COLGATE PALMOLIVE SDN BHD

v.

CHEONG FOO WENG

HIGH COURT [KUALA LUMPUR]
FAIZA BIN HAJI TAMBY CHIK, J
RAYUAN SIVIL NO: R2-16-9-2000
24 APRIL 2001

JUDGMENT

1. This is an appeal against the decision of the Director General of Labour, Wilayah Persekutuan and Selangor (hereinafter referred to as "Director General of Labour") in a claim arrears of overtime payments pursuant to Section 60A(3) of the Employment Act 1955 (hereinafter referred to as "the said Act"). The claim was commenced under Section 69 of the said Act. It is not disputed that the Respondents were at all material times receiving a salary of more than RM1,250.00 and were on that basis not covered by the said Act. (See section 2(1) of the said Act read with Para 2, First Schedule of the said Act.) The said Act has since been amended and the base figure is now RM1,500.00. It is also not disputed that the Respondents were required to perform overtime work and did in fact do so. They were paid for their overtime work and the overtime payments they received from the Appellant were based on the mutually agreed and accepted ceiling of RM1,325.00. This ceiling is found in the Collective Agreement between the Appellant and the National Union of Petroleum and Chemical Industry Workers, who represent the Respondents. It is pertinent to note that the Respondents

did not at any material time or at all dispute the basis upon which their overtime wage was computed nor the quantum of overtime payments they received, before they instituted the claim against the Appellants. However, in their claim the Respondents contend that they should have been paid overtime wages in accordance with Section 60A(3) of the said Act, which requires the quantum of the overtime wage to be computed on the actual monthly wage earned by the Respondents as opposed to the agreed ceiling of RM1,325.00. In this regard, it may be noted that the Respondents stand is that they are covered by the said Act, notwithstanding their monthly salary being in excess of RM1,250.00, by virtue of Section 2(1) of the said Act read with the exceptions found in para 2(1), the First Schedule to the said Act, which reads as follows:-

> "2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which:-
>
> > (1) he is engaged in manual labour including such labour as an artisan or apprentice (hereinafter referred to as "the First Exception").
> >
> > Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period (hereinafter referred to as "the Proviso to the First Exception").

2. The Appellants case before the Director General of Labour was that the Respondents cannot invoke the provisions of the said Act as they are outside the statutory wage limit of RM1,250.00 under the said Act and further they do not fall under either the First Exception and/or the Proviso to the First Exception to the said Act. It is trite that "manual labour" involves physical exertion as opposed to mental/intellectual effort. Thus, it is not manual labour if "the real labour" involved is a labour of the brain and intelligence: (per Warrington J in *Re Lithographic Artist* [1918] 108 LT 894 at 896.) Further, a distinction must be drawn between manual labour and manual work. Manual labour is manual work which requires toil and effort. This distinction was made by Lord Esher M.R. in *Bound v. Lawrence* [1892] 1 QB 226 as follows:-

> "There can be no manual labour without the use of the hands; but it does not follow that every use of the hands is manual labour, so as to make the person who does it a manual labourer."

Thus, whilst all manual labour would entail some manual work, it cannot be readily assumed that the person performing the manual work is a manual labourer and further it can not also be accepted that the person is in law "engaged in manual labour". It is clear from the authorities on this point that the test postulated by the Courts to determine whether or not a person is "engaged in manual labour" is as follows:-

> "what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment?"

Thus, it is essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. In law, a person is not deemed to be "engaged in manual labour" if his job functions are primarily and substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law "engaged in manual labour" if his duties are substantially or purely physical in nature with every little or no mental effort.

3. In applying the test, it is necessary to consider the general nature of the employment, which necessarily involves questions of fact. The Court must always separate manual dexterity (which is required) from the primary scientific/artistic/creative faculties - (see *Re Gardner* [1938] 1 AER 20.) It was noted by Lord Buckmaster in the *Jaques v. Owners of the Steam Tug Alexandra* [1921] 2 AC 339, that each case must be determined on its own set of facts and that it would be extremely unwise to decide on whether or not a person is "engaged in manual labour" by merely relying on the job designation or the title given to him by the employer. In other words, the label/category of employment is inconclusive. As provided in the Proviso to the First Exception - "partly in manual labour and partly in some other capacity", it is clear that the said Act has recognised, as the cases above have, that a person could at the same time be employed partly in work which is purely physical in nature and partly in some other capacity which is not manual labour. In such situations, the Court would inquire to ascertain whether the non-manual labour part of the work predominates and

takes up more than one-half (50%) of the total time of the wage period of the employee. If this is so, then the employee would be deemed in law not to be "engaged in manual labour". The thrust of the Proviso is clearly to prevent claims by employees who perform manual labour work for less than half (50%) of the total time of their wage period.

4. The Grounds of Appeal are:-

The phrase "engaged in manual labour" and the policy of the said Act.

It is observed that the Director-General of Labour preferred a very expansive or wide interpretation of the phrase "engaged in manual labour". This is evident from the following passage of the judgment:-

> "... when the whole question is whether somebody is "employed or engaged is manual labour" which are words of perfectly ordinary meaning in the English language and which parliament has thought fit to employ without further definition, then those words must be construed in their ordinary meaning to the particular facts of each case."

By adopting such a liberal interpretation of the phrase without qualification, the Director General of Labour has failed to consider and apply the legislative policy and purpose behind the said phrase when he purported to construe the phrase. It is trite law that it is incumbent on the decision-maker, tasked with the duty of interpreting a statutory provision, to identify the policy behind the

relevant provision and then properly apply the policy to his interpretation. It is obvious from the judgment that the Director General of Labour failed to do this as nowhere has he stated the legislative policy underlying the said phrase. Therefore the Director General of Labour erroneously attempted to interpret the phrase in isolation or in vacuum. This was contrary to law. The policy behind the said phrase is to protect employees who are engaged in purely physical work devoid of mental application for more than half (50%) of the entire wage period but earn a salary in excess of RM1,250.00. In other words, the Act would not protect employees who earn more than RM1,250.00 for work done which only incidentally involves physical work. The Act therefore necessarily limits the categories of employment who would qualify to be regarded as "engaged in manual labour". I think to give the phrase an "ordinary meaning" would mean that any employee performing any manual work (no matter how incidental in nature or temporal in time) is to be regarded as being engaged in manual labour. Such a basic and loose interpretation of the phrase negates the policy and purpose of the said Act. Accordingly, the decision of the Director General of Labour based on this misconceived understanding of the phrase "engaged in manual labour" must be rejected.

5. The Director General of Labour failed to appreciate the correct principles of law to determine whether or not the Respondents were engaged in manual labour.

The primary consideration is the substantial/dominant purpose of the employment. Further it may be reemphasized that

performance of work which has a physical/manual content but which is really dependent upon the acquired skill, knowledge or experience does not amount to the employee being “engaged in manual labour” for the purposes of the said Act. In the instant case, the Director General of Labour purported to set out the relevant principles at pp. 117 to 121 Appeal Record (AR) without really appreciating them. He did not properly cull the applicable principles required to interpret the phrase and accordingly he was unable to apply the correct principles. This may be seen from the following statement in the judgment, where he appears to have admitted that he was unable to distill the relevant principles. “Using these analogy, the determination of what is manual labour is still unsettled and a difficult one.” (See p. 121, AR). If the Director General of Labour had appreciated the relevant principles and then applied them to the evidence adduced in this case, he would have concluded that all the Respondents were not engaged in manual labour. This may be seen from the following parts of evidence in respect of the different categories of work in this case:-

(a) Senior Craftsman

- I decide on whether the machine chain has to be changed or not. (See p. 31, AR).
- When the machine is not running smoothly, I apply my mind to it and adjust. I don’t supervise. I do give advise to new craftsman. I do give them training. (See p. 31, AR).
- Yes I decide to change and replace parts if it is faulty and I decide on this. (See p. 31, AR).

- I also confirm that I decide on matters of purchase of spare parts ... (See p. 31 AR).
- If small items and on emergency basis I do decide to make orders. (See p. 32, AR)

(b) Electrical Technician

- I have a chargeman's certificate. I have to learn about electrical work and after 2 years I can apply and I have to sit for an electrical exams I have to read books on this subject to sit for the exam. (See p. 34, AR).
- In troubleshooting I look into the problems. I have to apply my mind and then to repair it. (See p. 34, AR).
- Yes if there is a problem I decide as to how to solve and I solve it. (See p. 34, AR).
- During the night shift, if there is something I have to decide, yes, I decide it. (See p 44 AR).
- I am an experienced electrician. I consider my job an important one and a job of an electrician is important. (See p. 55, AR).
- When a motor is not working, I check the starter then check the supply, incoming supply, then the fuses. Then I check the motor itself. So I determine the problem, set my mind to it then solve the problem. In a few cases I also refer to diagrams, boilers and my supervisor. (See p. 56, AR).
- In the grave shift my supervisor is not present. Yes during the grave shift I am in control during this shift and I attend to the problems. This duty is very important because dealing with electricity. (See p. 56, AR).

- Major task 2, my area is high voltage area, substation and not everybody can go into area. Only those qualified like me. (See p. 57, AR)

(c) Instrument Technician

- I have had experience before I joined Colgate Palmolive. Since 1970. 13 years as Instrument Technician. I am an experienced technician. (See p. 38, AR).
- Troubleshooting is to identify the problem, apply my mind to it and then to repair it... I work on my own and I make decisions to solve the problems. (See p. 38, AR).
- If there are new equipment then I need training to collaborate and to maintain them. My training is by having a briefing as to how the system works. (See p. 38, AR).
- Under work place I have an instrument room with my own desk. (See p.38, AR).
- Yes I am an experienced staff, I do bring in my input in my discussions. I do make recommendations and suggestions. (See p. 38 AR).

(d) Waste Water Technician

- I perform an important job. I don't quite agree that I perform a non-administrative and admin function. I do collect raw water sample and do analysis. I do put these results into a computer. I do, after inputing this information, print out daily and weekly reports. Lately, I've been keeping delivery orders and purchase orders of lime sulphuric acid ... I telephone suppliers to deliver these items ... Yes, I determine the shortage and then inform the

engineer and he informs me to inform the supplier to deliver the order ... I do prepare a daily log book. I put in any breakdown or any maintenance work that need to be done. I don't consider inputting information into the computer, making orders as administrative duties but I do perform them. I do perform lab work. (See pp. 49 and 50, AR).

