INDUSTRIAL COURT OF MALAYSIA

CASE NO: 1/2 - 416/2006

BETWEEN

KESATUAN PEKERJA-PEKERJA PERKILANGAN PERUSAHAAN MAKANAN

AND

NESTLE MANUFACTURING MALAYSIA SDN BHD

AWARD NO: 45 OF 2008

BEFORE: DATO' UMI KALTHUM BT ABDUL MAJID - PRESIDENT
ENCIK SHEN THIAM HOCK - EMPLOYER'S PANEL
ENCIK ABDUL HALIM BIN MANSOR - EMPLOYEE'S PANEL

VENUE	**:**	Industrial Court Malaysia, Kuala Lumpur
DATE OF REFERENCE	**:**	30.12.2005
DATES OF MENTION	**:**	16.03.2006; 15.06.2006; 29.08.2006; 29.09.2006 07.03.2007; 13.04.2007
DATES OF HEARING	**:**	17.10.2006; 01.12.2006; 15.02.2007 16.02.2007; 25.06.2007; 03.07.2007; 23.07.2007
DATES OF PANEL DISCUSSION	**:**	30.07.2007; 17.08.2007
REPRESENTATION	**:**	Encik VK Raj of M/s P Kuppusamy & Co, Counsel for the Union Lt Kol (B) Hj Mohd Akhir Hj Hamzah of the Malaysian Employers Federation (MEF), for the Company

REFERENCE: This is a reference under section 26(2) of the Industrial Relations Act 1967 **("the Act")** arising out of the dispute between the **Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan ("the Union")** and **Nestle Manufacturing Malaysia Sdn. Bhd. ("the Company")** regarding the Collective Agreement for the period 1 January 2005 to 31 December 2007 **("the C.A.").**

AWARD

1. This is a reference under section 26(2) of the Act arising out of the dispute between the Union and the Company regarding the C.A. This is the majority decision of the Court. The dissenting decision of the Court by learned panel member for the employers appears later in this Award.

2. On the first mention date, the Court fixed several dates to enable the parties to file in their respective pleadings, and had also fixed 15 June 2006 for case management and 20 July 2006 for hearing. On 15 June 2006, the parties had yet to file in their pleadings. This led the Court to fix two further dates for the filing of the respective pleadings as well as a hearing date of 17 October 2006 for the Court to deliberate on the preliminary objection raised by the Respondent in regard to paragraphs 6.2 and 8 of the Statement of Case.

3. Upon a brief hearing of the preliminary objection, the Court had requested the parties to agree to deleting certain offending parts of the Statement of Case, and which the parties agreed. The Court then ordered paragraphs 6.2 and the third sentences in paragraph 8 deleted from the Statement of Case, and consequentially parts of paragraph 1.7 of the Statement in Reply was also ordered to be deleted where it made reference to paragraph 6.2 of the Statement of Case. The Court had also urged the

parties to try and negotiate and conclude the C.A. in the shortest possible time. The Court then fixed 1 December 2006 for the hearing of the matter.

4. When the matter was called up for hearing on 1 December 2006, the Court was informed that the parties had agreed on most issues/Articles except for three issues, which are as follows:

4.1 Paragraph 6.1 of Statement of Case, the Immediate Adjustment Rate (I.A.R.);

4.2 the remaining paragraph 8 of Statement of Case, Contractual bonus;

4.3 paragraph 9, performance based Annual Increment in Salary.

5. However, at the beginning of the trial, the Company had raised an additional issue of the duration of the C.A. The Court then adds this issue as the fourth issue to be considered by it.

6. The Union called one witness, Naharudin bin Ibrahim ("UW-1"), whilst the Company called two witnesses, Mohd. Farid Shah bin Mohd. Basir ("COW-1") and Azman bin Abdul Khalid ("COW-2"). The evidence adduced from these witnesses will be dealt with together with the issues to be deliberated upon.

DURATION OF C.A.

