INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/1-663/05

BETWEEN

GOODYEAR MALAYSIA BERHAD

AND

NATIONAL UNION OF EMPLOYEES IN COMPANIES MANUFACTURING RUBBER PRODUCTS

AWARD NO : 1949 OF 2005

Before	**:**	**N. RAJASEGARAN**	**- CHAIRMAN**
		WAN RAZAK @ WAN RAZAK B. WAN ISMAIL	**- EMPLOYER'S PANEL**
		KARUNAMPIKAI ANANTHARASA	**- EMPLOYEES' PANEL**

Venue : Industrial Court Malaysia, Kuala Lumpur.

Date of Complaint : 30.5.2005

Date of Hearing : 29.9.2005

Representation : Ms. Peh Lee Kheng from M/s Zaid Ibrahim & Co. of counsel for the Company.

Mr. P. Veerasamy from National Union of Employees in Companies Manufacturing Rubber Products representing the Union.

Complaint : The National Union of Employees in Companies Manufacturing Rubber Products has filed a complaint of non-compliance under section 56(1) of the Industrial Relations Act 1967 against Goodyear Malaysia Berhad that Article 19(d)(ii) relating to Study Leave & Other Leave Of Absence of the Collective Agreement Cognizance No. 185/99 has not been complied with.

AWARD

The Collective Agreement

1. There exists a collective agreement, taken cognizance of by the Industrial Court ('the Court') and numbered 185/99 ('Collective Agreement'). The parties to the Collective Agreement are Goodyear Malaysia Berhad ('the Company') and the National Union of Employees In Companies Manufacturing Rubber Products ('the Union'). That Collective Agreement marked the eighth successive one between the parties. Though the Collective Agreement traversed the period 1.4.1999 to 31.3.2002, in the absence of any new collective agreement superseding the same, Article 5(a) enabled the Collective Agreement to subsist todate. This is in consonant with s.17(2) of the Industrial Relations Act, 1967 ('the Act').

The Complaint

2. The matter at hand involves a complaint raised by the Union pursuant to s.56(1) of the Act that the Company had failed to comply with Article 19(d)(ii) of the Collective Agreement ('the Complaint'). The Union complained by way of lodging in the Court on 30.5.2005 the prescribed Form S containing particulars of the complaint. This effectively prevented the Company from pursuing that part of its pleadings where it put in question the Court's jurisdiction to adjudicate the Complaint on the grounds that the Union had failed to comply with Rule 24A(1) of the Industrial Court Rules, 1967 in that the Complaint was not lodged by way of Form S.

Court's Jurisdiction

3. Stepping aside to dispose quickly of one other matter. This arose as a result of the Company including in its bundle of authorities, the apex Court decisions arising in the cases of ***Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers (1983) 1 MLJ 175*** and ***Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers (1988) 1 CLJ (Rep) 116*** with that part relating to the Court's jurisdiction in a s.56(1) complaint under the Act being highlighted. Coupled with this is that part of the Company's pleadings which avers that "the Union is in reality seeking an interpretation of Article 19(d) in the guise of an application for non compliance and this is contrary to the language and spirit of the Industrial Relations Act, 1967." Though Ms. Peh Lee Kheng, learned counsel appearing for the Company, did not labour on this issue during her submission, the Court takes this opportunity to remind itself of what its powers encompassed when dealing with a complaint made under s.56(1) of the Act.

4. The dichotomy presented by the aforesaid apex court decisions as opposed to the Court of Appeal decisions in ***Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union (1995) 2 CLJ 748 CA*** and ***National Union of Hotel, Bar Restaurant workers Peninsular Malaysia v. Tanjong Jara Beach Hotel Sdn. Bhd. (2003) 3 MLJ 49*** has been laid to rest with finality by the Federal Court in ***Tanjong Jara Beach Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia (2004) 4 CLJ 657.*** Speaking through Steve Shim CJ (Sabah & Sarawak) the Federal Court held :

> *" For the reasons stated, we agree with the view expressed by the Court of Appeal in the instant case that the Industrial*

Court had the threshold jurisdiction to interpret the collective agreement in order to determine whether or not there had in fact been non-compliance thereof. It is important to bear in mind that the sole object of such exercise is for the purpose of determining whether or not there has been non-compliance of the collective agreement. "

Subject of Complaint

5. Back to the mainstream. To realize the full import and effect, Article 19(d)(ii) cannot be read in isolation of Article 19(d)(i). This in substance is the position adopted by Ms. Peh Lee Kheng. This is what Article 19(d) says :

" Clause (d)   Leave on Trade Union business

i)   Leave of Absence

Officers of the Union will be granted leave of absence from the Company upon application to carry out his duties stating :-

1. *duration of such absence, and*
2. *purpose of such leave*
   with prior notification to the Company.