- Initially they incubate the sample in the incubator and after 5 days take out the sample and take the reading. Then we calculate the difference from the formula given by my superior. This is done daily. I keep records of this. (See p. 51, AR).
- During the grave shift, the Engineer is not present ... I am in charge. During the 8 years I worked with the engineers. Around 2 years I worked without the engineer during the grave shift. (Seep. 51, AR).
- I do supervise people below me. At present there is one person. For the past 8 years there would be 4 - 5 people under me. I supervised their work. No, I don't train them. Yes I assist in training them. Yes I supervise and train the person who is under me now. He s a contract worker who is with me for 2 months or more. As to the earlier, 4, 1 don't train to assist them but I instruct them. (See pp. 51 and 52, AR).

(e) Boiler Attendant

- This job requires high level of concentration and it is a specialised job. No others can do it. (See p. 47, AR).

- I do not perform supervisory function. I work alone in every shift. Item 1 is the major task in exhibit CO4. We suggest and recommend to the company and only a qualified boilerman can make such suggestions ... These are functions only a boilerman can perform. (See p. 47, AR).

Therefore I think if the aforesaid evidence had been properly appreciated, the Director General of Labour would have found that the substantial/dominant purpose of the respondents work was non-manual work as it required “the labour of the brain and intelligence” as well as their acquired skill, knowledge or experience. The Respondents use of hands in carrying out their day to day tasks should not therefore negate or obliterate the more substantial/dominant purpose of their employment, which is the use of their minds and their diagnostic skills. The Director General of Labour had obviously viewed the facts before him very superficially thus failing to appreciate that without the use of their mind, knowledge and vast acquired experience in their respective fields, the Respondents would have been paralysed in performing their daily functions. Accordingly, the claim is hereby dismissed.

6. The Director General of Labour failed to realise that, in any event, the Respondents were only partly engaged in manual labour for less than half (50%) of their wage period.

It cannot be disputed that the Respondent in the instant case were only partly engaged in manual labour. This is clear from the findings made by the Director General of Labour at pp. 121 - 137, AR where he at various parts of his judgment has alluded to work

performed by the employees in some other capacity other than manual work. This must necessarily mean non-manual labour type of work. The non-manual type of work performed by the employee in their various categories is may be seen in the following parts of the evidence:-

(a) Senior Craftsman

- I give advice to new craftsman. I give them training. (See p. 31, AR).
- I also confirm that I decide on matters of purchase of spare parts ... (See p. 31, AR).
- I have new apprentice in my area. I guide those craftsmen in my area ... I have to make sure they do the job properly. (See p. 32, AR).
- If small items and on emergency basis I do decide to make orders. (See p. 32, AR).

In the judgment of the Director General of Labour (p. 128 AR) the Director General Labour states as follows:-

> "In the event the Defendant purchases new machines, the suppliers would brief and teach the complainants the mechanism of the machines. Once this is done it is more a routine work. In the area of oiling and machinery, there is no special skill needed as pointed out by the Defendant ... Anyone with reasonable diligence and understanding should be able to do this."

I am of the view that the Director General of Labour had no basis for concluding that “Anyone with reasonable diligence and understanding should be able to do this” especially since this was not stated by the witness (Complainant No. 1) in examination-in-chief nor cross-examination and therefore not reflected in the notes of evidence (p. 30 - 32, AR). This was therefore an erroneous conclusion by the Director General of Labour as he used this as a basis to conclude that the Senior Craftsman were not persons engaged in manual labour, (p. 129, AR). In respect of the job functions of the Senior Craftsman, it will be observed that the real or substantial job functions of the Senior Craftsman are not those specified in Exhibit CO-1 at p. 145 AR, which are the tasks performed individually by the Senior Craftsman and not those tasks performed with others. Briefly the following are some of the main tasks:-

(i) troubleshooting;

(ii) rectifying mechanically related problems;

(iii) guiding new craftsman on the above;

(iv) liaising with suppliers and contractors;

(v) providing mechanical support to Process Plant,

(b) Electrical Technician

- If there is a newcomer, I have to train him up. (See p. 33, AR).
- In troubleshooting I look into the problems. I have to apply my mind to check and then to repair it. (See p. 34, AR).

- Yes if there is a problem I decide as to how to solve it and I solve it. (See p. 34, AR).
- ... we do some programming. Programmes are to run the motor which is done by the engineers and we assist. (See p. 35, AR).
- When a motor is not working, I check the starter then check the supply, incoming supply, then the fuses. Then I check the motor itself. So I determine the problem, set my mind to it then solve the problem. In a few cases I also refer to diagrams, boilers and my Supervisor. I do not often have discussions with my supervisor. When I have a problem, I refer to my supervisor, Mr. Yong. Normally, I give the feedback through my experience. They make the decision. (See p. 56, AR).
- In the grave shift my supervisor is not present. Yes during the grave shift I am in control during this shift and I attend to the problems. This duty is very important because dealing with electricity. (See p. 56, AR).
- The Osiloscope is a unit to check the frequency. I use the osiloscope to help me to check the problem. (See p. 56, AR).
- I lead the group because I am the most experienced. They may send an apprentice to help. When we do the job, I tell them what to do. (See p. 56, AR).
- Sometimes when new technicians come in, my supervisor assigns them to me, so I guide them or in fact tell them. (See p. 57, AR).

The major tasks performed individually by the Electrical Technician thereby constituting the real and substantial work performed by them, is *inter alia,* as follows: (Exhibit CO-2 at p. 149, AR).

(i) Troubleshooting for all electrical equipment and control systems fault;

(ii) Record all voltmeter, ampmeter, power factor meter readings;

(iii) Log daily work progress.

These duties are specifically listed out in the Electrical Technician's job functions as being the "Major tasks performed individually not involving others". It is observed that the Director General of Labour had failed to give sufficient consideration to these tasks in determining the real and substantial work of the Electrical Technicians and instead relied heavily on the evidence of the witness who merely spelt out the physical nature of their job functions omitting altogether the major tasks allocated to them to be performed individually.

(c) Instrument Technician

- Troubleshooting is to identify the problem, apply my mind to it and then to repair it... I work on my own and I make decisions to solve the problems. (See p. 38, AR).
- If there are new equipment then I need training to collaborate and to maintain them. My training is by having a briefing as to how the system works. (See p. 38, AR).

- Yes I am an experienced staff, I do bring in my input in my discussions. I do make recommendations and suggestions. (See p. 38, AR).
- Under work place I have an instrument room with my own desk. (See p. 38, AR).

It is observed that the Respondent submits only the physical functions of the Instrument Technician which have been listed out in an attempt to portray the Instrument Technician as a mere labourer doing nothing but physical work. The fact of the matter is that an Instrument Technician is a specialised job requiring the incumbent to hold a Diploma in Electrical Engineering and/or Instrument Controls. (Exhibit CO-3, at p. 156, AR). The major tasks performed individually by the Instrument Technician which does not involve others is, *inter alia*, as follows:-

(i) Troubleshooting and repairs of instrument, which by the Witnesses own admission requires him to apply his mind to it and make his own decision to solve the problems. (See p.38, AR).

(ii) Maintaining all control element and measuring and metering devices and pneumatic elements;

(iii) Keeping timely and informative records of daily activity.

I think the Director General of Labour had erred in placing much reliance on the case of *Haygarth v. J & F Stone Lighting & Radio Ltd* [1968] AC 157 as this case allows for too liberal an interpretation of the words manual labour thus omitting the fact that Section 175(1) Factories Act 1961

(which was the subject of the decision in J & F Stone Lighting) does not have a restrictive proviso like the Employment Act 1955 which requires the time taken for manual labour to exceed one-half (50%) of the time of their work.

(d) Waste Water Technician

- I do collect raw water sample and do analysis. I do put these results into a computer. I do, after inputing this information, print out daily and weekly reports. Lately, I've been keeping delivery orders and purchase orders of lime sulphuric acid ... I telephone suppliers to deliver these items ... Yes, I determine the shortage and then inform the engineer and he informs me to inform the supplier to deliver the order ... I do prepare a daily log book. I put in any breakdown or any maintenance work that need to be done. I don't consider inputting information into the computer, making orders as administrative duties but I do perform them. I do perform lab work. (See p. 49 and 50, AR).

- Biological Oxygen Demand (BOD) analysis, we use the oxygen meter. We take a sample, put it into the BOD bottle then use the oxygen meter and then switch on and take the reading. Initially they incubate the sample in the incubator and after 5 days take out the sample and take the reading. Then we calculate the difference from the formula given by my superior. I calculate using the formula. This is done daily. I keep records of this. (See p. 51, AR).

- I also do the bacteria Back-up culture feeding ... I take water sample from the equalization tank then I adjust the pH to around 7 then I add in the required amount of nutrient in the water and mix.

  Then I take a sample of Back-up culture, approximately 2 liters from one tank then add two liters of equalization mixture. (See p. 51, AR).

- During the grave shift, the Engineer is not present... I am in charge. During the 8 years I worked with the engineers. Around 2 years I worked without the engineer during the grave shift. (Seep. 51, AR).

- I do supervise people below me. At present there is one person ... I supervised their work ... No, I don't train them. Yes I assist in training them. (See p. 52, AR).

The crux of the Waste Water Technician's job function is to operate the physical and biological treatment plant. It is observed that the Waste Water Technician's duties are, at the very least, scientific in nature with intensive water analysis, mathematical calculations and the conducting of various scientific tests. The Director General of Labour, quoting Branson J. in Re Gardner (p. 119 of AR), states as follows:-

> "... Brandon J approved of the terms of an official circular in which one way of distinguishing manual from non-manual labour was said to be whether the work consisted of the application of scientific knowledge as distinct from manual dexterity."

I think the Director General of Labour failed to appreciate the import of Branson J's statement when he erroneously held that this category of employees were persons engaged in manual labour.

(e) Boiler Attendant

- My job function as boiler attendant is to take readings, analyse boiling water ... check compression (See p. 45, AR).
- I do not perform supervisory function. I work alone in every shift.

> Item 1 is the major task in exhibit CO4. We suggest and recommend to the company and only a qualified boilerman can make such suggestions. These are functions only a boilerman can perform. (See p. 47, AR)

The Director General of Labour (p. 136, AR) states the Boiler attendants job function to be as follows:-

> "From the evidence, COS as a boiler attendant, takes readings, analyse boiler water, regenerates water softness, blows down boiler water. Checks compression, service the compressor, does general cleaning besides servicing and maintenance work on the boiler."

While the major maintenance work and service of equipment is a task of the Boiler Attendant which is performed with others, the other tasks mentioned above are major tasks performed individually by this category of persons. Additional tasks not mentioned in the judgment but classified as major tasks performed individually by the Boiler Attendant are as follows: (Exhibit CO-4, p. 159, AR).