7. This issue will be dealt with first as it is pivotal to the whole C.A. It is the Union's contention that this issue had already been agreed to by the parties as evinced by Exhibit U-3 and that therefore the Court should recognize and allow such agreement to become manifest. This exhibit was undated but signed by Hj. Izam Harun for the Company with the designation "Pengerusi Perwakilan Pengurusan, Perundingan Perjanjian Bersama" and Selamat Mohamed, "Presiden Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan" for the Union. This Exhibit reproduces Article 6/Fasal 6 entitled "Tempoh, Ubahsuai Dan Penamatan Perjanjian" of the C.A. According to the testimony of UW1, Exhibit U-3 was one of 17 Articles of the C.A. which were signed by the parties on 24 March 2005 during a meeting of the parties. Paragraph (a) of the said Article 6 clearly states that the C.A. **shall come into force beginning from 1 January 2005** and shall continue to be in force for 3 years until replaced by a new collective agreement. Learned counsel for the Union cited the cases of (of relevance) *Sarawak Commercial Banks Association v. Sarawak Bank Employees' Union* [1990] 2 MLJ 315 and *Nestle Food (M) Sdn Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1995] 1 ILR 249 as his authorities. According to learned counsel, should the Court rule otherwise, it may result in a jurisdictional error.

8.1 In the Statement in Reply, the Company had stated that the period of the currency of the C.A. is to be determined by the Court (see paragraphs

1.2, 1.4, 1.6.1) and proposed instead that the "new C.A." should be for a period of 3 years from the date the Court hands down the award. Learned representative of the Company had raised this issue at the beginning of the hearing of the witnesses stage and asked for the Court's ruling on it. During the hearing of the submissions by the parties in respect of the issue on IAR, learned representative of the Company again raised the issue of the commencement date of the C.A. That if the commencement date of the C.A. is from the date of the Court's Award to 31 December 2009, the Company would be willing to concede to an IAR of 8 %. As this was stated in the context of a proposal, the Court will take this aspect as part of its consideration.

8.2 Learned representative for the Company in his submission had asked the Court to invoke the provisions of "section 34(4)" of the Act (the Court believes he meant section 30(4) to extend the expiry date of the C.A. to a three year period expiring in 2010 as this would also be in accordance with section 14(2)(b) of the Act.

THE DECISION

9. The Court is in agreement with the matters raised by learned counsel for the Union on this issue. The Court is of the view that:-

9.1 the matter had already been agreed to by the parties as evinced by Exhibit U-3 and was not challenged by the

Company. As such it should not be further litigated. Other than briefly alluding to the fact that nothing is agreed unless everything is agreed by the learned representative of the Company, the Court is of the view that the Company is not serious in taking this position to the end (if not the parties would have to adduce evidence and submit on all the Articles of the C.A.). The learned representative of the Company had in fact stated in paragraph 30 of the Company's submission that the Company is agreeable to the implementation of the C.A. be made retrospective to 1 January 2005;

9.2 the Court has to decide within the boundaries of the Ministerial reference ie, the Collective Agreement for the period of 3 years beginning from 1 January 2005, unless of course otherwise agreed to by both parties, which is not the case here;

9.3 the Court declines to extend the expiry date of the C.A. to 2010, even if it has the powers to do so under section 14(2)(b) of the Act, as urged by the Company in order to discourage parties from refusing to come to an agreement and insist on protracted negotiations. Further, it must be remembered that the arguments revolving around the issues of IAR and Annual Increment in Salary are based on the Company's corporate performance for 3 years before the date of implementation of

the C.A. If the period of implementation of the C.A. is extended for another 3 years, it would have given a distorted view of the Company's performance, assuming of course that the Company's performance would be improving during that extended period. On the other hand, should the corporate performance of the Company decline within such extended period, the Company would in all likelihood work towards varying the terms of the C.A.

IMMEDIATE ADJUSTMENT RATE (IAR)

UNION'S CASE

10. UW-1 is the General Secretary of the Union. He has been a member of the Union for about 20 years and is also the Chairman of the Union at the factory level. He had been involved in the negotiation process of the C.A. from its inception on 16 May 2005. He testified on what is meant by IAR, which testimony was not challenged by the Company and in fact agreed to by COW1 during cross-examination, and the Court accepts his testimony. IAR, according to UW-1, is the adjustment of salary as agreed to by the parties to be held every 3 years. The effect of such an adjustment on a worker's salary is to increase his salary from his existing one. This process of adjustment does not lead to a worker having less salary. The rate of such an adjustment has to be agreed between the parties through negotiations. Under the Fourth Collective Agreement for the years 2002-

2004 ("4th C.A."), UW-1 received an annual salary adjustment of 8% as shown in a letter dated 25 July 2002 to him from the Company - see page 62 of UB-1.

