment.*

In respect of Article 10 the Court is of the opinion that the Union's proposal does not contravene section 13(3)(c). In the Court's opinion what is prohibited is a proposal by a Union that any person be appointed by an employer in the event of a vacancy. Matters governing probation e.g. the length of the probationary period and the terms and conditions applicable on probation may be included and the Court may adjudicate on these proposals.

The Court therefore awards that the existing provision in Article 10 be retained.

In respect of Article 14 on the Temporary and Part-Time employees the Banks seriously object to the proposed Article 14(c) which seeks to prohibit the Bank to outsource its non-core functions to outsiders without the prior agreement of the Union. The Banks do not agree that the existing provisions be continued in respect of this matter. They claim these matters have nothing to do with terms and conditions of employment between serving members of the Union and the Banks. The Banks submit if by outsourcing the Banks have to terminate the service of serving Union members they can file for reinstatement under section 20(3) of the Act. The Banks also claim that it is the prerogative of the management of the Banks how they manage their business i.e. whether to do their non-core functions in-house or to outsource them provided that it is done fairly and there are sufficient safeguards in the law against abuse of this prerogative. The Banks cited a decision of the Australian High Court in the case of *The Judges of the Commonwealth Industrial Court & Ors. Ex-parte Cocks and Others (1968) 121 CLR 313* which held:

***"The Commonwealth Conciliation and Arbitration Commission has no power under sections 23 and 32 of the Conciliation and Arbitration Act 1904 - 1967 to make an award prohibiting employers from having work done by independent contractors outside their factory or workshop".***

The Banks also submit that the regulatory authority for the banking industry namely Bank Negara Malaysia has in fact encouraged outsourcing because this will enhance efficiency and competitiveness in the industry.

The Court holds that the right to outsource is part of management's prerogative. It certainly does not require the agreement of the Union. However in order that members of the Union may be prepared for it and the possibility of Voluntary Separation Scheme that may follow and for the sake of industrial harmony the Court agrees that there should be consultation between the parties. This is provided in the existing agreement and should be continued.

The dispute in Article 16 is again whether the Union's proposal offends section 13(3) of the Act. While we agree that the Union cannot include the post of Senior Special Grade Clerk as one of the promotion posts the existing provision in our opinion does not offend against section 13(3). In our opinion what the section prohibits is for the Union to propose any workman to be promoted. What the Union proposed still preserved the Bank's prerogative on promotion. The proposals are also reasonable and have not created any problem to the Banks.

In the circumstances the Court awards in terms of existing provisions. However the Court is of the opinion that the Agreement should not provide for the employment of school leavers and Part-time employees and their terms and conditions of employment.

## **5. Article 19 - Rates of Pay**

The main dispute in this Article is the issue of salary revision. The Union is asking for salary structure improvement of 11% as granted to the Sabah Union and a salary adjustment of 18% for non-clerical, 16% for clerical and 4% for Special Grade. The Banks propose no adjustment at all. For Sabah the Banks have agreed to grant salary revision of 12% to Non-clerical and Clerical Grades and 11.5% to Special Grade.

The Union in its submission made a plea that the Harun formula of granting only a salary revision of between 60% and 2/3 of the increase in Consumer Price Index (CPI) since the last salary revision should be abandoned and asked that full increase in CPI should be allowed. It also made a point that the Harun formula should only be followed if salary increase is based purely on increase in CPI. It submits there are other factors that the Court should take into account when considering salary revision and they are the salary revision in comparable industry, rate for the job, employers expectation of reasonable profits, employer's financial capacity and finally the requirements of section 30(4) of the Act which requires the Court to have regard to public interest the financial implications and the effect of the award on the economy of the country and industry concerned and also to the probable effect in related or similar industries.

The main thrust of the Union's submission in the Court's opinion is that since the same Banks operating in Sabah have granted the revision mentioned earlier the Court should at least grant similar rates of revision for Sarawak. The Union's claim for higher rates of revision is based on the consideration that it assumed the effective date of the Agreement to be awarded by the Court would be 1st September 2000 and not 1st January 2000. It quoted the decision of Harun J (as he then was) in a case between the same parties (Award No. 178/81) which held:

*"The majority of the bank employees in the three regions work for the same employers and perform the same functions. The principle of rate for the job should apply to all three regions".*

The Court is impressed with this submission. Although the above decision was handed down in 1981 as far as the Court knows the position remains the same today. We do not consider the other principles of wage fixation are as important in this case. The Banks do not deny that they have the financial capacity to grant some wage increase and they will not be deprived of reasonable profit in the event a fair and equitable wage increase is granted.