(i) To update and maintain a log of all key boiler operations parameters;

(ii) To check boiler fuel level and order fuel through Purchasing Department;

(iii) To perform water hardness analysis and control dosage of boiler chemicals.

All the above major tasks of the Boiler Attendant intended to be performed individually by this category of employees concern the application of the mind and analytical skills more than the physical use of hands. Thus, the Director General of Labour should have concluded that a substantial or real part of the Boiler Attendant's nature of work cannot possibly be regarded as being engaged in manual labour.

On the facts of *Re Gardner* (p. 76 IOP) the employees, who were modellers were supplied with photographs, drawings and models by the employers of which they were required to mould clay into ornaments and other things, according to the employers instructions. The intention being that the finished model was to be a reproduction of something conveyed to them by the drawings and photographs supplied by the employer and not an artistic creation of their own. Branson J. observed as follows in respect to the question of whether or not these employees, were engaged in 'employment otherwise then by way of manual labour.

> "The matter must always rest, in the last resort, upon the opinion formed based upon the facts of the individual case. ... these particular people (the employees), were not regarded as people who could be trusted to create, but that they were supplied, as far as possible, with every detail, to enable them to produce not anything which it was in their minds to create,

but something which the art directors of their employers (the employers) had thought of, had invented, and wanted to be brought into being... I think that these two men are on the side of the line that makes them to be employed by way of manual labour, and, therefore, that they are employed persons within the Act."

By way of analogy, it can be seen that an employee who applies his mind, creativity and skill to his work as opposed to merely carrying out the wishes of an employer, cannot, by any measure be said to be 'engaged in manual labour'. Likewise, all of the categories of employees mentioned above to a large extent are required to apply their minds and solve daily problems that may arise in their work. Their job functions cannot be performed by layman but clearly requires the obtaining of a qualification in the form of Certificates or Diplomas and/or vast years of experience. Hence given the nature of the work of the Respondents (who are partly "engaged in manual labour" and partly engaged in some other capacity), it was incumbent upon the Director General of Labour to ascertain whether or not they came within the Proviso to the First Exception. In this relation, the Director General of Labour was required to determine whether or not more than half (50%) of the total work time of the Respondent was spent on doing manual work. It is clear from the judgment that he completely failed to do so. He proceeded on the erroneous footing that the Respondent came within the Proviso to the First Exception without any evidential basis for this presumption and with clear evidence to the contrary. I think the Director General of Labour should have held that the burden of

proof was on the Respondents to establish in their evidence that, although they partly performed non-manual work, more than half (50%) of their total work time was spent on doing manual work. The Director General of Labour should have found that the Respondents failed to satisfy this burden and accordingly they could not be regarded as having been substantially engaged in manual labour. The failure of the Director General of Labour to determine whether or not the burden was satisfied is, without more, sufficient to vitiate his judgment in the instant case. In the absence of proof, the Respondents were substantially engaged in manual labour and there was no evidential basis whatsoever to hold that they were within the Proviso to the First Exception. It is also observed that the Director General of Labour should have held that the Respondents were outside the Proviso to the First Exception and accordingly the claim should have been dismissed.

7. I am of the opinion that the Respondent places a lot of emphasis on the meaning of the word “artisan” but even when determining whether a person is an artisan, Prem’s Judicial Dictionary states that “ ‘artisan’ does not apply to higher classes of work which involves responsibility and training”. Therefore, even by applying the test put forward by the Respondent (that once a person is an artisan he is a manual labourer), we will still have difficulty determining whether the person is an artisan. Furthermore, the Respondent’s emphasis on the definition on the meaning of ‘artisan’ is unjustified because the definition which the Court needs to decide upon is the meaning of a person “engaged in manual labour” in paragraph 2 of the First Schedule to s. 2(1) of the

Employment Act (hereinafter referred to as “the Act”). Although it includes an “artisan”, the definition is qualified by a proviso that the person “shall not deemed to be performing manual labour unless the time which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period”. From the survey of cases cited, in the instant case the test employed by the English cases seem to be whether manual labour forms a substantial part of the work or merely incidental to it. In Malaysia we seem to have the proviso to para. 2 of the First Schedule to s. 2(1) of the said Act, that the manual labour must exceed one-half of the total time that he worked. This being the case it is incumbent upon the Respondent to prove that the manual labour forms one-half off the time of his work since there is evidence which suggest that they clearly perform non-manual labour such as ordering and purchasing of items (Senior Craftsman), supervisory work during grave shift (Electrical Technician), troubleshooting (Instrument Technician) and input of data into computers and making orders (Waste Water Technician) and water hardness analysis (Boiler Attendant). Even if the Respondents fall within the definition of Artisan, the requirement of the proviso must still be satisfied. The submission of the Respondents that this definition would make it “difficult to bring any category of worker under the Act” is misplaced. This is because the Act seeks only to protect specially defined classes of employees under the Act. Had Parliament intended the ‘manual labour’ definition to be given a liberal interpretation, there would be no necessity for the other exceptions and this would render exceptions

such as persons "engaged in the operation and maintenance of any mechanically propelled vehicle operated for the transportation of passengers or goods or for reward or for commercial purposes (under para 2(2))" superfluous.

8. The Respondent's reliance on the decision of Lai Kiew Chai J in *Oliver Hennedige v. PP* [1985] 1 LNS 120; [1986] 2 MLJ 81 is misplaced because the learned Judge relied on the Privy Council decision of *Haygarth v. J & F Stone Lighting & Radio Ltd.*, which can be distinguished on two grounds:-

(1) First, that case was a case decided on s. 175 of the Factories Act 1961 and the relevant portion can be found in Lord Pearce's Judgment:-

> "employed in manual labour in any process for or incidental to any of the following purposes, namely ... the repairing ... of any article."

Lord Pearce further said as follows:-

> "Some guidance as to what is meant by "manual labour" can be derived from the description of the 'purposes' which are in fact operations, specified in paragraphs (a), (b) and (c) of the subsection (1) of section 175. They are:
>
> (a) the making of any article or of part of any article;
>
> (b) the altering, repairing, ornamenting, finishing, cleaning or the breaking up or demolition of any article; or
>
> (c) the adapting for sale of any article."

Therefore, it is not surprising that the television repairman was held to be a manual labourer. The close connection between the purpose and the manual labour under the Factories Act 1961 would have ultimately influenced and coloured the definition of manual labour. It is therefore I am of the view that the case of *Oliver Hennedige v. PP* is also not applicable since it is also based on the Factories Act.

(2) Section 175(1) of the Factories Act 1961 does not have a restrictive proviso like the Employment Act 1955 which requires the time taken for manual labour to exceed one-half (50%) of the time of their work. Thus, in England, the interpretation of 'manual labour' under the Factories Act 1961 can be wide and liberal but in Malaysia (as explained above), a too liberal interpretation would render the other exceptions redundant.

9. In response to the example given by the Respondents of a motor mechanic, my answer is that if he spends more than 50% of his time recommending changing of parts instead of actually doing it, he would be more like a supervisor than a mechanic. The 50% of manual labour test under the proviso was inserted precisely to focus one's mind on the actual work done as opposed to the label placed on the job. Therefore there is nothing illogical about placing the burden on the workman to prove that he spends 50% of his time doing manual labour as opposed to other forms of work. If he is a genuine manual labourer there would be no difficulty in proving it. Besides, whether or not "the time during which he is required to perform manual labour exceeds one-half (50%) of the total time

during which he is required to work", is a fact especially within the Respondent's knowledge. Thus, under s. 106 of the Evidence Act 1950, when any fact is especially within the knowledge of any person, the burden of proving that fact is on him. For this reason, the burden should lie on the Respondents. The work of the Respondents such as problem solving (troubleshooting), specialisation in their job and experience in their jobs are relevant factors to be taken into consideration when considering whether they are manual labourers. In this respect the judgment of Branson J in Appeal of Gardner, *Re Maschek Re Tyrrell* [1938] 1 All ER 20 at page 23 is relevant.

> "But one can go from him, by infinite gradations, through more and more skilled people - whose manual dexterity, perhaps may be greater, perhaps may be no greater, but yet who bring more and more of the artistic sense into their productions until one gets to the stage of a man like Grinling Gibbons whom nobody would pretend to think came within the category of a manual labourer, and not an artist."

As mentioned above, Appeal of Gardner dealt with artistic sense as that case involves clay modellers. However, there is no reason why the analogy cannot be extended to other employment such as technicians and craftsman. With increase in experience and knowledge, they would bring more of their scientific and technical knowledge into their work especially during troubleshooting and discussions and this would affect the categorisation of whether they are manual labourers. Therefore, the submission that such matters are merely incidental to their substantial work is not acceptable.

10. As to the functions of the appellate court in respect of finding of facts the simple answer to that is the qualification in *Woon Ngee Yew v. Ng Yoon Thai* [1940] 1 LNS 119; [1941] 37 MLJ case where there can be interference if the learned Judge had misdirected himself on the evidence or to have rejected the evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference. In this regard, in relation to the right of the appellate court to interfere, see also the Court of Appeal case of *Heller Factoring Sdn. Bhd. (previous known as Matang Factoring Sdn. Bhd. v. Metalco Industries (M) Sdn. Bhd*. [1995] 3 CLJ 9; [1995] 2 MLJ 153.

11. For all the aforesaid reasons, the appeal by the Defendant is allowed with costs.

12. Rayuan Sivil No. R2-16-10-2000 is an appeal against the decision of the Director General of Labour, Wilayah Persekutuan and Selangor (hereinafter referred to as "DG of Labour") of 29.4.1999. In essence, the DG of Labour held that the Respondents were "employees" for the purposes of Section 2(1) of the Employment Act 1955 ("the said Act") read with the First Schedule of the said Act (paras. 1 and 2). At the very outset, it is to be noted that this decision has very wide ramifications as the DG of Labour has decided that persons holding management positions are covered by the said Act. It is not disputed that the First, Second, Fourth and Fifth Respondents all held management positions in the Appellant Company at all material times.