11. UW-1 further testified that the Union's current demand in respect of the IAR is for an increment of 12% under the new C.A. The reasons for the 4% increase over the rate of IAR under the 4th C.A. are as follows:

11.1 there has been a rise in the cost of living that has affected members of the Union;

11.2 a rise in the price of petrol;

11.3 a rise in the cost of toll charges on roads/highways leading to the Union members' worksites;

11.4 a rise in the cost of the Union members' children's education.

UW-1's testimony on these aspects was not challenged by the Company.

12. Based on the testimony of UW-1, learned counsel for the Union submitted that it is within the domain of public knowledge, and which the Court accepts, that the prices of petrol had been increased at least 3 times over the space of two years from 2005 to 2006. These price increases have had great impact on the disposable income of the Union members; not only that, the increases in the price of petrol also have the domino effect of

increasing the prices of goods in the country generally which ultimately has led to the increase in the cost of living. This would have had compounding effects on lives of the Union members who have families to maintain. In the midst of all these increases, the base salaries of the Company's employees have remained the same since the last IAR under the 4th C.A.

13. In urging the Court to determine an IAR which would take into consideration all necessary factors, learned counsel for the Union further submitted as follows:

13.1 based on the case of *Persatuan Bank-Bank Perdagangan Tanah Melayu (MCBA) v. Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia (ABOM)* [2005] 2 ILR 426 ("*MCBA's case*"), which in turn cited the cases of *Penfibre Sendirian Berhad, Penang v. Penang & Seberang Prai Textile & Garment Industries Employees Union* [1986] 1 ILR 323 and *Kilang Nenas Malaysia Sdn Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [2002] 1 ILR 793, the Court has to take into account various factors in deciding on the question of wage structure and wage increases as established in Industrial Law ie,-

13.1.1 wages and salaries prevailing in comparable establishments in the same region;

13.1.2 any rise in the cost of living since existing wages or salaries were last revised; and

13.1.3 the financial capacity of the company to pay higher wages/increases - this being the limiting factor in dealing with wage increases and with other employees' benefits, because when other factors may provide *prima facie* justification, increased wages will normally be awarded only within the limits of the company's financial capacity;

13.1.4 increase in Consumer Price Index (CPI) only and apply the "2/3 formula";

13.1.5 increase in productivity of the employees';

13.2 the Company's **Company Annual Report 2005**, as extracted from the Archives of the Kuala Lumpur Stock Exchange (see Exhibit UB-4), can be seen in this Annual Report which actually refers to the Report of Nestle (Malaysia) Berhad but which makes direct references to the Company. So on page 82 of Exhibit UB-4, under the heading "Directors' Report", it is stated that the "principal activity of the Company is that of an investment holding company" and that "all the manufacturing activities are now consolidated

into Nestle Manufacturing (Malaysia) Sdn. Bhd.", with the exception of the confectionary operations. It was submitted by learned counsel for the Union that the main contributor to the profits of Nestle (Malaysia) Berhad is through the manufacturing activities of the Company;

13.3 following from paragraph 13.2 above, learned counsel referred to:-

13.3.1 page 13 of Exhibit UB-4, where the Chairman's Statement stated that:-

> "The year under review will go down in history as the Group registered RM3.1 billion in turnover, 7.8% growth over 2004, surpassing the RM3 billion mark for the first time. The sustainable and profitable growth was contributed by all product categories, led by Chilled Dairy and Culinary, which have registered a double digit growth."

The Court notes at this juncture that "Chilled Dairy" and "Culinary" products are manufactured by the Respondent as testified by COW-1;

13.3.2 page 79 of Exhibit UB-4, entitled "5 Years' Statistics", which showed that since 2003, the turnover, earnings per share, pre tax profit and net dividend per share had all been on an ascending scale;

13.3.3 page 17 of Exhibit UB-4, entitled "Business Review", and under sub-heading "Profitability", where the workers' efforts were acknowledged as:-

> "Profit before tax margin, although impacted by higher prices of milk solids, wheat flour, packaging materials and fuel mainly, showed an improvement from 10.2% in 2004 to 10.6% in 2005, partly due to a more favourable product mix and the efforts of all our very dedicated staff through Operational Excellence initiatives for efficiency improvements.";

