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ELIGIBILITY OF EMPLOYEES TO JOIN RANK-AND-FILE UNIONS: THE MINISTRY OF LABOUR'S 1992 GUIDELINES[1]

Collective bargaining is an integral aspect of industrial relation in Singapore. The precise scope of the restrictions placed on certain classes of employees to collective have been a subject of prolonged discussion between unions and employers. This article examines the Ministry of Labour 1992 Guidelines on union eligibility in light of relevant awards by the Industrial Arbitration Court with particular emphasis on the eligibility of middle level employees to join and participate in rank-and-file union activities.

I. FREEDOM OF ASSOCIATION

IN Singapore, the right of employees to form, join and be represented by trade unions is part of the fundamental liberty of freedom of association enshrined in Article 14(l)(c) of the Constitution of the Republic of Singapore which proclaims that "all citizens of Singapore have the right to form associations." However, such freedom of association is not unqualified; indeed, Article 14(2)(c) and Article 14(3) of the Constitution expressly provide that restrictions may be imposed in the interests of Singapore's security, public order, morality or by any law relating to labour or education.

In the context of employment and industrial relations, freedom of association exists within the legal regime created under the Trade Unions Act,[2] the Employment Act,[3] and the Industrial Relations Act.[4] In brief:

(i) trade unions in Singapore may be formed and are governed by the Trade Unions Act and must remain registered under that Act;

(ii) employees generally have the right to organise, join and participate in the activities of registered trade unions as Section 17

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1 This article is adapted from a paper delivered on 9 April 1992 at the Singapore National Employers Federation Seminar entitled, "Union Recognition and Representation: Issues and Problems".

2 Cap. 333, 1985 Rev. Ed.

3 Cap. 91, 1985 Rev. Ed.

4 Cap. 136, 1985 Rev. Ed.

of the Employment Act makes illegal any contractual restriction on such rights. The Act also sets out certain minimum standards applicable to some employees; and

(iii) the Industrial Relations Act establishes a system which allows for the compulsory recognition of trade unions for purposes of collective bargaining and provides for voluntary or compulsory arbitration of trade disputes if conciliation is unsuccessful.

II. Restrictions on Managerial, Executive and Confidential Employees

Restrictions on the freedom of association of employees apply particularly with respect to employees in managerial, executive and confidential positions. Such employees are subject to two levels of restriction:

(i) *Non-bargainability of senior staff*

Senior managerial, executive and confidential employees are not permitted to join any trade union at all *i.e.,* they are 'non-bargainable'. As stated in the award of the Industrial Arbitration Court (IAC) in *Caltex Union of Managerial, Executive & Confidential Staff* v. *Caltex (Asia) Limited*,[5] such staff have sufficient seniority:

> To disqualify them from becoming members or holding office even in a Union which caters specially for managerial, executive and confidential staff. There must be a core of senior managers and executives of the company who must be distinctly managerial in every respect of their duties and responsibilities. If they so accept their positions and the duties and responsibilities that go with them, the acceptance of such positions make it necessary for them to relinquish their membership of the Union ....[6]

The non-bargainability of such employees is envisaged and permitted by existing legislation. Together with other specified categories of persons, persons employed in managerial, executive or confidential positions are not subject to the Employment Act (including the provisions prohibiting restrictions on organising, joining and participating in trade unions) as they are expressly excluded from the definition of "employee" for the purposes of that Act.

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[5] IAC Case No. 67 of 1979, [1981] I.R.S. 917.
[6] *Ibid., p.* 919.

(ii) *Ineligibility of middle-level staff to join rank-and-file unions*

The second level of restriction, which is the main focus of this paper, prevents middle-level managerial, executive and confidential employees from joining and participating in the activities of rank-and-file unions which may represent the other bargainable employees. With respect to managerial and executive employees, this restriction is expressly provided in the Industrial Relations Act. The proviso to Section 79 of the Act allows employers to require that employees resign from rank-and-file unions as a condition of appointment or promotion to managerial or executive positions.[7] Further, Section 16(3) prohibits rank-and-file unions from seeking recognition (a precondition for collective bargaining) in respect of employees in managerial or executive positions. Although the Act is silent with respect to confidential employees, the IAC has decided that this restriction also applies to them.[8]

III. Underlying Rationale for the Restrictions

There appear to be two main reasons why managerial, executive and confidential employees are restricted from participating in trade union activities, particularly for purposes of collective bargaining. First, there is a presumption that allowing their involvement in the collective bargaining process would place them unavoidably in positions where there is or would be conflict between the duty they owe to their employers and their own interests as trade union members seeking to improve their employment conditions. Secondly, it may also be that some employees are in sufficiently senior or special positions where they may not be in as much need of the benefits of collective bargaining. Ordinarily, the second reason would not apply to middle-level employees who should consequently be entitled to join a special union (hereinafter referred to as an "officers' union") although ineligible to join rank-and-file unions.

