A

SUZUKI ASSEMBLERS (M) SDN BHD

v.

NATIONAL UNION OF TRANSPORT EQUIPMENT AND ALLIED INDUSTRIES WORKERS

B

INDUSTRIAL COURT, PENANG
YUSSOF AHMAD
EMPLOYER'S PANEL: SYED MUBARAK SYED OSMAN
EMPLOYEES' PANEL: LENGERBALAN NADARAJAH
C AWARD NO. 617 OF 2006 [CASE NO: 1(14)/2-227/2004]
13 APRIL 2006

TRADE DISPUTE: *Collective agreement - Terms and conditions - Bonus, salary revision and annual increment - Company in financial straits - Whether bound to pay bonus - Whether to continue with existing rates of annual increment - Industrial Relations Act 1967, ss. 26, 30*

D

This was a reference of a trade dispute between the Union and the company under s. 26 of the Industrial Relations Act 1967. The dispute arose out of the parties' failure to conclude their Collective Agreement.
E *Inter alia,* the disputed items relate to the matter of bonus as well as salary revision and annual increment for the years 2003 and 2004. Apparently, in respect of the bonus, the Union had taken issue with the company's proposal to base the payment thereof on the so-called productivity-linked-wage-system ('PLWS'). This apart, it was the
F Union's stand that a salary revision of 18% ought to be implemented and incorporated into the agreement. The company explained that it was facing financial difficulties and so was unable to meet some of the Union's proposals. The company also affirmed that the determining factor in the mechanism to decide on bonus was the attendance of the
G employees. This aside, the company contended that it had paid increments for the years 2003 and 2004 and sought the court's confirmation of the same.

Held:

H **(1)** Even without taking into account the depreciation suffered by the company for the relevant years, the company was in fact making losses. The law is clear that, just as the employees could aspire to improve on their standard of living, companies in poor financial position cannot be expected to raise wages across the board. (para 13)

I

(2) The facts showed that the company, to its credit, has already granted provisional revision in 2003 and 2004. That being so, it would be consistent with industrial harmony if the court were to order that the payments be refunded to the company. The employees, therefore, should retain the increment. This increment is in actual fact the usual once-in-every-three-years salary revision. It is to be taken as annual increment. (para 14)

(3) The company should continue with the existing rates of annual increment. We however disagree with the company's proposal to introduce incentive based purely on attendance. Clearly, such incentive is not part of PLWS. Incentive is to be based on productivity or at least higher performance. Attendance or full attention need not necessarily bring about better performance. If the idea is to combat absenteeism, they are other ways available. In any event, absenteeism can be checked by treating it as misconduct which could lead to dismissal. Further, if the proposed incentive is not given because the employee did not attend work and also has to face disciplinary action, it would mean that he suffers from double jeopardy. We therefore do not approve of the company's proposal on attendance incentive allowance. (para 16)

(4) Since the company has suffered financial incapacity, they need not pay bonus. Bonus is meant to be a reward for good performance which in turn leads to the company's better financial position. Considering the company's financial position, the court will not therefore order the company to pay bonus for the years 2003, 2004 and 2005. However, it will not order the employees to refund the bonus already paid in 2003 and 2004. (para 17)

(5) The company is to retain the current rate of its contribution to the EPF (15% of employees' wages). The court appreciated the company's action in paying the high rate and, considering that the employees had no other retirement benefits, would order the company to continue to pay the same rate. (para 18)

(6) As to items 'Employees Mobility' and 'Probationers', the company must maintain the rights to move its employees or to rotate them to achieve the company's objectives. We further hold that a probationer is not quite like in the same position as a confirmed employee, and so, need not be granted the same benefits. (para 19)

[Parties to prepare their agreement based on the decisions herein and the articles already agreed upon by them]

Case(s) referred to:
Khaliah Abbas v. Pusaka Capital Sdn Bhd [1997] 3 CLJ 827

Legislation referred to:
Industrial Relations Act 1967, ss. 26(1), 30(4), 30(5), 54

For the company - Gan Khong Aik; M/s Lee Hishammuddin
For the union - Syed Shahir Syed Mohamud; National Union of Transport Equipment and Allied Industries Workers

Reported by WA Sharif

AWARD
(NO. 617 of 2006)

Yussof Ahmad:

[1] The Honourable Minister of Human Resources referred to the court on 27 January 2004 a trade dispute under s. 26(1) of the Industrial Relations Act 1967 ("the Act") between the National Union of Transport Equipment and Allied Industries Workers ("the union") and Suzuki Assemblers (M) Sdn. Bhd. ("the company"). The dispute arose from the failure of the parties to conclude their collective agreement.