13.4 in view of such unchallenged and undisputed evidence as contained in Exhibit UB-4, learned counsel submitted that the Company had achieved a record turnover and profits never before experienced by the Company. When the IAR was last revised under the 4th C.A., the Company had agreed to a 8% adjustment. But now when it is in its best financial position, the Company is seeking to reduce the IAR for the new C.A. to a rate that is even lesser, ie, 6.5%, than under the 4th C.A.;

13.5 during the clarifying of issues stage of the Union's submission, learned counsel for the Union stated that he had instructions to inform the Court that the IAR acceptable to the Union is anything better than the last 4th C.A. because of the efforts put in by the employees.

RESPONDENT'S CASE

14. COW-1 is the Group Human Resources Manager, Remuneration and Expatriation. His testimony is as contained in his Witness Statement, COWS-1 and as orally given in Court. He is a member the Management Negotiating Team appointed by the Company to negotiate the C.A. with the Union. According to him, the Company proposed a 6.5% IAR based on 3 reasons -

14.1 **economic factor** - by looking at the Consumer Price Index (CPI) for the past 3 years ie, 2003, 2004 and 2005 which ranged from 1% to 2% and accumulatively it is less than 6%;

14.2 **external competitiveness factor** - based on the salary survey conducted by COW-1, COW-1 found that the benefits, fixed increments and salary structure offered by the Company are far more competitive than other comparable companies. COW-1 made reference to pages 4, 5, 6 and 7 of COB-1 to emphasise his point;

14.3 **company sustaimability factor** even though the Company had consistently made profits, it had to be compared with its operational costs in running the business. According to COW-1, when the operational costs of the Company were compared with other Nestle factories from

other countries, the operational costs of the Company were found to be "quite on the high side". That if the said operational costs were not managed efficiently and effectively there would be a possibility that the business would be conducted elsewhere, as had happened previously where the Company's operations in Petaling Jaya was moved to Thailand. On this aspect the Court was asked to take into account of the facl: that on a global perspective, Vietnam, Indonesia and China are more competitive in terms of operation costs.

15. During cross-examination, COW-1 was allowed time to produce document Exhibit CO-3 to explain how the Company derived the IAR at 6.5%. The Court finds his explanation unsatisfactory and not very helpful. More so when he explained that the "Table 1: Cumulative CPI from 2002-2004" in Exhibit CO-3 was derived by using the **actual** CPI for the year 1999 and increases starting from that actual CPI for the year **1999.** COW-1 agreed that the so-called "CPI" in Table 1 is not the actual CPI as contained in the Bank Negara Malaysia's Report but was so stated below Table 1 itself. When asked the question whether the logic in the said Table 1 was applied to the 8% IAR for the 4th C.A., COW-1 said he did not know. He instead repeated his answers during examination-in-chief that the CPI was one of the factors which the Company took into account in determining the IAR. On re-examination, COW-1 stated that the proposed 6.5% IAR is part of the

total package of the new C.A. arid as contained in document CO-3. The other elements which comprise the package are:-

15.1 contractual bonus;

15.2 increase in the fixed increment;

153 the annual performance incentive which is a lump sum amount;

15.4 increase in the maximum salary.

16. In his submission, learned representative of the Company stated that the Company in offering an IAR at 6.5% had taken into account:-

16.1 **external competitiveness,** wherein the Company's salary structure has always been comparatively highest within the food industry, thus enabling the Company to attract, engage and retain employees;

16.2 **company sustainability** where even though the Company's sales turnover was RM3 billion in 2005 and the Company is still profitable, the Company needs to continuously be mindful of its competitiveness and effective cost structure in the coming years. Any increases in the salary structure would further escalate the Company's cost structure and by that way dilute its competitiveness;

16.3 **economic factor,** which requires the unit cost of production to be always competitive among other regional production centres. Failure to keep unit cost competitive would lead to a relocation of the manufacturing activity to other cost effective centres in neighbouring countries such as Thailand and Indonesia, and thus resulting in the loss of jobs in Malaysia;