This therefore is a drastic extension to the statutory protection afforded by the said Act to a category of employees who were hitherto always outside the ambit of the said Act. The action before the DG of Labour was for arrears of overtime payments pursuant to Section 60A (3) of the said Act. The claim was commenced under Section 69 of the said Act. It is not disputed that all five (5) Respondents in this case were at all material times receiving a salary of more than RM1,500.00 and were on that basis not covered by the said Act (see again Section 2(1) of the said Act read with para 1, First Schedule of the said Act). It is also not disputed that the Respondents were required to perform overtime work and did in fact do so. They were paid wages for their overtime work and the overtime payments they received from the Appellant was based on the hitherto mutually agreed and accepted ceiling of between RM1,275.00 and RM1,600.00 (see pp. 5 - 37, *Appeal Record* ("AR"), Vol.1) It is pertinent to note that the Respondents did not at any material time or at all dispute the basis upon which their overtime wage was computed nor the quantum of overtime payments they received, before they instituted the claim against the Appellant. In the instant claim, however, they contend that they should have been paid overtime wages in accordance with Section 60A(3) of the said Act, which requires the quantum of the overtime wage to be computed on the actual monthly wage earned by the Respondents as opposed to a prefixed ceiling. It is the Respondents stand now that they are covered by the said Act, (notwithstanding their monthly salary being in excess of RM1,500.00), by virtue of section 2(1) of the said Act read together with the exceptions found in the First Schedule to the said Act. It would appear that the Respondents are relying on the following exceptions:-

Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which:-

(1) he is engaged in manual labour including such labour as an artisan or apprentice. Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period (hereinafter referred to as "the First Exception");

(2) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work (hereinafter referred to as "the Second Exception").

13. From the evidence led by the Respondents, it would seem that the claims of the First Respondent (CLW-1), Fifth Respondent (CLW-2), Fourth Respondent (CLW-3) and the Second Respondent (CLW-5) are mixed and alternative claims, *viz* they seem to contend that they were both "engaged in manual labour" under the First Exception and/or the Proviso to the First Exception as well as being Supervisors who were supervising or overseeing other employees engaged in manual labour "in and throughout the performance of their (ie, The manual labourers) work", under the Second Exception. The claim of the 3rd Respondent (CLW-4) is purely that he was "engaged in manual labour" under the said First Exception. The

Appellant contends that the Respondents cannot invoke the provisions of the said Act as they earned in excess of the statutory wage limit of RM1,500.00 under the said Act and further they do not fall under either the First Exception and/or the Proviso to the First Exception and/or the Second Exception.

14. The First Exception - "engaged in manual labour"

It is trite law that "manual labour" involves physical exertion as opposed to mental/intellectual effort. Thus, it is not manual labour if "the real labour involved is labour of the brain and intelligence" (per Warrington J in *Re Lithographic Artist* [1918] 108LT 894 at 896. Further, a distinction must be drawn between manual labour and manual work. Manual labour is manual work which requires toil and effort. This distinction was made by Lord Esher M.R. in *Bound v. Lawrence* [1892] 1 QB 226.

> "There can be no manual labour without the use of the hands; but it does not follow that every use of the hands is manual labour, so as to make the person who does it a manual labourer."

Thus, whilst all manual labour would entail some manual work, it can not be assumed that the person performing the manual work is a manual labourer and further it can not also be readily accepted that the person is in law "engaged in manual labour". It is clear from the authorities on this point that the test postulated by the Courts to determine whether or not a person is "engaged in manual labour" is as follows:-

> "What is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment?"

Thus, it is essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. In law, a person is not deemed to be "engaged in manual labour" if his job functions are primarily and substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law "engaged in manual labour" if his duties are substantially or purely physical in nature with very little or no mental effort.

In applying the test, it is necessary to consider the general nature of the employment which involves questions of fact. The Court must always separate manual dexterity (which is required) from the primary scientific/artistic/creative faculties - (See *Re Gardner* [1938] 1 AER 20). It was noted by Lord Buckmaster in the Jacques case (above) that each case must be determined by its own set of facts and that it would be extremely unwise to decide on whether or not a person is "engaged in manual labour" by merely relying on the job designation or the title given to him by the employer.

15. The Proviso to the First Exception - “partly in manual labour, Partly in some other capacity”

As to the Proviso, it is clear that the said Act has recognised, as the cases above have, that a person could at the same time be employed partly in work which is purely physical in nature and partly in some other capacity which is not manual labour. In such a situation, the Court would inquire to ascertain whether the non-manual labour part of the work predominates and takes up more than one-half (50%) of the total time of the wage period of the employee. If this is so, then employee would be deemed in law not to be “engaged in manual labour”. Thus, if in a shift of eight (8) hours, the employee performs work in another capacity which does not call for manual work (eg, If he supervises as a Supervisor) for about five (5) to six (6) hours in the eight (8) hour shift, the employee concerned would, in law, deemed not to be “engaged in manual labour” and cannot rely on the First Exception of the Proviso to the First Exception. The thrust of the Proviso to the First Exception is clearly to prevent cases where there are mixed claims and the actual physical or manual work is only minimal or marginal in the overall job functions of the employee.

16. The Second Exception

As regards the said Second Exception, it is necessary for the Respondents relying on this exception to prove the following:-

(a) That they were “supervisors”;

(b) That as Supervisors they were “supervising or overseeing other employees labour” and

(c) That they supervised persons engaged in manual labour “in and throughout the performance of their (the manual labourers) work”.

There are therefore three essential limbs (as stated above) that the Respondents must satisfy. The first two are essentially questions of fact and may be easily determined. However, it is the phrase “in and throughout the performance of their work” that is really the key to the interpretation of the Second Exception. It would appear that these qualifying words would require the Supervisor to supervise or oversee employees engaged in manual labour throughout their (the manual labourers) working shift. The supervision envisaged by this provision would further certainly necessitate the Supervisor being present at the place of work of the manual labourer at all times. The supervision must also be only on employees (human beings) engaged in manual labour. Other forms of supervision (eg, of machines, materials or methods of productions) would not suffice as the Second Exception is only concerned with manpower (ie, manual labourers) supervision. Thus, the intention of Parliament in imposing the qualifying words found in the phrase “in and throughout the performance of their work” was to ensure that the Supervisor concerned would only be eligible to rely on the Second Exception if he spent almost all his working hours in a shift supervising and overseeing the manual labourers. The job functions of the Supervisor must therefore be purely and wholly to supervise

these persons and he would necessarily have nothing else to do. He must be physically present at all times when the work is done. A literal reading of the said Second Exception would also suggest that this provision cannot be relied on by any Supervisor who partly oversees persons engaged in manual labour and partly performs other functions. The provision would definitely disqualify claims by Supervisors who only perform intermittent or sporadic supervision of persons engaged in manual labour and performs other general supervisory and administrative functions. This type of supervision cannot be regarded as "in and throughout". The said Second Exception was therefore clearly not intended to cover all Supervisors who supervise or oversee employees engaged in manual labour as the qualifying words "in and throughout the performance of their work" was expressly stipulated by Parliament to limit the application of this exception only to genuine cases of Supervisors who are with the manual labourers throughout the shift and therefore spend almost 100% of their working time supervising the manual labourers. It is also crucial to appreciate that the Second Exception is only concerned with Supervisors who supervise or oversee manual labourers (ie, human beings or the man-power). Unlike the Proviso to the said First Exception, there is no provision under the Second Exception to cover Supervisors who partly supervise persons engaged in manual labour and partly perform other functions. Thus, a Supervisor who only partly supervises persons engaged in manual labour would not be covered at all by the Second Exception. The purposive and necessary interpretation of the Second Exception would clearly not allow for situations where a Supervisor has mixed functions of supervising and overseeing manual labourers as well as either himself performing manual labour, *albeit* minimally, or

engaging in other general supervisory and administrative functions. Thus, where a Supervisor supervises or oversees other employees engaged in manual labour (ie, the man-power of the Company), but also at the same time is required to supervise the machines and materials being used for production as well as the methods of production of the employer and is further required to attend to administrative matters attendant to the production, such a Supervisor would not be only supervising employees “engaged in manual labour”. Due to his other supervisory and administrative functions, which do not involve man-power supervision, he cannot in law be regarded as supervising employees engaged in manual labour in and throughout their (the manual labourers) employment. Ultimately, I think for the Second Exception to apply, the Respondents must be:-

(a) Supervisors who are physically present at all time during the performance of the job functions and

(b) The supervision must be of employees (ie, manpower), as opposed to general supervision (ie, machines, materials and methods) and administrative functions.

It is the Appellants submission that the Respondents have fallen into grave error in attempting to interpret paragraph 2(3) of the First Schedule to s. 2(1) of the said Act broadly. A literal interpretation of the words used in that paragraph, connotes supervision of persons and not machines and materials used by manual labourers. It is therefore essential, that the evidence adduced establishes that the First, Second, Fourth and Fifth Respondents supervise and oversee persons (human beings) and not machines. This argument is fortified by the following passage in *Titaghur*

Paper Mills Company Ltd. v. West Bengal & Ors. [1982] Lab I. 307:-

> "A 'supervisor' as understood in s. 2(s), really means that the person exercising supervisory work, is required to control the men and not the machines."

17. The Grounds of Appeal are:-

The DG of Labour failed to properly identify the issues in the case and apply the correct principles of law to them.

I am of the opinion that the DG of Labour failed to properly appreciate the issues involved in the instant case. The issues are as follows:-

(a) As regards the mixed and/or alternative claims, the following questions may be posed:-

(i) Were the First, Second, Fourth and Fifth Respondents "engaged in manual labour" within the meaning of the First Exception?

(ii) Alternatively, were these Respondents wholly engaged in manual labour or only partly engaged in manual labour within the meaning of the proviso to the First Exception?

(iii) Were these Respondents to be regarded as supervisors who supervise or oversee "persons engaged in manual labour and was this supervision in and throughout" the performance of their work for the purposes of the Second Exception?

(b) The claim of the Third Respondent is to be resolved by deciding whether or not he was “engaged in manual labour” within the meaning of the First Exception.

It is clear from the Judgment (pp. 363 - 367 AR, Vol.2) that the DG of Labour did not at all consider these issues although they were placed before her (see pp. 201 - 202 AR, Vol.1). This is a fundamental error which impugns the whole decision. Indeed, it appears that the DG of Labour confused herself and mixed up the issues to be determined. This is evident from the following part of the Judgment:-

> “Memandangkan mereka menjalankan tugas sama menyelia dan mengawasi pekerja-pekerja pengeluaran dan “manual” melebihi 50% sepanjang masa di dalam pekerjaan yang sama dengan majikan yang sama terhadap pekerja-pekerja berkenaan maka mereka adalah dianggap sebagai pekerja “manual” dengan sendirinya.”
>
> (see p. 366, AR Vol.2)

It may be noted that the DG of Labour does not even distinguish the claim of the First, Second, Fourth and Fifth Respondents (the mixed and alternative claim) from that of the Third Respondent (the purely engaged in manual labour claim). I think if the DG of Labour had properly identified the issues and applied the relevant principles of law to them, she would have had to decide against the Respondents in this case.