[2] During the mentions and case management, the court was informed that only a few articles have not been settled. The agreed Articles are as in the exh. CO1.

[3] At the mention on 5 August 2004, the court also recorded that Article 23 on Wages/Salary Administration had been agreed between the parties, the agreement being that the annual increments for the years 2003 and 2004 will be negotiated in September 2004 and that for 2005 in January 2005. The court also recorded that in the event they fail to reach settlement, the parties agree that the dispute will be mediated.

[4] At the mention on 8 November 2004, after the parties continued their negotiation they informed the court that they had not resolved the dispute on salary revision and annual increment for the years 2003 and 2004. The court fixed the hearing of the matter on 30 November 2004.

[5] At the hearing on 30 November 2004, learned counsel for the company objected to the union changing its stand to have the issue of salary revision and increment adjudicated having earlier agreed to have the issue negotiated between the parties and failing which to have it mediated. He claimed that having reached agreement on the issue it had become *res judicata* and cannot be adjudicated any more. The union's

representative disagreed, submitting that no award had been handed down and cited also s. 54 of the Industrial Relations Act 1967. In the court's opinion, s. 54 applies only to agreements reached at negotiation between the parties or at conciliation proceedings. In reply learned counsel for the company submitted that the agreement on the 2003 and 2004 salary revision and annual increment was a contract between the parties and the union cannot withdraw from it unilaterally. Furthermore the company had acted on the contract by commencing negotiation.

[6] On this preliminary issue the court decided that even if the parties were to hold to the agreement reached at the mention stage of the hearing and no agreement was reached after negotiation, it is best that it be adjudicated now together with other issues remaining unresolved rather than proceeding to mediate the 2003 and 2004 salary revision and negotiate the revision for 2005 in January 2005. This is so because if the mediation fails the issue still had to be adjudicated. The court therefore ordered all the disputed items to be adjudicated.

[7] At the hearing the company informed the court that the company had already made a revision of the salaries of its monthly rated employees on 1 January 2003 and its daily rated employees' on 1 April 2003. For 2004 the company had made "temporary" increments under its existing collective agreement which was for the period 1 May 2000 to 30 April 2003. The company's contention is that it should no longer be a dispute or alternatively no increment be ordered based on its financial incapacity. On the adjustment for 2005 the company's contention is that it should be negotiated in 2005 when the financial position of the company is clearer.

[8] For the union it was contended that for 2004 increment, those who have reached their maximum salaries they are allowed to retain whatever has been paid to them. For those who have not reached their maximum salaries, the union contends both monthly and daily rated employees should get another increment.

[9] On the issue of bonus the union contends that the existing provision in the collective agreement should be retained and stated that it did not agree with the aompany's proposal based on the productivity linked wage system (PLWS). The company proposed that bonus for 2003 and 2004 should be based on productivity. Their respective proposals are contained in art. 24 in the comparative table.

[10] For the company its Financial Director had submitted his written statements which he duly signed in court. The company also tendered Bundles of Documents marked COB1 and COB2. The witness in oral testimony confirmed that in the financial year 2002, the company lost RM9.69 million (COB1, p. 12) and as at September 2004 the company

made a loss of RM4,954,955. The witness also testified that the net assets of the company is RM507,959. The witness also asked that whatever had been paid in 2004 in terms of salary adjustment which is about 4% to be confirmed by the court. On bonus the witness explained that the mechanism to decide on bonus is contained in the company's exhibit marked CO3. It only takes into account the attendance of the employees. He said if they attend work they are assumed to be productive. On the other hand if they are absent their salaries will be deducted. He also testified that the company has no money to meet the union's proposal for a salary revision of 18%. It is the witness's stand that it had paid increments in 2003 and 2004 and that there is no difference between wage revision and annual increments. In answer to the union's proposals on art. 17(f) on Maternity Gift of RM500 on every occasion of child birth, art. 18(c)(i) on Hospitalisation benefit limited to RM 8,000 for each employee in a calendar year, art. 18(f) - Medical Attention for Dependents, art. 18(h) - Dental Benefit of RM200 per year to confirmed employees, art. 19(c)(e) on Retrenchment, art. 20 on Retirement Award, art. 32 on Group Personal Accident Insurance, art. 33 on Attendance Incentive Scheme which provides for RM4 incentive per day, art. 34 on Death in Service Payment and art. 36 on Laundry Allowance, the witness confirmed his reply in the witness statement which is that the company cannot afford to meet the proposals of the union due to its financial problem. He asked the union to appreciate that the company was able to continue to meet its existing commitment. The witness also testified the company cannot meet the union's proposal to increase retirement benefit and to grant pilgrimage leave due to financial and operational problems.