16.4 **the CPI from 1999 to 2005,** wherein the rate of salary increase was significantly higher compared to the rate of increase of CPI from 1999 to 2005. Learned representative of the Company referred to the case of *Malayan Commercial Banks Association v. National Union of Bank Employees* [Jan.-June 1982] MLLR 246 for the proposition that the IAR should be made in accordance with the formula as laid down in that case by the late Justice Harun Hashim, the then President of the Industrial Court. In that case, the Court ruled amongst others, that as a general rule, salary increases based purely on the increase in the CPI should not be less than 60% or more than 2/3 of the average increase of the CPI over the previous three-year period;

16.5 during the clarifying of issues stage of the Company's submission, learned representative of the Company stated that the Company was willing to concede an IAR of 8%

provided that the date of coming into force of the C.A. be from the commencement date of the Award to 31 December 2009.

THE DECISION

17. The Court in deciding that the IAR be at **10%** took into account the following matters:

17.1 the Company's offer of 6.5%, which later led to an offer of 8% (subject to the condition that the commencement date of the C.A. be from date of Award to 31 December 2009, but which has been decided as not being possible before this), as compared to 12% as demanded by the Union;

17.2 the last 4th C.A. had an IAR of 8%;

17.3 the Company had recorded a record performance for the year 2005 and based on the Annual Report of the Company in UB-4, there is every reason to be optimistic on the Company's future corporate performance;

17.4 the factors which the Court needs to take into account as laid down in the 2 cases cited by learned counsel for the Union - see paragraphs 13.1-13.4 above;

17.5 at the same time the Court agrees with the Company to some extent in regard to all the factors which the Company had taken into account in deriving the IAR (but not the percentage as such) and which it is the view of Court are consonant with the requirements of the Act ie, **section 30(4).** Section 30(4) requires the Court to take into account the economic impact on the country, the financial impact on the Company, and the industry. In doing so, the Court is of the view that the ***Malayan Commercial Banks Association's*** case *(supra)* is a 1982 case and does not serve to help the Court greatly in deciding this issue purely on the CPI alone. This is more so in the face of facts produced by the Union, especially in the form of UB-4, as well as the fact that the Company had only taken the CPI as one of its considerations when determining the IAR.

CONTRACTUAL BONUS

18. At the clarifying stage of the submission of the Company, learned representative of the Company had informed the Court that parties had agreed to a **contractual bonus of *2* months.** It is so ruled.

PERFORMANCE BASED ANNUAL INCREMENTS IN SALARY

THE UNION'S CASE

19. The dispute between the parties on this matter arise from the Company's introduction of the Productivity Linked Wage System (PLWS) to the annual increments in salary of the Union members under the C.A. In his testimony, UW-1 stated that the Union principally supports the policy of PLWS. The Union, however, according to UW-1, found the Company's proposal on this matter very unsatisfactory when it based the appraisal system on 5 levels, ie, level 1 - well above expectations; level 2 - above expectations; level 3 - meets expectations; level 4 - below expectations; and level 5 far below expectations. Even though this appraisal system had been in place before the C.A., its proposed implementation under the C.A. differed from the previous Collective Agreements. Under the current proposal, those employees who have been appraised at levels 4 and 5 will be prevented from receiving the annual salary increment, which had never happened before in respect of those employees who had not reached their maximum salary. In view of this, the Union was unable to accept the Company's proposal as it was a form of penalty against the individual worker involved The Union's proposal was to allow those employees who have been appraised at levels 4 and 5 to still receive their annual salary increment and to limit to only those employees who have achieved appraisal levels 1 to 3 eligible for promotion. For those who have been appraised at levels

4 and 5, they would be eligible for future promotion should their future performance be appraised at levels 1 to 3.

20. According to UW-1, before the negotiation on the new C.A., the Company had never informed the Union of there being an increase in problematical employees The Company is using the "Performance and Development Review Report" in document marked as CO-4 in the Statement in Reply to appraise the performance of the employees. The Union is concerned that the use of CO-4 would give rise to biasness in the appraisal of the employees and thereby incurring the feeling of dissatisfaction of the employees towards management. It may also give rise to discrimination.

21. The said Company's proposal was to be implemented beginning from the month of January 2007. The Union, according to UW-1, opposes the Company's proposal since normally the slackened performance of an employee is due to the lack of discipline, such as going to work late, for which the Company has established procedures on disciplinary action to be taken against such employee and as contained in the Nestle Employees Handbook. It is the Union's proposal that in order to overcome the problem of under performing employees, the Company should instead have an incentive scheme in the form of additional bonus and additional annual salary from the existing one. Over and above that, those employees with performance rating of levels 4 and 5 should be given counselling and motivation.