Paid leave of absence is only granted for such officer to represent their members in Industrial Relations matters concerning the Company.

ii)   Paid leave for other matters

Paid leave will be granted for Union representatives for the following :

Attendance at the Industrial Relations/ Labour Office	*A maximum of four (4) persons*
Attending Industrial Court cases.	*A maximum of two (2) persons*
Bi-Annual Delegate Conference	*Three (3) persons once every two (2) years*
Monthly Exco and Branch Union meetings	*One (1) for Exco meeting Two (2) for Branch meeting*

6. It is Ms. Peh Lee Kheng's submission that in a non-compliance proceedings the Court has to determine whether a term in the collective agreement has been breached. The Court cannot agree with her more. And this is what the Court will first set itself upon doing. But before that, the contending positions adopted by the parties.

Union's Case

7. Mr. P. Veerasamy, learned representative of the Union, took the position that Articles 19(d)(i) and d(ii) are distinct and should be read separately. Article 19(d)(i) he said, refers to **leave of absence** and this is different from (d)(ii) which relates to **paid leave** and which translates to mean a day-off as opposed to time-off. And it is for this reason that they have been set aside separately in Article 19(d) and not joined together. He further maintained that since the fifth collective agreement between the parties commencing on 1.4.1990 up to the current Collective Agreement, the terminology in Article 19(d)(ii) had been similar. And

since that date on 1.4.1990 for a period of fourteen years, the Company had in implementing that article granted a day-off and not time-off. It was only sometime in April 2004 that the Company started implementing that article on the basis of time-off.

Company's Case

8. Ms. Peh Lee Kheng counteracted by taking a consequential approach. She submitted that the Union's contention would mean that after a meeting stipulated in Article 19(d)(ii) had ended, the Union representatives "should be given paid time-off to go home and rest there or do whatever they want to do." And to support such a contention the Court will have to read into that article the words 'one whole day'. She maintained that Articles 19(d)(i) and (d)(ii) are conjoined and should be read together and that part relating to the procedure on the application for leave of absence as stated in (d)(i) also applied to (d)(ii) and this implied time-off in both instances. She then referred the Court to s.6 of the Act. The need to repeat the same here does not arise. Suffice it to say that in the main it is *in pari materia* to Article 19(d)(i). Relying on that section, she fashioned the argument that the day-off which the Union sought is a benefit not provided for under the law nor in equity. On that point regarding the Company having granted a day-off in the past when implementing Article 19(d)(ii), Ms. Peh Lee Kheng with a flash of her customary genius, took the position that union representatives who did not return to work after a meeting had in effect committed misconduct but the Company had exercised its prerogative not to take disciplinary action against them. She concluded that part of her argument by taking the stand that "whatever that has happened outside the CA, if parties have not captured that practice in writing and deposited that agreement in court, then it had no legal and binding effect." Somewhere along the line Ms. Peh Lee Kheng referred the Court

to the case of ***Malayan Commercial Banks Association v. National Union of Bank Employees (1989) 1 ILR 48.*** With respect, I do not find that case to be of any assistance to the Company in this case. That case involved a reference under s. 26(2) of the Act and dealt with the merits of a claim put forward by the union to include as a term in the collective agreement the benefit of leave for trade union business. The instant case involves a term already existing in the Collective Agreement.