18. The DG of Labour failed to distill the correct principles of law to determine whether or not the Respondents were engaged in manual labour.

It may be emphasized here that performance of work which has a physical/manual content but which is really dependent upon the acquired skill, knowledge or experience does not amount to the employee being "engaged in manual labour" for the purposes of the said Act. It is obvious that the DG of Labour did not at all address her mind to the principles of law governing the interpretation of the phrase "engaged in manual labour". Although numerous cases were cited to her (see pp. 194 -197, AR Vol.1), she did not consider any one of them and instead chose to adjudicate the matter without the benefit of the relevant legal principles. This is obvious as not even one case is found in her Judgment. In the absence of proper guidance (from the legal authorities), her appreciation of the evidence and her analysis of the facts is suspect. Her findings therefore cannot stand. It is observed that the following issues and evidence were culled for her benefit (on this point) but she failed to appreciate them:-

(i) Were the First. Second. Fourth and Fifth Respondents "engaged in manual labour" under the First Exception or. were they partly engaged in manual work and partly in non-manual work for the purposes of the Proviso to the First Exception?

It is common ground that all these Respondents were holding management positions and it therefore cannot be said they were manual labourers who are "engaged in manual labour". In this

regard, it is not disputed that the First Respondent was appointed as the Production Shift Manager and then promoted to Senior Shift Manager in the Spray Products Department of the Company. The Fifth Respondent was appointed as Shift Manager and later promoted to Senior Shift Manager in the Detergent Making Department of the Company. The Fourth Respondent held the post of Electrical Powerhouse Supervisor in the Engineering Department. CLW-3 confirmed in cross-examination that this was a management position. The Second Respondent held the post of Product Shift Manager in the S.L.B. Finishing Department of the Company.

The First Respondent gave evidence to say that his job requirements were such that he was required to do some manual work, which was essentially to guide his subordinates and to attend to problems in running of the machines in his department. (See p. 66 AR Vol.1) His immediate superior, COW-2, S.S. Tan however gave unchallenged evidence that the manual work done by the First Respondent was “less than 5%” of his total working hours (see p. 129, AR Vol.1). The First Respondent confirmed this himself by saying that his job functions were “mainly supervisory in nature”. (See p. 71, AR Vol.1). He did not at all testify that he performed substantial manual labour or even that his job functions were partly manual labour and partly non-manual work. It is therefore clear beyond any doubt that although the First Respondent’s job functions may have required some manual work, it was very minimal and certainly very much less than 50% of his total working hours and he was therefore not “engaged in manual work” for the purposes of the First Exception and the Proviso thereto.

As to the Fifth Respondent (CLW-2), the only evidence of manual work done by him is, according to him, when he replaces the base plant and spray tower operators during their meal breaks. In this regard, his evidence was that he would replace them for a minimum of 1 $^{1}/_{2}$ hours and a maximum of 2 hours in any shift (of 8 hours). (See p. 76, AR Vol.1) COW-1, Gurmit Singh, who was the Fifth Respondent's superior testified that when CLW-2 replaced the base plant and spray tower operators during their meal break, his duty would essentially be to sit in the Base Plant Control Room and check the temperature and the pressure controls in the T.C.C. Monitors. (See p. 122, AR Vol.) This is obviously an observatory function and not manual work or manual labour. COW-1 further also gave unchallenged evidence that the only manual work done by CLW-2 was when he was required to change the valves in the base tank but even this is not done in every shift. (See p. 125, AR Vol.1) From the evidence on Fifth Respondents job functions, it is obvious that he was only required to perform one type of manual work (ie, to change valves in the base plant tank) and even this was not done in every shift. He therefore performed very little manual work and the manual work done by him was also certainly less than 50% of his total working hours. He also admitted that his main functions were supervisory functions (see p. 77, AR Vol.1) and he therefore cannot be heard to contend that he was engaged in manual labour for the purposes of the First Exception and the Proviso thereto.

Next, we consider the Fourth Respondent (CLW-3). According to him, he would replace the electricians and boilerman when they go on leave and this happens "once or twice a month, sometimes not at

all". (See p. 85 AR Vol.1). He also admitted in cross-examination that his functions were largely supervisory. (See p. 85, AR Vol.1). In reexamination he confirmed further that his basic role is "that of a supervisor" (see p. 87, AR Vol.1). COW-3, N.K. Chan, his immediate supervisor also confirmed that the Fourth Respondent's work was largely supervisory in nature. (See p. 137, AR Vol.1). It is therefore observed that the Fourth Respondent also did not perform manual work or engage in manual labour on a daily basis. He replaced the electricians and boilerman when they were on leave only and not daily. He would therefore not come within the First Exception or the Proviso thereto.

Lastly, the Second Respondent (CLW-5). There is no evidence at all from him that he did any form of manual work, whether incidental to his job performance or on a replacement (of manual workers) basis. It is further clear on the totality of the evidence of COW-1, (who was his immediate superior), that the Second Respondent was not at all "engaged in manual labour" at any material time. (See pp. 122 - 123, AR Vol.1). It is too late for CLW-5 to now take the position that he is covered by the First Exception or the Proviso to the First Exception. Therefore there was ample evidence before the DG of Labour that the First, Second, Fourth and Fifth Respondents were all not "engaged in manual labour" at all. On their own evidence, they accepted that their functions were largely supervisory and not manual work or manual labour. Alternatively, even if there was some mutual work required of them (except the Second Respondent), this manual work was incidental, so minimal and most definitely very much less than 50% of their job

functions in any given shift, and therefore they could not also take advantage of the Proviso to the First Exception. The DG of Labour completely ignored or misappreciated this evidence and instead erroneously found they were "engaged in manual labour" (see p. 366, AR Vol.2). As a matter of law, it is well established that employees who hold management positions or employees who are primarily engaged to supervise and oversee (and are therefore Supervisors) cannot be regarded as being "engaged in manual labour". In the case of *Smillie v. Rangitikei Co-op Dairy Co.* [1934] NZLR 238, the employee was employed as a Factory Manager and his duties were essentially to supervise the employees under him as well as to supervise factory operations. The Court held that, although the employee performed some manual work, the employee was not "engaged in manual labour" as his manual work was not the substantive part of his employment.

As to the Third Respondent, the DG of Labour also failed to realise that he was not engaged in manual labour. The relevant evidence in support of this is that he admitted in cross-examination that his position in the Company was that of Senior Craftsman in the Detergent Finishing Department. (See pp. 90-91, AR Vol.1). He further confirmed that his main functions was to ensure the smooth running of all machines in his department. In performing this functions, he accepted that his "knowledge and experience is very crucial". (See p. 91, AR Vol.1).

He also confirmed that he was entrusted with the responsibility of ensuring that certain sophisticated and complex machines in his department such as, ACMA, Rovema, Hamacs and Zamboni, run properly. He further accepted that he was taught how to operate these machines and therefore acquired technical knowledge in the result. (See p. 91, AR Vol.1). Therefore the Third Respondent was responsible for the smooth running of all machines in the Detergent Department and this in turn would have resulted in the production of the detergent products as per the requirements of the Company (ie, qualitative task) and further that the process is continuous to enable the company to maintain the necessary output (ie, quantum of production). See p. 90, AR Vol.1). Thus, as a Senior Craftsman, he was primarily responsible to ensure that the lines/machines function efficiently to achieve the qualitative and quantitative requirement of the Company. It was also necessary for the Third Respondent to ensure that the production machinery performs to optimum capacity. This is a crucial task in the production lines of the Appellant as if machines do not perform well the products produced would be defective, and this would affect the overall performance of the Appellant. Thus, the job requirement carries a very onerous burden which requires the job holder to attend to problems quickly and apply his diagnostic skills, which would flow from his experience, and find prompt solutions to safeguard production. It is critical for the Senior Craftsman to ensure that the machinery at the production line function efficiently to ensure that the products produced attain the highest standards possible.

COW-1 also testified that the Third Respondent was to attend to the break-down of machines. This is a troubleshooting function which requires him to act promptly. (See p. 123, AR Vol.1). It involves the application of the mind to identify problems and to rectify them to put the machines into running order immediately with minimal disruption on production. The importance of this task is seen by the fact that the whole production line is dependent on his skill to address the problems promptly and effectively. On the whole, it is clear on the evidence that the performance of the job functions of the Third Respondent called for the use of "acquired skill, knowledge or experience", which is crucial. The use of hands or manual work is of course also required but that was incidental to the exercise of the mental faculties. In the premises, there was also sufficient evidence adduced for the DG of Labour to hold that the Third Respondent was not engaged in manual labour. As a whole on this point, the DG of Labour clearly failed to set out the relevant evident on all the respondents to justify her findings. She appears to have glossed over important pieces of evidence that support the Appellant's contentions. She further based her findings mainly on the fact that there was some physical "exertion" on the part of the Respondents in performing their job functions. This was a narrow and erroneous approach to the issue.

19. The DG of Labour failed to realise that, in any event, the Respondents were only partly engaged in manual labour for less than half (50%) of their wage period.

It cannot be disputed that the Respondent in this case were only partly engaged in manual labour. This is clear from the findings made by the DG of Labour at p. 364, AR Vol.1:-

> "Kelima-lima pengadu di dapati bekerja di dalam keadaan dan mempunyai tugas-tugas yang meliputi suasana persekitaran pekerjaan yang melibatkan pengalaman kerja-kerja penyeliaan dan pengawasan sesuatu kerja terhadap pekerja-pekerja pengeluaran yang merupakan pekerja-pekerja "manual"."

Therefore given the nature of the work of the Respondents (who are partly "engaged in manual labour" and partly engaged in some other capacity eg, supervisory work), it was incumbent on the DG of Labour to ascertain whether or not they came within the Proviso to the First Exception. In this relation, the DG of Labour was required to determine whether or not more than half (50%) of the total work time of the Respondent was spent on doing manual work. The DG of Labour came to the conclusion that the Respondents spent 80% of their job hours supervising (see p. 365 (para H), AR Vol.1). Yet, she still concluded that they were engaged in manual labour (see p. 366 (para J), AR Vol.1). I am of the opinion that the DG of Labour should have held that the burden of proof was on the Respondents by virtue of Section 106 of the Evidence Act 1950 to prove that, although they partly performed non-manual work, more than half (50%) of their total work time was spent on doing manual work. The DG of Labour should have found that the Respondents failed to satisfy this burden and accordingly they could not be regarded as having been substantially engaged in manual

labour. The failure of the DG of Labour to determine whether or not the burden was satisfied is, without more, sufficient to vitiate her judgment in this case. In the absence of proof that the Respondents were substantially engaged in manual labour, there was no evidential basis whatsoever to hold that they were within the Proviso to the First Exception. The DG of Labour should have held that the Respondents were outside the Proviso to the First Exception and accordingly their claim should have been dismissed.

20. The phrase "engaged in manual labour" and the policy of the said Act.

It is noted that the DG of Labour preferred a very expansive or wide interpretation of the phrase "engaged in manual Labour". This is evident from the following passage of the Judgment:-

> "Kriteria pekerja pentadbiran yang jelas ialah bekerja di pejabat, mempunyai kelayakan sijil atau ikhtisas yang mentadbir sesuatu pekerjaan atau menguruskan sesuatu bahagian yang khusus berkelayakan mengikut taraf atau bidang tugas itu tetapi jika ada kerja-kerja yang menggunakan tenaga sepenuhnya bukan daya pemikiran untuk membuat keputusan yang berasaskan kepada kelayakan dan kepimpinan maka adalah wajar mereka di anggap pekerja-pekerja yang sama kedudukannya sebagai pekerja-pekerja "manual"."
>
> (See p. 366, AR Vol.1).

By adopting such a liberal interpretation of the phrase without qualification, I am of the view as I have said earlier that the DG of Labour failed to consider and apply the legislative policy and purpose behind the said phrase when she purported to construe the phrase. It is trite law that it is incumbent on the decision-maker, tasked with the duty of interpreting a statutory provision, to identify the policy behind the relevant provision and then properly apply the policy to his interpretation. It is obvious from the Judgment that the DG of Labour failed to do this as nowhere has she stated the legislative policy underlying the said phrase. It is noted therefore that the DG of Labour erroneously attempted to interpret the phrase in isolation or in vacuum. This was contrary to law. The policy behind the said phrase is to protect employees who are engaged in purely physical work devoid of mental application for more than half (50%) of the entire wage period but earn a salary in excess of RM1,500.00. In other words, the said Act would not protect employees who earn more than RM1,500.00 for work done which only incidentally involves physical work. The Act therefore necessarily limits the categories of employment who would qualify to be regarded as “engaged in manual labour”. I think to give the phrase a broad interpretation would mean that any employee performing any manual work (no matter how incidental in nature or temporal in time) is to be regarded as being engaged in manual labour. Such a basic and loose interpretation of the phrase negates the policy and purpose of the said Act. Accordingly, the decision of the DG of Labour based on her misconceived understanding of the phrase “engage in manual labour” has to be rejected.

21. The DG of Labour failed to properly interpret paragraphs 2(3) of the First Schedule to the said Act.

The issue before the DG of Labour was whether the First, Second, Fourth and Fifth Respondents were "supervisors" who supervised or did oversee "employees engaged in manual labour" and whether did they do so "in and throughout" the performance of the manual labourers work. I think the DG of Labour failed to appreciate these issues and in the result she misconstrued the Second Exception (paragraph 2(3) of the First Schedule to the said Act) when she decided in the Respondents favour. It is noted that the Appellant led a comprehensive evidence, on the various issues concerning the Second Exception, but this was completely ignored by the DG of Labour without any reason or basis. It is common ground that the First, Second, Fourth and Fifth Respondents all performed supervisory functions and they would therefore necessarily supervise or oversee for the purposes of the Second Exception. There may be regarded as "supervisors" who were holding management positions and were designated as Managers by the Appellant. The next issue that the DG of Labour had to decide whether they supervised, or did oversee "employees engaged in manual labour". In this connection, the Respondents called their subordinates as witnesses to show that their subordinates were "engaged in manual labour". The evidence of their subordinates was as follows:-

For the First Respondent

(i) CLW-6, Murali Naidu, a Machine Operator in the Liquids Department, said that the First Respondent was his Shift

Supervisor. He said that his (CLW-6's) functions were to "take care of the line, filling up the detergent bottles, capping the bottles and staking the bottles". He also confirmed that the First Respondent would not replace him when he goes on his meal breaks as the machines are switched off. He admitted however that the First Respondent may temporarily relief them when he goes to the gents. (See p. 100, AR Vol.1). In cross-examination, CLW-6 agreed although he places the bottles to be filled, it is the machine that does the filling of detergent and not him. He admitted that the most important part of the process in his department was the filling of the bottles and this was done by the machine. (See pp. 100 - 101 AR Vol.1). He also admitted that while he would place the bottles to be filled, other employees would cap and stack the bottles. (See p. 100 - 101, AR Vol.1). There was no evidence led from these other employees. It would appear that the job functions of CLW-6 are fairly routine. There was therefore no clear evidence of whether or not CLW-6 was "engaged in manual labour". On the contrary, it would appear that the real manual labour was done by the machine (which fills up the bottles) and not by CLW-6. CLW-6 was therefore not "engaged in manual labour" within the meaning of the First Exception.

(ii) Another witness who was also supervised by the First Respondent was CLW-7, Mohandass s/o Letchuman, Process Operator in the HHSC Department. He testified that his main duties were to operate a computer and he would "press the buttons to add the elements to make the Axion base in the mixer". According to him, in every hour he would spend 50

minutes working on the computer and it is only for the remaining 10 minutes he would do manual work (ie, addling of the colour and perfume). (See p. 103, AR Vol.1). The evidence of CLW-7 as stated above clearly shows that his job functions involved partly manual work and partly non-manual work. It cannot however be disputed that his non-manual work (ie, operating the computer) clearly predominates his job functions and his manual (adding the colour and the perfume) is incidental to the performance of his job functions on the evidence. It is plain that CLW-7 was not "engaged in manual labour" for the purpose of the said First Exception. Again it is noted that his manual work was less than 50% of his total working hours and therefore he does not fall within the Proviso to the First Exception. Thus, with regard to the CLW-6 and CLW-7 who were supervised by the First Respondent, the DG of Labour was urged to find that both these employees (especially CLW-7) were "not engaged in manual labour". Alternatively, and or in any event, they were engaged in manual labour for less than 50% of their total work time and cannot therefore be deemed in law to be engaged in manual labour. On this footing, the DG of Labour should have held the First Respondent was not supervising or overseeing "employees engaged in manual labour". In respect of the evidence given by CLW-6 and CLW-7, both of whom the First Respondent purportedly supervised, it is clear that their job functions cannot be described as being "engaged in manual labour". (CLW-7 gave evidence that his main duties were to operate a computer which he spent 50 minutes each hour, working on). (See p. 103, AR) CLW-6's main functions were to place

detergent bottles to be filled by machines and capped and stacked by other employees (See p. 100-101, AR) CLW-6 gave evidence that the most important part of the process in his department was filling the bottles and this was done by the machine. The First Respondent was therefore tasked with supervising the smooth flow of this important process and not the individuals placing the bottles on the machine to be filled. If at all CLW-6 and CLW-7 did any manual labour it was clearly for less than 50% of their total work time and cannot therefore be deemed in law to be "engaged in manual labour". The fact is that the First Respondent also gave evidence that besides the Supervision of Operators and Line Helps (which is his main responsibility) he also supervised Mechanics and Forklift Drivers. (See p. 66, AR). With regard to Forklift Drivers, paragraph 2(3) of the First Schedule to s. 2(1) of the said Act would not cover any supervision rendered to 'Forklift Drivers'. This is because 'Forklift Drivers' may be described as "persons engaged in the operation of a mechanically propelled vehicle" as described in paragraph 2(2) of the First Schedule to s. 2(1) of the said Act. These 'Forklift Drivers' would therefore not be person engaged in manual labour and hence any supervision rendered to them cannot be considered 'supervising or overseeing persons engaged in manual labour'. I think this fact alone is sufficient to preclude the First Respondent from satisfying the requirement that he supervises persons engaged in manual labour "in and throughout the performance of their (manual labourers) work.

For the Fifth Respondent

His subordinate was CLW-8, Jamali bin Hassan, who is a Spray Process Attendant in the Detergent Making Department. He gave evidence that he was supervised in his previous position of a Line Helper by the Fifth Respondent. His job functions were cleaning the machines, cleaning up soap spills and generally following the instructions of the "Process Operator" in his Department. (See pp. 106 - 107, AR Vol.1). It was clear from the evidence of CLW-8 that he was supervised in the performance of his manual work functions by the Process Operator and not by the Fifth Respondent. In any event, CLW-8 said in the cross-examination that he was in charge of "automatic" machines and not machines which are manually operated. (See p. 108, AR Vol.1). He further confirmed in the cross-examination that he would require the assistance of the Fifth Respondent only when there are blockages which "pose a serious problem". He confirmed that for the normal blockages, he would not need the supervision. (See p. 108, AR Vol.1). From the evidence of CLW-8, it was clear that the Fifth Respondent did not supervise him when he did the manual work as CLW-8 was supervised by the Process Operator. If at all the Fifth Respondent supervised him, the supervision was limited to helping CLW-8 to deal with serious blockages in the machines. This was very limited supervision in an emergency type of situation. The work done at this time was not the dominant part of CLW-8's job functions and CLW-8 cannot be said to be "engaged in manual labour" when dealing with this emergency. Thus, the supervision given by the Fifth Respondent was not while CLW-8 was engaged in manual labour. On the evidence therefore the DG of Labour should have held that the Fifth Respondent did not supervise or oversee "employees engaged in manual labour".

CLW-8 was the main witness for the Fifth Respondent. From the evidence of CLW-8, in respect of the cleaning of soap spills and cleaning of machines he clearly took orders from the Process Operators in his Department and not from the Fifth Respondent. (See p. 106 - 107, AR Vol.1). Any assistance from the Fifth Respondent was only required when there were blockages which "pose a serious problem" (See p. 108, AR Vol.1). CLW-8 failed to give any concrete evidence that he was in fact supervised by the Fifth Respondent during the time he was engaged in manual labour. The Fifth Respondent, did not, save where there were serious blockages, supervise or oversee the work of CLW-8. This function was clearly done by the Process Operators. Hence it cannot be said that the Fifth Respondent 'supervises or oversees persons engaged in manual labour, in and throughout the performance of their work.' The Respondents have submitted that COW-1, Gurmeet Singh's evidence should be disregarded, due to the fact that during the period of 1992 and 1996, he apparently had no knowledge of what the Fifth Respondent was doing on a day-to-day basis. However CLW-1 did in fact know the functions of the Fifth Respondent and had given evidence during the examination-in-chief as follows:-

> "Michael Chin, I confirmed he was Shift Manager since 1990 - 1996 in making spray product Department. I am aware of his job function. In any given day his function in 4 categories what we call 4M ..." (See p. 120, AR).

It may be observed that the fact that the Fifth Respondent may have been involved in supervisory work for 80% of his time is irrelevant as the supervision was not of "persons engaged in manual labour". COW-8's evidence leaves no room for doubt that this was in fact the case.

For the Fourth Respondent

As to this Respondent, evidence was given on his behalf by CLW-9, Cheong Foo Weng, who was a Craftsman at the time in the Detergent Making Department. He gave evidence that he (CLW-9) would overhaul machines, charge sizes of valves, do piping and welding. However, he admitted in cross-examination that his duties also included running certain machines in the production line, for example, HAMAC and ZAMBONI, and further admitted that this was an important function. (See p. 112 AR Vol.1). It is a fact that CLW-9 was entrusted with the responsibility of running and managing sophisticated production machines and the performance of this duty definitely entailed the use of his intellectual abilities. It therefore cannot be assumed that CLW-9 was "engaged in manual labour". (See p. 112, AR Vol.1). CLW-9's job functions required him in the main to exercise to his acquired skill, knowledge and experience (especially in operating the sophisticated machines alluded to above) together with the incidental manual work. On this basis alone, CLW-9 cannot be deemed to be "engaged in manual labour". It would follow that the DG of Labour should have held that the Fourth Respondent did not supervise or oversee "employees engaged in manual labour" within the meaning of the First Exception. It is to be seen from CLW-9's unequivocal evidence that the Fourth Respondent merely "organised work for me" (CLW-8). "He also records overtime as well as he would come and see if we had any problems. He also fills up our leave forms". (See p. 11, AR Vol.1). He testified that he would only need CLW-3's assistance when there are serious problems. (See p. 112, AR Vol.1). The DG of Labour should have found on CLW-9's evidence that the Fourth Respondent offered very little supervision and the supervision was only given by him in emergency situations where clearly CLW-9 could not be regarded as being "engaged in manual labour".

The Fourth Respondent gave evidence that he supervised Boiler House Electrician and Mechanics. He was sometimes required to replace these very same Mechanics and Electricians.

> "I work shift only when to replace the Mechanic or Electrician ... when they are not working 1 have to carry out all electrician work" (See p. 84 AR).

In *South Indian Bank Ltd. v. Chacko* AIR 1964 S.C 1522, the High Court Judge in *Titaghur Paper Mills Company Ltd. v. West Bengal & Ors.* [1982] Lab. 1C 307 at p. 316 observed the following:-

> "If occasionally a workman has acted in the place of an agent when the agent was absent, the workman cannot be held to be discharging administrative or supervisory work principally."

It is the Appellant's submission that a parallel may be drawn between the use of the word "principally" and the words "in and throughout the performance of their work". Thus, the very fact that the Fourth Respondent is sometimes required to step in the shoes of the persons he supervises, cannot make him a supervisor or overseer of (persons engaged in manual labour) in and throughout the performance of their work. CLW-9 gave evidence on behalf of the Fourth Respondent. The evidence shows that CLW-9 cannot be said to be engaged in manual labour by virtue of the vast acquired skill, knowledge and experience required in the exercise of his job functions. It is observed that the Fourth Respondent offered very little supervision to CLW-9 and even that was extended where there were serious problems (see p. 112, AR). Thus the conclusion that can be reached in respect of the Fourth Respondent's job function is that if at all there was supervision involved, it was not to persons engaged in manual labour, and it was certainly not in and throughout the performance of their (CLW-9) work hence bring him outside the ambit of the First Schedule.

For the Second Respondent

His subordinate who gave evidence was CLW-10, Kamari b. Haji Ismail, a Machine Operator in the S.L.B. Department. He confirmed that his responsibility was to ensure the packing of soap bars but the actual packing (ie, the manual labour) was done by machine. (See pp. 115 - 116, AR Vol.1). Thus, there was insufficient evidence as to the job functions of CLW-10. On the evidence the DG of Labour should have concluded that the manual work was done by the machine and not CLW-10. Therefore, the DG of Labour should have concluded that the Second Respondent was also not supervising or overseeing an employee "engaged in manual labour". CLW-10 was also able to state in evidence that the supervision given by the Second Respondent was, in any event, intermittent. He said that the Second Respondent would "sometime show us how to work and sometimes he just watches". (See p. 117, AR Vol. 1). He went on to testify that the real supervision given by the Second Respondent was when there were problems in running the machines. This confirmed the Appellant's stand that he was not supervising CLW-10 while he (CLW-10) was "engaged in manual labour" as clearly the supervision was only in emergency situations when CLW-10 was not performing manual labour.

Based on the evidence adduced above, the DG of Labour should have decided that the First, Second, Fourth and Fifth Respondents could not also rely on the Second Exception as they did not supervise or oversee employees "engaged in manual labour".

The Second Respondent gave evidence that his most important function was, *inter alia* to ensure the production was carried out smoothly, that the materials involved were sufficient, that there were enough workers to run the production line and the safety of the workers (see p. 98, AR). The function of ensuring that the materials involved

were sufficient, has nothing to do with the supervision of persons engaged in manual labour. On the contrary it has everything to do with the logistics of the Company. Likewise, in ensuring that the production runs smoothly, the Second respondent would have to ensure that the machine runs smoothly. The Respondents submit that notwithstanding the fact that the machines do the actual work, they still require human operators such as CLW-10 to operate it and therefore the Second Respondent in giving assistance to CLW-10, must be said to be supervising him. This, I think is an erroneous view. This very question was the subject of the dispute in *Titaghur Paper Mills Company Ltd. v. West Bengal & Ors.* [1982] Lab I.C 307, where the following was said:-

> "It may be noted that in the matter of production and running sophisticated machines, persons having technical expertise are often required to guide the labourers as to how the machine will run and how the technical process of the production is to be carried out. Such technicians render their technical expertise along with other workers. In such circumstances, it cannot be said that simply because they did not run the machines themselves but stood by and guided ordinary workmen in the matter of running the machine and/or carrying out the phases of production, they were purely administrators and/or supervisors and their only job is to supervise the men and not the machine and/or technical works of production. Supervisor, as understood in s. 2(s), really means that the person exercising supervisory work, is required to control the men and not the machines."

In the light of the above, I am of the view that the Respondents submission that the Second Respondent is tasked with supervising or overseeing persons engaged in manual labour, in and throughout the performance of his work, is clearly misplaced.

22. The DG of Labour failed to properly construe the phrase "in and throughout the performance of their work", particularly with regard to the "4M" policy practiced by the Appellant. It is observed that the DG of Labour completely failed to appreciate the significance of the qualifying words (in the Second Exception) "in and throughout", which required the Supervisors in question to wholly and purely supervise and oversee employees under him. He may not perform other functions (eg, of general supervisory nature or administrative functions). The qualifying words "in and throughout" requires the Supervisor to wholly and purely supervise and oversee only employees engaged in manual labour (ie, man-power). He may not at the same time or partly supervise machines, materials and methods of production or perform administrative functions. The question of the DG of Labour had to consider was whether the First, Second, Fourth and Fifth Respondents did supervise or oversee employees of the Appellant who were engaged in manual labour in and throughout the performance of these employees work. The DG of Labour did not at all address this question in the Judgment. It is important to note that the Appellant's witnesses, COW-1, COW-2 and COW-3 all gave evidence that between 75% to 80% of the job of the First, Second, Fourth and Fifth Respondents were supervisory in nature. All the Appellant's witnesses also testified that the job functions of these Respondents would cover four (4) different types of supervision (ie, the 4M's policy). Under this policy, the Respondents would supervise the following in their respective departments:-

(a) Machines required for production;

(b) The availability of Materials for production;

(c) The mechanical process or Methods of production, and

(d) The Manpower of the Company.

(See pp. 121, 128- 129, 135, AR Vol.1).

From the evidence adduced before the DG of Labour, it was clear that the supervisory functions performed by the Respondents were not only with regard to Manpower (which would cover their supervision of employees whether or not engaged in manual labour) but would also in relation to the other 3 M's, ie, Machines, Materials and Methods. On this alone, and without more, it was clear that the Respondents could not have supervised employees engaged in manual labour in and throughout the performance of the manual work as they also had to supervise the performance of the Machines, check on the availability of Materials and ensure that the Appellant's established Methods of production are complied with. This is a fundamental fact which the DG of Labour completely failed to appreciate. With regard to the "4M policy" and on the question of whether the purported supervision of the Respondents was "in and throughout", the following evidence was adduced before the DG of Labour:-

First Respondent

COW-2 testified that up to 80% of the First Respondent's time during a shift would be spent on supervision and of this, only 20% of his time would be spent supervising the employees. COW-2 also

testified that the First Respondent needed to only spend 20% of his time as the employees whom he supervised were able to work independently and they therefore required minimum supervision. (See pp. 128 - 129, AR Vol.1). CLW-2's evidence was confirmed by the First Respondent's own subordinates, CLW-6 and CLW-7, who both said that they did not need supervision all the time as they were experienced and that they could work quite independently. (See pp. 101 and 103, AR Vol.1). CLW-6 further testified that the First Respondent would only spend about 20 minutes in every hour supervising him while CLW-7 was able to say the First Respondent would come to his work station once in every 2 or 3 hours. (See p. 101 and 104, AR Vol.1). COW-2 also said that the remaining 20% (as 80% is for supervisory functions) of the First Respondent's time was spent on administrative matters such as preparing shift reports, production reports, records of shift allowance, vacation/leave forms, labour time sheet and the water meter report. (See pp. 128 - 129 AR, Vol.1). Both CLW-6 and CLW-7 confirmed that the First Respondent had a desk to perform these functions. Indeed the First Respondent himself admitted in the cross-examination that there is a "considerable amount of administrative work" in the performance of his job functions. (See p. 70, AR, Vol. 1). The totality of the evidence on the First Respondent's job functions should have impelled the DG of Labour to come to the conclusion that the First Respondent could not have been supervising the employees under him who were engaged in manual labour 'in and throughout' the performance of their work as he clearly had other equally important functions of supervision (non-manpower) and administration.

The Fifth Respondent

COW-1 gave evidence that this Respondent would also spend about 80% of his time during a shift performing supervisory functions, which according to him would take about 6 hours. Of the 80% COW-2 was able to give a breakdown of the Respondent's supervisory functions as follows:-

> "20% for Methods and 20% for Machines as the Operators could do most things for themselves unless there are major problems ... the rest would be 20% for Materials and about 20% would be for going around the factory floor to supervise manpower."
>
> (See p. 121m AR Vol.1).