22. In support of UW-l's testimony, learned counsel for the Union drew the Court's attention to the **Guidelines on Wage Reform System** which were adopted by the National Labour Advisory Council on 1 August 1996 ("the Guidelines") and issued in a pamphlet form by the Ministry of Human Resources Malaysia - see pages 74-76 of Union's Bundle of Authorities. Learned counsel submitted that under the Guidelines, both the **Profitability Model and Productivity Model** incorporate **annual increment as a fixed component** ie, that the annual salary increment cannot be taken away. That the Company's proposal to withhold annual salary increment of the employees who are graded at levels 4 and 5, which in effect denies the employees their annual increments during the period of withholding, is not what is envisioned by the Guidelines and is against the spirit of the Guidelines. He therefore prayed the Company's proposal on the PLWS be disallowed.

THE COMPANY'S CASE

23. According to COW-1, the Respondent is proposing to implement the annual personal performance incentive whereby employees who have shown performance rating 1 will receive RM200/-, employees who have performance rating 2 will receive RM150/-. This is in accordance with the Government's initiative which introduced productivity linked wage system or PLWS. Employees with performance rating *3* will not receive any incentive, whilst those with performance ratings 4 and 5 will be given counselling and coaching to help them to improve their performance.

24. COW-1 confirmed what was stated by UW-1, that those employees with performance ratings 4 and 5 will have their annual increment withheld until they have improved their performance. Whilst COW-1 is aware that the annual salary increments is a fixed component in the Wage Reform System in the Guidelines, it did not mean that he agreed with it.

25. COW-2's testimony centred on the appraisal system and the proposed withholding of annual salary increment for those employees with performance ratings 4 and 5. His testimony essentially reaffirmed the testimony of UW-1 on these matters which were -

25.1 the performance appraisal system has been in practice by the Company since 1995;

25.2 under the Company's proposal there will be withholding of annual salary increments for employees with performance levels 4 and 5, ie, 50% for level 4 and 100% for level 5;

25.3 Company's proposal on the PLWS in regard to the withholding of annual salary increment of employees with performance levels 4 and 5 was to come into force on January 2007;

25.4 even though the employees with performance levels 4 and 5 will be given counselling and coaching for certain period of time and subsequently their performance would be again

appraised, during which time their annual salary increment would be withheld until their performance rating improve, their annual salary increment after their performance rating has improved will be reinstated but will not be backdated. In other words the annual increment will only be made prospectively.

26. Learned representative of the Company stressed on the fact that the performance appraisal practices had always been in place in the Company for many years, since 1995 to be exact. In order for the performance appraisal to be more meaningful, it must be linked to the salary increase. He cited the case of *Prestige Ceramics Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union* [2004] 1 ILR 1177 ("*Prestige Ceramics*"), excerpts from the National Productivity Corporation May 2006 report, and the Guidelines to stress on this need. It was submitted that linking wage to performance is one of the crucial factors in enhancing the Company's competitive advantage in facing the rising global challenge. This system would avoid rewarding non-performers and enable the Company to have highly motivated and productive employees.

THE DECISION

27. Section 30(4) of the Act requires the Court:-

> "(4) In making its award in respect of a trade dispute,... shall have regard to the **public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries**."

The Court's mind is weighed very heavily on these provisions more so in a trade dispute involving a collective agreement such as the C.A. The Court takes into account very much the arguments and issues raised by the Company. It does not wish to see its award on the issue of PLWS to have the effect of, in the words of learned representative of the Company, rewarding non-performers or poor performers. This would lead to serious consequences such as preventing the Company from competing internationally or worse, leading to closures of its operations or part of its operations in Malaysia and having to move out to neighbouring countries where costs of operations are kept low and therefore more competitive as compared to Malaysia. These concerns of the Company have been very much the basis of the Guidelines drawn up by the National Labour Advisory Council on 1 August 1996 and which is in line with the Malaysian Government's policy, as reported in the press from time to time and which the Court takes judicial notice, of raising the efficiency and productivity of the Malaysian labour market for Malaysia to remain competitive internationally.