[11] During his cross-examination the following relevant facts were established; firstly in arriving at the losses of the company depreciation was taken into account.

[12] In industrial law it is well established that in arriving at the true financial position of the company depreciation and tax are not to be taken into account.

[13] We have considered the union's submission that depreciation cannot be taken into account. However, we still find that even without taking into account the depreciation suffered by the company for the relevant years ie, the years covered by the existing agreement, the company was in fact making losses. The law is equally clear and just that while employees aspire to have improvement to their standard of living by having an increase in wages every three years or at least to set off against increase in the costs of living as reflected by the consumer price index, companies in poor financial position meaning

companies not making reasonable or any profit cannot be expected to raise wages across the board. It may mean killing the goose that lays the golden eggs. If employees are to get an upward revision of salaries they must come from a PLWS. For this reason we regret having to reject the union's claim for any salary revision during the next collective agreement.

[14] However, the company to its credit has already granted provisional revision in 2003 and 2004. The court does not think it is good practice that could lead to industrial harmony if it were to order that these payments be refunded to the company. The company had paid the increase probably not in accordance with industrial law but in consideration of better employer-employee relationship and as indication of its understanding of the employees' difficult position. The court commends the company and decides that the employees are to retain the increment. This increment is in actual fact the usual once in the three years salary revision. It is not be taken as annual increment.

[15] In our system annual increment is the reward for value added to the employee's skill and experience. It is made on the presumption that with every year of working experience, the employee has become a better employee. For this he is rewarded with an annual increment. It is not related to the company's financial position as in the case of the salary revision granted once in three years. There is of course criticism of this principle. Not all employees become better employees as they continue working. In some cases with age and boredom doing the same chores, employees may in fact decline in their performance. For this reason a combination of fixed annual increment and incentive for productivity may be a better option.

[16] In the case before this court we feel that the company should continue with the existing rates of annual increment and so order. We have in fact considered the company's proposal to introduce incentive based purely on attendance. We do not agree that this is in fact part of PLWS. As the name implied incentive is to be based on productivity or at least higher performance. Attendance or full attention need not necessarily bring about better performance and lead to higher productivity. If the idea is to combat absenteeism there are other ways. In any event absenteeism can be and is being checked by treating it as misconduct which could lead to dismissal. If the proposed incentive is not given because the employee did not attend to work and also has to answer disciplinary action, it would appear he suffers from double jeopardy. We therefore do not approve of the company's proposal on attendance incentive allowance.

[17] On bonus, having held that the company suffered financial incapacity, we order that they need not pay bonus. Bonus was meant as a reward in appreciation for good performance on the part of the employees which leads to the company's better financial performance. The court will therefore not order the company to pay bonus for the years 2003, 2004 and 2005. However, it will not order the employees to refund the bonus paid in 2003 and 2004. There is we regret no bonus for 2005.

[18] The court will also not accede to the union's proposal for enhancement of other benefits involving financial implication on account of its financial incapacity. However, the company is to retain the current rate of contribution to the EPF which is 15% of employees' wages. The court appreciated the company's action in having paid this rate, which is higher than the statutory rate of 12%. The court orders the company to continue with this rate. The decision taken by the court is partly due to the fact that the employees have no other retirement benefits.

[19] There are two other items. They are Employees Mobility and Probationers. We are with the company on these items. The company must maintain the right to move its employees or to rotate them to achieve the company's objectives. We also hold a probationer is not quite in the same position as a confirmed employee and need not be granted the same benefits. The case of *Khaliah bt Abbas v. Pusaka Capital Sdn Bhd* [1997] 3 CLJ 827 is only on authority that probationers have the same rights as confirmed employees if they are to be dismissed in that their dismissals must be with just cause.

[20] In making our decision on the disputed items we have taken into account the provisions of ss. 30(4) and 30(5) of the Act.

[21] Having made our decisions the court would ask the parties to prepare their agreement based on our decisions and the articles which have been agreed by them. If they so desire they can submit the agreement for the court to endorse and it will be made supplemental to this award.