With regard to the 20% supervision of manpower, COW-1 said that very little time is spent by the Fifth Respondent on this since the guys know what to do unless there are major problems. (See p. 121, AR Vol.1). COW-1 further said that in any given week "one to one supervision is between 0% to 20%". (See p. 121, AR Vol.1). This 20% level of supervision is corroborated by the Fifth Respondent's own subordinate, CLW-8, who said in cross examination that in any average shift the Fifth Respondent "is not always" present and his presence is only required when there are serious problems. (See p. 108, AR Vol.1). COW-1 also said that the staff under the Fifth Respondent "were experienced staff as they have been with the Appellant for many years". (See p. 121, AR Vol.1). In answer to the DG of Labour, CLW-8 said that he would only see the Fifth Respondent "when I first go to work, then at tea time and lunch time and finally at 3.00 p.m. when I go back". (See p. 109, AR Vol. 1). It is obvious that the Fifth Respondent was not always or at all times present when his subordinates performed their job functions. Even when he was present, his supervision was clearly minimal as CLW-8 was well capable of working independently. Thus, the Fifth

Respondent was not supervising CLW-8 “in and throughout” the performance by CLW-8 of his duties. COW-1 also testified that the Fifth Respondent would spend 20% of his time on administrative matters (eg, attending meetings, liaising with other departments, going through the Shift Report, preparing the tower report and the base-plant report). (See p. 121, AR Vol.1). The DG of Labour should have concluded on the evidence that the Fifth Respondent could not have supervised employees engaged in manual labour in and throughout the performance of their work as he had other equally important supervisory functions as well as administrative matters to attend to.

Fourth Respondent

In respect of this Respondent, the evidence was that he spent 75% of his time on supervision and the balance 25% on administrative work. (See p. 135, AR Vol.1). COW-3 said that out of the 80%, 50% of the Fourth Respondent’s time would be spent on supervising the employees. (See p. 135, AR Vol.1). The Fourth Respondent’s subordinate, CLW-9, testified that he needed supervision from him only when there were problems. (See p. 111, AR Vol.1). He said in cross-examination that during a shift, the Fourth Respondent would come to see him work about “2 to 3 times” and on each occasion he would spend about “15 to 20 minutes”. (See p. 112, AR Vol.1). CLW-9 further testified that for the rest of the time, the Fourth Respondent would be in the office. (See p 112 AR Vol 1) COW 3 also confirmed that the workers under CLW-9 were able to work alone unless there were problems It cannot be disputed that the Fourth Respondent did not supervise or oversee employees engaged in manual labour in and throughout the performance of their work because he was not present at all times and indeed it is clear from the evidence that he was in his office during the majority of the time. It was

also accepted by the Fourth Respondent himself that he performed administrative and clerical functions such as preparing the Engineering Personnel Log Book, the Daily Work Report, filling up overtime and vacation/leave forms. (See p. 86, AR Vol.1). COW-3 said that CLW-3 would spend between 25% to 15% of his time on administrative matters. (See p. 137, AR Vol.1). There was therefore sufficient material before the DG of Labour for her to hold that the Fourth Respondent could not have been supervising employees engaged in manual labour in and throughout the performance of their work as he was busy with general supervision of the machines, materials and methods and this took up 25% of his time while the remaining 75% of his time was spent on administrative matters.

The Second Respondent

Finally, the evidence on the job functions of the Second respondent was also given by COW-1. He was able to state that the Second Respondent also spent about 80% of his time on supervision of the 4M's (Machine, Material, Methods and Manpower) and 20% was on administrative matters. (See pp. 122 - 123, AR Vol.1). The Second Respondent's subordinate, CLW-10, then confirmed that he was an experienced employee and he would only require the Second Respondent's instructions when there were problems. (See p. 117, AR Vol.1). In this connection, CLW-10 said that the Second Respondent would come and oversee his work once in every "2 or 3 hours" and on each visit he would spend about "30 minutes" and "sometimes he shows us how to do the work and sometimes he just watches". (See p. 117, AR Vol.1). Based on the evidence of CLW-10, it was clear that the Second Respondent did not supervise him in and throughout the performance of his work. He offered only intermittent supervision or supervision when there were serious problems. Further, it was also clear

that during the remaining period of the shift, the Second Respondent would perform general supervisory functions (ie, Machine, Material and Methods) as well as attend to administrative matters (eg, preparing shift reports and production reports). Thus, the DG of Labour could have quite legitimately concluded that the Second Respondent could not have supervised the performance of CLW-10's job functions in and throughout the performance of his work during the shift as he had other functions to perform.

It is observed that the Appellant's 4M policy of supervision, of which the supervision of employees engaged in manual labour is only one component, is such that there cannot be any Supervisor in the Appellant Company who would supervise or oversee employees performing manual work in and throughout the performance of the manual work. There are two very cogent reasons for this:-

(a) Apart from supervising the employees engaged in manual labour, the Supervisors were required to spend a substantial part of their time supervising the Machines, Materials and Methods as well as undertaking administrative matters. Thus, they are not expected to, nor do they, constantly supervise the workers. Supervision of the workers would be done together with their other functions.

(b) The employees who are under the supervision of the Supervisors are mostly very experienced persons who are able to perform their duties independently with minimum supervision. They do not need to, and indeed were not, supervised "in and throughout" the performance of their work. The Supervisors were really only required to supervise them and assist them when there were major problems and the major problems did not occur frequently.

The 4M policy was the lynch pin of the Appellant's case and yet there is no mention of it at all in the Judgment of the DG of Labour. It was clear on the evidence that the First, Second, Fourth and Fifth Respondents spent about 75% to 80% of their time supervising. Since they did not spend all their time supervising, they could not have supervised employees engaged in manual labour in and throughout their work. This is further borne out by the evidence of the respective subordinates. The Respondents therefore cannot have recourse to the Second Exception.

23. The Respondents purport to provide a definition of 'manual labour' by focussing on the word "manual" and "manual work". I think this approach invariably obfuscates the issue at hand, ie, whether or not the Respondents are 'engaged in manual labour'. In *Bound v. Lawrence* [1982] 1 QB. 226, Lord Esher clearly distinguished "manual labour" from "manual work" and that is evident in the following passage (at page 228):-

> "There can be no manual labour without the use of hands; but it does not follow that every use of hands is manual labour, so as to make the person who does it a manual labourer."

Thus, whilst all manual labour would entail some manual work, a person who does some manual work is not necessarily a manual labourer. Hence, it cannot readily be accepted that the person who does manual work, is in law "engaged in manual labour". A surgeon operating on a patient for example, whilst clearly engaged in manual work, can, by no stretch of the imagination be said to be a manual labourer. For this reason, reliance on the definition

of “manual work” to lend support to the definition of manual labour is clearly misplaced. The distinction between the two must be appreciated. The Respondents further reliance on the definition of “artisan” as a means to include the Respondents within the ambit of paragraph 2 of the First Schedule to s. 2(1) Employment Act 1955 (the said Act) is erroneous because the definition which the Court needs to decide on is the meaning of the words “engaged in manual labour” in sub-para (1) of paragraph 2 of the First Schedule to s. 2(1) of the said Act. Although it includes an “artisan”, the definition is qualified by a proviso that the person “shall not be deemed to be performing “manual labour” unless the time which he is required to perform manual labour in any one wage period exceeds one-half (50%) of the total time during which he is required to work in such a wage period.”

24. In the instant case the DG of Labour had failed to hold that the burden lies on the Respondents, by virtue of s. 106 of the Evidence Act 1950, to prove that although they partly performed non- manual work, more than half (50%) of their total work time was spent on doing manual work. The DG of Labour should have found that the Respondents failed to satisfy this burden and accordingly they could not be regarded as having been substantially engaged in manual labour. Section 106 of the Evidence Act 1950 provides as follows:-

> “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

In *Public Prosecutor v. Kum Chee Keong* [1992] 2 SLR 126, the High Court explained when s. 106 ought to be used in the following manner:-

> "It (s. 106) is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience."

It is not disputed that the Respondents are engaged partly in manual labour and partly in some other capacity. But, in order for the Respondents to succeed in their claim that they do in fact come within the scope of the Employment Act, they would have to prove that more than 50% of their total work time was spent doing manual labour. I am of the opinion that the Appellants have satisfied the evidential burden by adducing evidence to show that the Respondent's job functions and scope of work involve both manual and non-manual work. As to whether or not the time during which he is required to perform manual labour in any one wage period exceeds 50% of the total time during which he is required to work, is a fact especially within the Respondents knowledge or at any rate is a fact for him to prove. This is because the Appellant merely stipulates functions to be performed by each Respondent and that is his scope of duties in the respective contracts of employment. If the Respondent on the other hand, wish for the Court to believe that more than 50% of their work comprises manual labour, then the Respondents must establish how those functions or duties of theirs, which can be described as "manual labour", take up more than 50% of their total time of work. I think it would be impractical for the burden to be placed on the Appellants because it is impossible for

the Appellant to be able to identify exactly how much time each Respondent spends on each of his duties and whether or not the manual labour content of those duties exceeds more than 50% of their total work time. For the aforesaid reasons and in the light of the fact that the Respondents are engaged partly in manual labour and partly in some other capacity, it is incumbent upon the Respondent to prove, if they intend to come within the scope of the Act, that the time during which they are required to perform manual labour in any one wage period exceeds 50% of the total time in which they are required to work in such wage period. It must have been the intention of Parliament in drafting the said Act for the definition of "employee" to be given a specific and narrow interpretation. If the Act was supposed to have been interpreted broadly as suggested by the Respondents, there would have been no necessity to create the First Schedule with specifications as to who came within the definition of "employee". In order to give effect to the clear intention of Parliament, it is imperative that the definition of employee is not expanded indiscriminately to include any person engaged in the use of his hands.

25. It is observed that the basis for interference of an Appellate Court when there are findings of fact made by a Subordinate Court (here by the DG of Labour) is well established (see *Heller Factoring Sdn. Bhd. (previous known as Matang Factoring Sdn. Bhd.) v. Metalco Industries (M) Sdn. Bhd.* [1995] 3 CLJ 9; [1995] 2 MLJ 153 at page 154 where the Court of Appeal held (1) and (2):-

"(1) (Per Mahadev Shankar JCA) Where a question of fact has been tried by a judge, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) (Per Mahadev Shankar JCA) The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

26. For all the aforesaid reasons, the appeal by the Defendant is allowed with costs.

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