28. The introduction to the Guidelines, states as follows:

> "...In the interest of all parties concerned it is prudent to take measures to enhance efficiency and productivity. This will ensure the future competitiveness of the economy which in turn should contribute to the improvement of the quality of life of workers.
>
> Recognising the importance of this issue, **the National Labour Advisory Council (NLAC) has agreed on the need to draw up a set of Guidelines On Wage Reform System which would be in the immediate and long term interests of employees in the unionised and non-unionised sectors, employers and the nation.** Such guidelines would facilitate employers and employees to formulate the types of reform systems that would best suit the interest and environment of their companies."
>
> [Emphasis added.]

29. The concerns of the Union on the PLWS, moreover, such as it may lead to discriminatory practices etc., though legitimate, cannot stand in the way of the appraisal being made. Even in the public services, appraisal of public servants has been the norm for many years and put into effect by the respective public services commissions. In any case, based on the testimony of COW-2, employees whose performance appraisals are at levels 4 and 5 will be given counselling and coaching, the very thing which the Union had wanted.

30. At the same time section 30(5) of the Act also requires:-

> "(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form."

Since the negotiations of the C.A. had been protracted, despite many urgings by the Court for parties to try and settle their differences amicably, and since the Company's proposal on the PLWS was intended to be implemented in the 3rd year of the C.A., the Court is of the view that such a step would be unfair to the Union members who have been given the legitimate expectation that the terms of the 4th Collective Agreement would continue to be in force until superceded by a new agreement (in the form of the proposed C.A.) see Article 6 of the 4th Collective Agreement in Exhibit CO-1 in the Statement in Reply. The Court therefore disallows the PLWS provisions as proposed by the Company, whereby the annual salary increment of those employees whose performance ratings are at levels 4 and 5 would be suspended at 50% for level 4 and 100% for level 5 The provisions under the 4th Collective Agreement in this respect shall be provided for in the C.A. In doing so the Court takes into account the Union's submission that the Guidelines have stipulated in both the **Profitability Model** and the **Productivity Model** the "Fixed Component" as against the **"Variable Component".** That the "Fixed Component" for both Models includes "annual increment".

31. Further, the Court distinguishes the facts in ***Prestige Ceramics'*** *case* as against this case. In that case, it was found as a fact that the company could not afford a wage increase of its employees and therefore not bound to continue with existing wage system and the Court allowed the

company's proposal to introduce its PLWS. This is not the case where this case is concerned.

32. The Court, however, in so ruling wishes to point out to parties that this ruling applies to the C.A. where the effective date of coming into force is 1 January 2005 and continues to be in force until 31 December 2007. Thereafter, and even though Article 6 of the C.A. as referred to earlier provides for similar situation as contained in Article 6 of the 4th Collective Agreement, the Court would strongly urge both parties to negotiate as soon as possible the next Collective Agreement taking into account the said proposal of the Company. This is more so since the Union has stated that it has accepted the PLWS in principle. It is incumbent upon the Union to cooperate with the Company to educate its members on the importance of accepting the Company's proposal as the way forward to ensure greater efficiency and productivity of the Company's workforce in the face of many global challenges.

33. Finally, other than the four issues dealt with by the Court above, the parties had informed the Court that the rest of the provisions of the C.A. have been agreed upon. In the premises, the parties are required to submit the C.A. for cognizance one month from the date of this Award.

34. The dissenting views of the panel member representing the employers are reproduced below;

"1. I would like to present my dissenting views on the three (3) issues that of "Duration of the C.A., the Immediate Adjustment Rate (IAR) and the introduction of the Performance Link Wage System (PLWS)".

2. I would endeavour to deliberate my reasoning on each of the issues and to offer my grounds for the decision.

Duration of the C.A.

3. The Court is empowered as provided by section 14(2) of the Industrial Relations Act 1967 to specify the period it shall continue in force "which shall **not be less than** three years" from the date of the commencement of the agreement. The C.A. before the Court commence on 1 January 2005. Thus, in line with the above provision, the Court could make an award for an effective duration extended beyond the three (3) years period to 2008 (for a four (4) years period) or 2009 (for a five (5) years period).

4. The objective of section 14(2) is ostensibly for the purpose that there must be stability in Industrial Relations for at least of a **minimum period** of three (3) years. I am therefore of the view that the period should be a **minimum period** of three (3) years from the date of the award.