9. So much for the contrasting positions adopted by the parties.

Court's Evaluation

10. Now for the Court's decision. In approaching the conflicting positions taken by the parties and arriving at a conclusion, the Court will hearken to the words of Steve Shim CJ (Sabah & Sarawak) in ***Tanjung Jara Beach Hotel Sdn. Bhd. (supra).*** This is what his Lordship said at page 672 :

> *" In applying the powers under s.30(5) above, the Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the raison d'etre of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both*

parties with the object of establishing harmony between capital and labour and fostering good relationship. "

11. The Court is of the view that Articles 19(d)(i) and (d)(ii) should be read disjunctively and not conjunctively. The genus is stated in the title to Article 19(d) that is, 'Leave On Trade Union Business'. The two species are 'Leave of Absence' at (d)(i) and 'Paid leave for other matters' at (d)(ii). The Court finds (d)(i) to be born of statute. It served the purpose of satisfying the requirements of s.6 of the Act. On the other hand (d)(ii) is not the making of statue nor any vague notion of equity. It had its birth through freedom of contract between the parties. Article 19(d)(ii) is a benefit over and above that found in (d)(i) and under s.6 of the Act. The paid leave granted under (d)(ii) is wider in scope and is not merely restricted to paid leave of absence as in (d)(i) to represent union members, only in industrial relations matters concerning the Company.

12. Article 19(d)(i) on the whole is specific in referring to the duration of absence to carry out the duties as a union officer. And the duration of absence is called 'leave of absence'. ***Black's Law Dictionary, 7th edn. at page 901*** gives the meaning of 'leave of absence' as *"worker's temporary absence from employment or duty with the intention to return."* In short 'leave of absence' does not connote a day's leave. On this there is no dispute between the parties.

13. On what are those situations that attract paid leave is specified in Article 19(d)(ii). That is not in dispute. What is relevant to the complaint at hand is the meaning to be attached to the words 'paid leave'. The Court did not have the benefit of having sight of the whole of the Collective Agreement. Viewing was limited to those portions of the Collective Agreement enclosed to the Union's pleadings. To say the least they were dismal. Putting to good use what was available, the Court

notes that Article 9(a) on leave to be taken on days of an academic examination is described as 'paid leave'. So too does Article 19(b) on paid leave to attend trade union approved courses, seminars and conferences. The term 'leave of absence' is not used. And for good reason too. For the words 'paid leave' usually connotes a day's paid leave unless provided otherwise. To reach such a connotation the need for the Court to read in words of any nature does not arise.

14. Against this backdrop the Court notes that the Company had interpreted and implemented for fourteen preceding years that paid leave as envisaged under Article 19(d)(ii) was a day's paid leave. The Court finds that in doing so, the Company had complied with the provisions of that article. In now not doing so, the Company has opened itself to be in breach of the term of Article 19(d)(ii). And so, the Court finds the Company not to have complied with that article.

Order

15. For the reasons adumbrated, the Court unanimous in decision, orders the Company to comply with Article 19(d)(ii) of the Collective Agreement by granting union representatives paid leave on the basis of a full working day, for the purposes stated in that article.

In Passing

16. I pause to observe that Article 19(d)(ii) involves amongst others, attendance at the Industrial Relations Office, Labour Office and the Industrial Court. Attendance thereat will undoubtedly include union representatives, management representatives and possibly workmen affected by the dispute. It is not uncommon for such attendance to be only for part of a day. In such instances it is more likely than not that

the management representatives and the workmen involved in the dispute would be required to return to their respective work station and remain there until the end of the working-day. But not so the union representatives who will have for themselves the rest of the working-day. Truly an anomalous situation.

17. That the Company contributed towards the making of this situation cannot be denied. It did this by agreeing and including the relevant term in the Collective Agreement and through implementing that term over a period of fourteen years. The Company could not upon waking up to the true consequences of the bargain it had freely entered into, unilaterally cease to carry out that term.

18. A compulsory starting point in the relationship between management and union is strict adherence to the principle of *pact sunt servanda.* The Court on its part will jealously guard the sanctity of collective agreements and will be quick in enforcing terms contained therein. Otherwise the very foundation of our system of industrial relations will be derailed. This will cause disharmony and disruption in the work place and in industry. And that will set back the Country's progressive march towards the status of an industrialised nation.

19. The Company would have done better if it had sort to resolve any discrepancies caused by Article 19(d)(ii) at the negotiation table instead of adopting the course of action that it did.

HANDED DOWN AND DATED THIS 11TH OCTOBER 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT