RESOLVING CONFLICTS THROUGH COLLECTIVE BARGAINING: THE CURRENT LEGAL FRAMEWORK

Mumtaj Hassan and 1
Dr. Harlida Abdul Wahab 2

Abstract: Collective bargaining is the first step towards achieving an agreement that called as collective agreement. It is the essence of the right to association of the workers so that they can impartially enjoy their fair share and benefits in employment. The trade union, as a principal to the employees, functions to negotiate with the management or employers for better or additional terms and conditions of employment. This article deliberates the functions of collective bargaining and collective agreement as playing role, not only to improve terms and conditions of employment but to resolve any conflicts within the industrial relationship. The article starts with the discussion about terms and conditions of employment and further discusses the process of collective bargaining, the enforcement as well as legal effects of collective agreement. In most occasion, court cases are relied upon as the authorities to support the discussion.

Keywords: collective agreement, collective bargaining, industrial relations.

Introduction

Collective agreement plays a vital role in the relationship of management or employer and the trade union of employees. It is initiated when bargaining is done between the parties, i.e employers and employees, in concordance for industrial harmony. Hence, collective bargaining is a prerequisite to the collective agreement. If collective bargaining fails, conciliation at the Department of Industrial Relations may then follow. When conciliation becomes fruitless, the matter would be referred to the Industrial Court where the awards given is considered as final and to be binding on the parties. Therefore, collective

1 Senior Lecturer, School of Law, College of Law, Government & International Studies, Universiti Utara Malaysia. 06010 Kedah. Tel: 604 928 8066, E-mail: mumtaj@uum.edu.my
2 Associate Prof., School of Law, College of Law, Government & International Studies, Universiti Utara Malaysia. 06010 Kedah. Tel: 604 928 8062, E-mail: harlida@uum.edu.my
bargaining is the best mechanism that essential to attain cordial relationship between employers and employees (Shatsari & Hassan, 2006).

Collective bargaining is defined by Tran (2017, p. 58) as “a process through which the collective employees and employers discuss and negotiate their relations and interactions at the workplace, such as pay and other terms and conditions of work” where the process “aims to reach mutually harmonious and stable industrial relations, improve working conditions and efficiency, and create a fair and expeditious process for enforcing the rights and obligations of each party”. According to Krishnan and Wahab (2017), collective bargaining is the process by which representatives of labor and management attempt to negotiate a mutually acceptable labor agreement. Having a mutual agreement between employers and trade union or representative of employees is central to any industrial relations system since it is a tool through which regulated flexibility is achieved (Godfrey et al., 2007). In history, collective bargaining has played the role of improving working conditions and wages (Montoya, 2015). Even nowadays collective bargaining continues to have a significant role in industrial relations.

Industrial Relations Act 1967 defines collective agreement as “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”; while collective bargaining means “negotiating with a view to the conclusion of a collective agreement”. From the definitions, it is understood that collective agreement is the outcome of the negotiation and bargaining of the parties. Here, the formation of a collective agreement begins with the collective bargaining in which the trade union of workmen acts as a principal for its members to negotiate the terms and conditions of employment with employers. It is not only a mechanism for negotiating better terms but also to reconcile conflicts, if any. The agreement or collective agreement is therefore the expectations and concerns that have been agreed between the parties.

A number of studies showed the efficacy of collective bargaining. Edwards (2002) mentioned that where workers had their terms and conditions of employment determined through collective bargaining and where management supported unions, there was an improved industrial relations environment. Further, Ilesanmi (2017) noticed the relevance of collective bargaining in resolving conflict in employment relations between the academic staff of the universities and the federal government of Nigeria. Another study of collective agreements and the wages of rubber tappers in Malaysia by Parthiban and Suresh (2017) found that collective bargaining outcomes ensured that the overall earnings of rubber tappers kept pace with increases in the cost of living although in the face of an increasingly restrictive bargaining environment, declining union membership, and the displacement of its members by foreign workers. This proves that collective bargaining can be an effective forum for employers and employees to agree on terms and conditions of employment (Shatsari & Hassan, 2006).

Upon the cognizance by the Industrial Court, collective agreement has the legal effect to bind all the relevant parties. Hence, the related parties have the obligation to honour every term and condition stipulated in the collective agreement. This article generally intends to discuss the functions of collective bargaining and collective agreement as the mechanisms
and tools applicable to improve terms and conditions of employment. The legal provisions, particularly which contain under the Industrial Relations Act 1967, are the main reference to facilitate collective bargaining. In the beginning, the legal provisions relating to terms and conditions and its definitions are presented. The authors also discuss the enforcement and legal effects of collective agreement. In most occasion, court cases are relied upon as the authorities to support the discussion.

**Terms and Conditions of Employment**

Generally, a contract of employment sets the working conditions of an employee on pecuniary and non-pecuniary matters. In Malaysia, the contract of employment shall consist basic and minimum terms and conditions as stipulated under various statutes such as the Employment Act 1955 (EA), Industrial Relations Act 1967 (IRA), Trade Union Act 1959 (TUA), Occupational and Safety Act 1994 (OSHA), Employees’ Social Security Act 1969 (ESSA), Employee Provident Fund 1991 (EPF) and Minimum Retirement Age Act 2012 (MRAA).

The phrase “term and condition” is not defined in the Malaysian statutes. However, the explanation can be seen from the English case, *British Broadcasting Corporation v Heam & Others* [1978] 1 All ER 116, when Lord Denning said:

> The terms and conditions of employment may include not only the contractual terms and conditions but those terms and conditions which are understood and applied by the parties in practice or habitually or by common consent, without ever being incorporated into the contract.

While in *Breda Dunne Ltd. v Fitzpatrick* [1958] IR 29, the court goes further to explain that the term and conditions of employment were the physical conditions under which a workman works, such as appertain to matters of safety, health and physical comfort. These explanations imply that it should include wages that cover allowances and bonus, if any, hours of works, overtime, paid holidays, leave benefits, sick leaves, disciplinary matters, safety and health matters, and so on.

Although no special definition is given by the legislations to the words “term and condition”, there are few provisions relating to the phrase term and condition of service (or employment) that should be adhered to. Section 7 EA stipulates that any term and condition of a contract of employment which provides a term or condition which is less favourable to an employee than a term and condition prescribed by the EA or any regulations, order or other subsidiary legislation shall be void and of no effect to that extent (*MCBA v ABOM* [2005] 2 ILR 426; *Hume Industries (M)-Concrete Division v Non-Metallic Mineral Products Manufacturing Employees’ Union* [2005] 1 ILR 824). Section 7A however does not prohibit an employer and an employee from agreeing to any terms and conditions that are more favourable to an employee than those legislated by the EA. Finally, section 7B appears to encourage the term and condition other than those legislated by the EA.
The terms and conditions must be prepared by the employer in writing and its details must comply with Regulation 5(b) and (c) of the Employment Regulations 1957. Where a trade union of employee had entered into a collective agreement with the employer, the terms and conditions of employment are also found in an award of the collective agreement that had been taken cognizance by the court. In this situation an employee is considered to have two types of document for reference on terms and conditions of employment. The employer must take caution that if any term in the contract of employment is inconsistent with the terms of the collective agreement, collective agreement will prevail. Nevertheless, the terms of the collective agreement will not prevail if they are less favorable to the employee when compared to the EA as provided under section 14(3) of the IRA.

Rationally, the terms and conditions in any contract of employment are likely to vary by establishment, trade, occupation or industry. In Agricultural Producers Association v All Malayan Estates Staff Union (Award 62/1982) the court mentioned as follows:

*The banking industry, the petroleum industry and the plantation industry each have their own peculiar needs and requirements and one cannot just pick the best terms and conditions of the banking industry or the petroleum industry and plant them in the plantation industry.*

A clear example can be noticed from the 17th Collective Agreement of Malayan Commercial Banks’ Association (MCBA) and National Union Bank Employees (NUBE) that came into effect on 1st January 2015 and remain in force until 31st December 2017 and thereafter, until superseded by a new collective agreement. The agreement contains comprehensive and better terms and conditions of employment which is presumed to be complied with section 7A of the EA. It contains amenable provisions on probation, annual increment with salary structure, national service, disabled employee, temporary employees, payment on allowances, advances to employee, and entitlement to bonus. There are also provisions on the uniform, including helmet with visor, raincoat and shoe. Other pecuniary benefits available are medical benefit, maternity benefits, retirement benefits and others. In addition, it also has a code of conduct for the prevention of sexual harassment in the workplace. About twenty-three thousand employees in the non-clerical and clerical grade employed by 21 member banks of MCBA are benefiting from the succeeding collective agreement.

**Collective Bargaining and Collective Agreement**

As mentioned, collective bargaining is a method of determining terms and conditions of employment which utilises the process of negotiation and agreement between representation of management and the trade union of employees. The trade union would bargain over the proposal and later come to a settlement. If the parties fail to reach the bargain and conclude a collective agreement, a trade dispute shall be deemed to exist (section 13(7) IRA). This shows that, although the IRA defines the collective bargaining simply as negotiating with a view to the conclusion of a collective agreement, the collective bargaining is essentially the principal means of improving the terms and conditions of service of employees.
The Process of Collective Bargaining

Under section 13(1) of the IRA, the process of collective bargaining starts with the invitation by either the trade union or the employer. The invitation must be in writing and must set out the proposals for a collective agreement (section 13(2) IRA). A proposal for a collective agreement may include provision for training to enhance skills and knowledge of the workmen, provision for an annual review of the wage system and provision for a performance-based remuneration system (section 13(2A) IRA). It must be noted however that the trade union may not include matters classified as the managerial prerogatives in the proposal to a collective agreement. According to section 13(3) of the IRA, these include matters relating to promotion, transfer, employment in the event of vacancy of any post, termination for the reasons of redundancy or reorganization, dismissal and reinstatement, and assignment of duties and task.

Once the negotiation works and succeeds, collective agreement would follow. This written agreement that contains new, revised and even better term and condition of service must be signed up by the parties. The duration, though must be specified therein, shall be not be less than three years (section 14 IRA). The copy of the collective agreement must be deposited with the Registrar of the Industrial Court for cognisance (section 16 IRA). The Court has the jurisdiction to approve or reject the collective agreement or require the parties to amend it if does not comply with the requirements set in section 14. Subsection (2) of the same section 14 emphasises that a collective agreement shall set out the terms of the agreement and shall, where appropriate –

“(a) name the parties thereto;

(b) specify the period it shall continue in force which shall not be less than three years from the date of commencement of the agreement;

(c) prescribe the procedure for its modification and termination; and

(d) unless there exists appropriate machinery established by virtue of an agreement between the parties for the settlement of disputes, prescribe the procedure for the adjustment of any question that may arise as to the implementation or interpretation of the agreement and reference of any such question to the Court for a decision.”

Subsection 14(3) is mandatory as it strictly mentions that any term or condition of employment, contained in a collective agreement, which is less favourable than or in contravention of the provisions of any written law applicable to workmen covered by the said collective agreement, shall be void and of no effect to that extent and the provisions of such written law shall be substituted therefore. Hence, any term and condition that deemed to be less favourable or in contravention of any written law, shall be considered as invalid, therefore such provisions must be replaced: Eng Luan Chin v Edaran Otomobil Nasional Bhd. [2009] 4 ILR 335.
Collective Agreement and the Legal Effect

Collective agreement is the outcome of a cordial bargaining of the parties. It is a binding agreement between the trade union of workmen, the employer and all employees concerned. The significance of a collective agreement is well explained in section 17 of the IRA that provides as follows:

(1) a collective agreement which has been taken cognisance of by the court shall be deemed to be an award and shall be binding on:

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assigns or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

This indicates that the collective agreement that has been taken cognisance by the court is binding on the parties to the agreement. The parties, depending on the case, can be the employer or the trade union of employers or all members of the trade union to whom the agreement relates including their successors, assigns or transferees; and also all workmen who are employed or subsequently employed in the undertakings regardless of whether they are members of a trade union or not. Furthermore, the rates of wages to be paid and the conditions of employment to be observed shall be in accordance with the agreement until varied by a subsequent agreement or a decision of the court (section 17(2) IRA).

In Abu Bakar bin Salleh & 36 Ors. v Langkasuka Resort Sdn. Bhd. (Langkawi Beach Resort & Langkawi Airport Sdn. Bhd. (Hotel Helang) & Anor [2017] MLJU 354, the Court of Appeal pointed out that the collective agreement entered into by the Union and Langkasuka Hotel is binding on both parties. Any dispute which arises between the Union and Langkasuka Hotel must be resolved pursuant to the terms and conditions as encapsulated in the Collective Agreement. Pursuant to Article 1 of the Collective Agreement, the terms and conditions contained therein shall be binding on Langkasuka Hotel and its successors, assignees or transferees. Therefore, the terms and conditions stated in the Collective Agreement shall be equally binding on Sheraton Langkawi under Article 1 of the Collective Agreement.

In interpreting section 17 IRA, the Court of Appeal in the case of Abdul Aziz Abdul Majid & Ors. v Kuantan Beach Hotel Sdn. Bhd. & Ors [2012] 1 LNS 1294 held as follows:

“Quite independent of the second respondent having agreed to take over liability in respect of the appellants, the question whether the second respondent will be bound by the Collective Agreement will depend on whether it can be regarded as a “successor, assign or transferee” of the first respondent within the meaning of section 17(1) of the Industrial Relations Act 1967”.

In our judgment the second respondent is such a successor, assign or transferee within the meaning of section 17(1).”
In Kesatuan Kebangsaan Wartawan Malaysia & Anor. v Syarikat Pemandangan Sinar Sdn. Bhd. & Anor. [2001] 3 CLJ 547, the Federal Court in analysing the provisions of section 17(1) IRA held that:

“The words “their successors, assigns or transferees” contained in section 17(1)(a) must be taken to mean the successors, assigns and transferees of both parties to the Collective Agreement and not only to the members of a trade union... We agree with the appellants that the decision of the Federal Court shows that a purchaser of a business would be bound by a Collective Agreement if it is established that the purchaser is a successor, assign or transferee of either of the parties to a Collective Agreement.”

Enforcement of Collective Agreement

The enforcement of collective agreement is a primary matter for a trade union. Here, the Industrial Court as an arbitration tribunal is empowered to arbitrate disputes between employers and unions. The awards of the Industrial court are final and conclusive (section 33B IRA) although the court may refer a question of law to the High Court (section 33A IRA). An application under section 33A IRA shall be made within thirty days of the date on which the award was made. The High Court shall hear and determine the question referred to it as if the reference were an appeal to the High Court against the award of the Industrial Court. Subsequently, the High Court may confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

With regards to the collective agreement, a direct application to the Industrial Court may be made in relation to the following matters:

(i) interpretation of collective agreement – section 33(1) IRA;
(ii) variation of collective agreement – section 33(2) IRA; or
(iii) non-compliance of collective agreement – section 56(1) IRA.

The above provisions allow any party to the agreement to refer to the Industrial Court if there is any dispute in relations to the interpretation, non-compliance or to vary the collective agreement.

The general rule for interpreting the collective agreement taken cognisance of the court is that ordinary words will be given their ordinary meaning unless some ambiguity or absurdity will result. A collective agreement should be interpreted in a reasonable and pragmatic manner, shorn of an excess of legal learning; Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Johan Ceramics Berhad [2006] 2 ILR 768.

Section 33(1) IRA provides that if any question arises as to the interpretation of any collective agreement, the Minister or any party bound by the agreement may apply to the court for a decision on the question. The court then, by an order, vary any terms of collective agreement if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty (section 33(2) IRA).

Thus, it could be seen the above section only empowers the Industrial Court to give a decision on any question that arises as to the interpretation of a collective agreement taken cognisance of by the Court on the application made to it by any party bound by the
agreement, or when referred to it by the Minister. Nevertheless, section 33 does not give any power to the Court to vary terms or conditions set out in the collective agreement.

In the case of Kesatuan Kebangsaan Pekerja-Pekerja Bank v Bumiputra Commerce Bank Berhad [2009] 2 ILR 497 (Award No. 451 of 2009), the Industrial Court stated as follows:

The court agrees with the bank's submission that there is no basis for NUBE to claim a legitimate expectation on the ex gratia payment and that a legitimate expectation arises only if there was a promise made as to how one party would behave in the future towards another party. Nowhere is it stated that there was a promise by the bank that the employees would be paid ex gratia every year. It is only stated in art. 20(6) that the bank may at its sole discretion make such a payment.

Non-Compliance of Collective Agreement

Any trade union or person bound by such collective agreement may lodge complaint with the Industrial Court in writing on non-compliance with the award or collective agreement. Under section 56(2), the Industrial Court may, upon the receipt of the complaint, order the party, either to comply with the term of the award or collective agreement or to desist any act in contravention of the term of the award or collective agreement. The Industrial Court may also make order that it deems fit for proper rectification for any contravention of any term of the award or collective agreement or an order to vary upon special circumstances any term of such award or collective agreement: Non-Metallic Mineral Products Manufacturing Employees' Union v MCIS Safety Glass Sdn. Bhd. [2017] 2 LNS 1003.

In Hume Industries (M) Bhd. Concrete Division v Non-Metallic Mineral Products Manufacturing Employees' Union [2005] 1 ILR 824, the Industrial Court cited as follows:

Basically, where there is a complaint under section 56(1) of the Act, the first function of the Industrial Court is to inquire into and finally determine the question whether the Union had brought its case within the terms that the company had not complied with said Collective Agreement which had been taken cognisance by the Industrial Court. If the court had decided that the company had not committed a breach of the term of the Collective Agreement, then it should not proceed further into the matter. On the other hand, if the court found that the company had failed to comply with the term of the Collective Agreement which formed the subject-matter of the complaint, then this court could consider exercise the statutory powers contained in subsection (2) thereof and subject always to the ability of the company to prove "special circumstances" as stated in section 56(2)(c) of the Act.
Again in *Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan v Gold Coin Specialities Sdn. Bhd.* [2017] 2 ILR 260, the Industrial Court held that in order for the Court to exercise its powers under section 56(2)(c) IRA, the complainant must prove that there had been a breach by the employer of the terms and conditions contained in the collective agreement and that special circumstances had not existed.

In *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v HFMS Sdn. Bhd. (Hotel Fortuna) & Anor* [2013] 2 ILR 640, an application was made by the company for an order of non-compliance in relation to the terms of the 6th Collective Agreement with an issue on whether the service charge should be paid to the retired employees based on article 12(i) read together with Appendix B of the Collective Agreement. They prayed for the court to invoke its powers under to set aside the wording in the Appendix B which excluded part-timer, temporary, casual, and retired employees. The court then referred to *The Bakers’ Union v Clarks of Hove Ltd.* (1978) IRLR 366, and explain that to be “special circumstances” the event must be something out of the ordinary, like sudden disaster that strikes a company, whether the disaster is physical or financial. Since the company failed to satisfy the criteria of “special circumstances” in section 56(2), the court ordered that the Company Multi-Metal Solutions Sdn. Bhd. being successors, assignees or transferees of the parties to comply with article 12 of the collective agreement.

**Conclusion**

To bargain and negotiate collectively is the essence of the right to association of the workers. Nevertheless, an individual employee cannot in any circumstances have equal bargaining power to negotiate the terms and conditions with employer. It is the fundamental function of a trade union to bargain with the management and accordingly to conclude an agreement for better terms and conditions. Collective agreement becomes an important instrument where it plays the role to regulate not only the terms and condition of employment, but other matters that are not covered and governed by the law. As a result, collective agreement may supersede an employment contract and even the law when its terms and conditions are more favourable and beneficial to all workers, both unionised and non-unionised. The current legal framework in Malaysia, as far as collective bargaining is concerned, does offer mechanism to facilitate the bargaining although the results in some occasion are not so promising. At one point, although the legislations particularly the IRA can be the apparatus for the mutual bargain between employer and employees, common understanding and mutual respect of the parties are also crucial in order to avoid any disputes. The legislation has just given the means to ensure harmony in industrial relations. It is still the parties’ initiatives to make full use of them.
Acknowledgement: The authors would like to thank the Ministry of Higher Education for awarding Fundamental Research Grant Scheme (FRGS) where this article is a part of the findings.

References