5. The parties officially commenced Collective Bargaining on 24 March 2005. The whole process from unable to reach agreement and refer to Industrial Relations Court, negotiation process, Industrial Relations Court mentions and hearings take about more than two (2) years to be completed.

Therefore it is my considered view that the protracted time frame is far beyond the control of the parties and it is my decision as a member of the Court that the period of the C.A. to be extended up to 31 December 2009. It would be opportune for the Court to view the case **No: 7/2-30/02 between Standard Chartered Bank Berhad and Persatuan Pegawai-Pegawai Standard Chartered Bank Award No. 491 of 2003** where on the "Issue of Backdating the C.A." The Chairman amongst other ruled as follows:

> "The Court deems appropriate in this case to invoke section 30(4) to extend the expiry date by twelve months to 31st July 2004 looking at the rapidity of the C.A. cycle of three years. Because of the various criticisms, ideally a cycle of five (5) years will be more realistic especially during bad economic times, and the serious cost-escalation trends, which results in disproportionate cost versus revenue ratio. If the expiry date of 31st July is retained the parties will have no time to implement this Award, and the next cycle begins in a month's time".

Immediate Adjustment Rate (IAR)

6. The practice of the Industrial Relation Court to award the IAR has always been based on Consumer Price Index (CPI) according to Harun formula. **Industrial Relation Court Award 45 of 1987** lays down the following principle:

   a. wages and salaries in comparable establish in the same region;

   b. any rise in cost of living since existing salaries and wages were last adjusted;

   c. the individual capacity of the employer to pay the increase;

   d. the legitimate desire of the employer to make a reasonable profit.

7. In making an Award of an adjustment the Court is bound to observe section 30(4) wherein the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industries concerned, and also to the probable effect in related or similar industries or other industries.

   I agreed with the Company that Nestle has the highest pay in it industries in comparison, and the Company still willing to

give an Immediate Adjustment Rate of 6.5% to it's employee (which I think is a quite reasonable amount).

In my opinion, we should not compare private sector with public sector as it will open up the Floodgates to the Private Sector. The Public Sector only has an adjustment after more than ten (10) years, while in this case the employee are enjoying an adjustment every three (3) years once a new C.A. are Awarded. In a highly competitive environment as it is today in view of globalisation the need for companies to remain competitive is paramount. Any wages adjustment should take into consideration the effect on the national economy and probable effect in related and similar industries or other industries.

8. The CPI for the period movement from 1 January 2005 to 31 December 2007 was 8.2%. Following Harun formula two third (2/3) of that would amount to 5.8%. In my opinion the adjustment should have something to be base on and I would say that Harun Formula is still very applicable and reasonable. I hereby make an Award of 7%, which in my opinion is very reasonable.

Performance Link Wage System (PLWS)

9. The Company wishes to introduce a performance element into the wage system. From what I understand Company wishes to introduce the performance element into the annual increment.

10. In my understanding the Union has no objection for the introduction of the PLWS as testified in Court during the hearing. Their only qualm is the withholding of increments for those with the rating 4 and 5 in the performance appraisal exercise.

11. In my opinion a bad or poor performance employee should not entitled to any annual increment unless the employee improve himself or herself, if they still entitled for whatever the good performance employee is entitled, this will be unfair to the good performer. I wish to point out that all reasonable person will make the same logic decision like me.

12. To make it amenable to the Union, I am suggesting the withholding of 75% increment for rating 5. Thus no one is deprived of an increment. However employees with rating of 4 and 5 will have to show improvement in their performances through the “Proses Peningkatan & Bimbingan Individu” in

the coming month for their full increments to be restored fully.

13. Since rating 4 & 5 get two (2) opportunities to get increment restored not retroactive though, I am of the view that an Award is made in accordance with the proposal of the Company except the amendment I made for rating 5 so that every employee will get an increment. Lastly, I am of the view that with the extended duration Awarded by the Court, the PLWS will suitably be implement through this C.A.

I have reasoned out my views with clear conviction for fair dealings to both parties in this case."

HANDED DOWN AND DATED THIS 8TH JANUARY 2008

(DATO' UMI KALTHUM BT ABDUL MAJID)
PRESIDENT
INDUSTRIAL COURT