The approach taken by the IAC is set out in its award in *Singapore Bank Officers' Association* v. *Indian Overseas Bank.*[9] In determining that certain middle-level bank officers were eligible to join an officers' union, the IAC held that:

> In any banking establishment there would be at the very apex of the organisation a group of senior managerial and executive officers who

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7 See *Singapore Industrial Labour Organisation* v. *Shinsei (Singapore) Pte. Ltd.* IAC Case No. 62 of 1980 (unpublished, IAC's decision delivered on 11 June 1980 *per* Mr Tan Boon Chiang, President of the IAC).

8 See *Singapore Industrial Labour Organisation* v. *Singapore Fujitec Elevator Corporation Limited,* IAC Case No. 41 of 1976, [1981] I.R.S. 683.

9 IAC Case No. 31 of 1971, [1972] I.R.S. 1579.

> would be followed by managerial and executive officers of middling seniority and the rest of the staff consisting of clerical and non-clerical employees. Thus in any such banking establishment the top management personnel would be debarred from representation and be in non-bargainable positions whilst the middling managerial and executive officers and the clerical and non-clerical employees could be represented by the [Singapore Bank Officers'] Association and the Singapore Bank Employees' Union.[10]

IV. Difficulties Facing Unions Arising From Restriction on Middle-Level Staff

Although the IAC's award in *Singapore Bank Officers' Association* v. *Indian Overseas Bank*[11] referred only to the banking industry, the approach has been accepted as generally applicable by both employers and the unions in other industries. The approach divides employees into three broad categories: those considered non-bargainable who cannot join any union, those eligible to join only officers' unions and those eligibile to join rank-and-file unions. This three-fold division has posed difficulties for unions and their members, including the following:

(i) with the exception of a few sectors in Singapore where established officers' unions exist, the lack of an appropriate union has meant that middle-level employees are effectively unable to unionise;

(ii) the workforce employed by most employers in Singapore is comparatively small and in most establishments there are insufficient numbers of middle-level employees to form and run their own unions;

(iii) the trade union movement in Singapore has organised itself largely on either an industry-basis or a house-basis and no omnibus officers' union currently exists which recruits its membership from middle-level employees across industry lines;

(iv) promotion of union members to middle-level positions has depleted both individual rank-and-file unions and the trade union movement as a whole of many of their existing and potential leaders; and

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[10] *Ibid.,* p. 1580.
[11] Note 9, above.

(v) some employers may have re-designated or promoted staff to what may be only marginally middle-level positions or to bogus executive titles to prevent such staff from joining or remaining in rank-and-file unions.

Unhappiness in union ranks has been voiced by several trade union leaders including Mr Ong Teng Cheong, Deputy Prime Minister and concurrently Secretary-General of the National Trades Union Congress (NTUC). In particular, there have been calls for changes in the existing laws to clarify exactly what determines whether an employee has managerial, executive or confidential status.

V. The Ministry of Labour's 1992 Guidelines

In response to the unhappiness expressed by the trade unions, the Ministry of Labour engaged in prolonged discussions with the NTUC and the Singapore National Employers Federation (SNEF). They sought an alternative solution which avoided the need to revise the existing laws on union eligibility. Arising from those discussions, the Ministry issued guidelines on union eligibility in early 1992 ("the Guidelines").

The Guidelines state that:

> An employee is eligible to join a rank-and-file union if he satisfies the following:-
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> (a) he is not given direct authority or has no substantive influence on hiring, firing, promotion, transfer, reward or discipline of other employees; or
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> (b) he is not given duties and responsibilities that are in conflict with his affiliation with the union; or
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> (c) he is not given access to confidential information relating to labour management matters and policies; or
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> (d) he is not entrusted to represent the interests of the employer in labour management matters.

Based on the above criteria, front-line supervisors should in normal circumstances be eligible to join rank-and-file unions. Where there is doubt, the Ministry will assist companies and unions to resolve their differences through conciliation based on the Guidelines.

There may be certain categories of employees to whom the Guidelines may not be applicable. In such a situation, their eligibility will be considered on a case by case basis. The Ministry will offer its advisory and conciliation service. If no agreement could be reached, the parties concerned will be advised to seek a ruling from the IAC.