The Banks submit that the Court should not even grant the same salary revision as granted to Sabah employees. They contend that the agreement the Banks entered with the Union in Sabah was consensual agreement reached by the parties taking into consideration their respective assessments of cooperation work demands and other factors peculiar to their locations and operations. The Court agrees that the level of cooperation between the Banks and the Union in Sabah may be better than that between the Banks and the Union in Sarawak. The Court is not satisfied that work demand and other relevant factors in Sabah are different from those in Sarawak. The Court cannot take into account the different level of cooperation between the Banks and the Union in Sabah in considering whether to award a salary revision or not and the quantum of the revision. The Court will determine the issue based on generally agreed principles. The best authority that the Court can rely on would be ***Arab-Malaysia Development Berhad v. Perak Textile & Garments Manufacturing Employees Union (Award No. 45/87)***. The Court held in this case as follows:

*"Over the years, the Industrial Court, including its predecessors the Industrial Arbitration Tribunal, has, in deciding on the question of wage increases, generally taken into account the following factors:-*

*(a) Wages and salaries in comparable establishments in the same region;*

*(b) Any rise in the cost of living, since the existing wages and salaries were last revised;*

*(c) The financial capacity of the employer to pay the increases;*

and

*(d) The legitimate desire of the employer to make a reasonable profit".*

The Banks submitted at great length on the cost of living factor. In short the Banks say the salaries of the Bank employees have been revised many times and have addressed the need to offset inflation. The Banks also say the Sarawak allowance should also be considered as a measure to reduce the loss in purchasing power of wages due to inflation. In summary the Banks say total CPI increase for the period 1988 - 1999 is 35%, the total increase in salary has been 74.4% and 92.6% with the average increase in salaries being about 89.02%. The Court is of the opinion that the Banks have taken the wrong period (1988 -1999) into consideration. The relevant period is the period of the existing agreement i.e. 1.1.1997 - 31.12.1999. What is the increase in CPI during the period? If the increase to be allowed is based solely for the purpose of keeping pace with the increase in the cost of living then the Court should allow salary adjustment of between 60% and 2/3 of the increase in CPI. It is not right under this principle to take into account previous salary increases. In the cases of ***Firma Bulking Services Sdn. Bhd. v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan (1996) 2ILR 1690*** and ***Mutsui OSK Lines Malaysia Sdn. Bhd. v Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan (1997) 1 ILR 624*** the Court declined to award adjustments because salary revisions have been made during the currency of the existing Collective Agreements. Therefore the Court cannot agree with the Bank's submission that no salary revision be made on account that there have been many revisions in the past (but not during the currency of the existing agreement).

Financial capacity is not disputed by the Banks. However the Court would say that if any revision is awarded by the Court it is not solely on the ground that the Banks can afford it.

Having taken all the factors into consideration and the requirements of section 30(4) of the Act and in particular the principle that wages in comparable establishment in the same region can be used as one of the factors the Court awards that Article 19 of the Agreement between the Banks and the Sarawak Union shall be the same as Article 19 of the Sabah Agreement. This means the Banks shall grant to their Sarawak employees the same salary revision as they did to their Sabah employees.

There are other Articles in dispute between the parties. Having decided that Article 19 on salary should be the same as in the Sarawak Agreement the Court based on the same consideration hold that other disputed articles of benefits should also follow the Sabah Agreement.

However there remains one final Article to be decided i.e. Article 38. In this Agreement the Court is of the opinion that the benefits of this award should also be extended to those employees within the scope of the agreement including those who have resigned before the date of the award. The Court feels it will be inequitable to deprive them of the benefits of the Agreement merely because they have resigned. It is different if they were dismissed.

The Collective Agreement between the parties taking into account the award of the Court and the agreement between the parties shall be as in the Annexure to this Award.

**HANDED DOWN AND DATED THIS 20TH DAY OF SEPTEMBER 2002.**

**(YUSSOF BIN AHMAD)**  
PRESIDENT  
INDUSTRIAL COURT