It should be noted that:

(i) the Guidelines do not result in any change in the existing law on union eligibility. They only serve to clarify the position in certain borderline cases (the so-called 'grey areas');

(ii) the intent of the Guidelines is that front-line supervisors should, in normal circumstances, be eligible to join rank-and-file unions if they do not fall within the four specified exclusions;

(iii) the Guidelines are not meant to be exhaustive and it is expressly envisaged that they may not apply in all situations;

(iv) where employers and unions differ in their interpretation of the Guidelines or on whether they apply, reference to the Ministry for advice and conciliation is encouraged;

(v) the Guidelines envisage that unresolved disputes should be referred to the IAC for decision. The procedure under the Guidelines is consistent with the existing legal position under the Industrial Relations Act. Under Section 16(4), employers may object to unions representing certain employees or classes of employees and such objections are referable to the IAC for determination; and

(vi) although the Guidelines do not have the force of law, in determining disputes the IAC is likely to have regard to their intent as Section 34(1)(a) of the Industrial Relations Act permits the IAC to have regard not only to the interests of the parties immediately connected with a dispute but also the interests of the community as a whole.

VI. FACTORS GOVERNING UNION ELIGIBILITY

The Guidelines do not attempt to resolve the central and perennial question as to which classes of employees fall within the "managerial", "executive" or "confidential" categories for the purpose of Section 16(3) and Section

79 of the Industrial Relations Act. There is no statutory definition of these categories in the Employment Act, the Industrial Relations Act or any other relevant Singapore statute. Perhaps, the Singapore Parliament has deemed that there can be no one all-embracing (and therefore static) statutory definition and prefers that the IAC be able to adopt a flexible approach, based on the particular circumstances of each case which it considers from time to time.

However, the various awards made by the IAC since its creation in 1960 and some decisions made by courts in other jurisdictions provide us with some guidance as to the factors which govern the IAC's determinations on the issue of union eligibility. We now consider these awards and decisions, making appropriate reference to the Guidelines.

A. *Eligibility Not Determined by Mere Titles*

The IAC has clearly decided that the mere title given to an employee does not, of itself, determine his union eligibility. In *Singapore Manual & Mercantile Workers' Union* v. *Business System & Equipment Limited,*[12] the IAC was asked to determine whether a particular employee held a managerial post. The employer referred to him as an assistant service manager; the union claimed that he was actually a service assistant. In its award, the IAC held "that the mere use of terminology expressing a particular employee's position in the firm should not be the ultimate criterion in determining whether or not that employee occupies a managerial post."[13]

B. *Conflict of Duties and Responsibilities: Guideline Criterion (b)*

The main criterion determining union eligibility relates to the rationale for restricting the union eligibility of some employees: the possibility that union membership may place an employee in a position of conflict between the duties owed to his employer and his own interests. This criterion appears as criterion (b) under the Guidelines. The leading IAC's award on this criterion is *Sime Darby Holdings Ltd* v. *Sime Darby Holdings Local Executives Union.*[14] In the course of determining the eligibility of some executives to join an officers' union, the then President of the IAC (Mr Tan Boon Chiang) held:

> What is in fact relevant in this case is whether recognition of an executive for membership and representation purposes will place that

[12] IAC Case No. 144 of 1964, [1965] I.R.S. 932.
[13] *Ibid.,* pp. 934-935.
[14] IAC Case No. 73 of 1966, [1968] I.R.S. 461, [1967] 2 M.L.J. lxiii.

> executive in such a position of embarrassment and difficulty that he will frequently in the course of his official and personal relationship with other employees find himself in a position of conflict detrimental to the interests of the company and his fellow executives in the long run .... The criteria in my view rest upon the duties and responsibilities of the executives concerned, the possibility of conflict between duty and interest if their positions are representative and bargainable and to some extent upon the salaries they are paid. Each case must be considered on its own particular merits ....[15]

The above criterion is central to the determination of an employee's union eligibility and, indeed, the other criteria found in the Guidelines may be considered as elaborations.

C. *Direct Authority/Substantive Influence on Hiring, Firing Etc: Who are True Managers or Executives – Guideline Criterion (a)*

Guideline criterion (a) is that a person with direct authority or substantive influence on hiring, firing, promotion, transfer, reward or discipline of other employees is ineligible to join a rank-and-file union. The principle behind the criterion was accepted in an early decision of the IAC in 1961. In *Singapore Printing Employees' Union* v. *The Straits Times Press (Malaya) Limited,*[16] the IAC (although qualifying its remarks to the particular employer) held that:

> Within the Employer's firm managerial position could be understood to mean the position of a person who is principally engaged in the direction and control of the firm's employees under him, and is responsible to the Employer for the efficiency, quality and output of his section or department.[17]

Difficulty arises not over the principle but from its application. Not all persons with some measure of influence or control over other employees are truly managers or executives. Increasing sophistication at the work place has given rise to the emergence of a new and growing category of employee:

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[15] *Ibid.,* pp. 464-465; Ixvi, respectively. See also note 7, above, where the Court gave, as an example of possible conflict, a situation where a unionised supervisor might have to take orders in regard to union matters from a union executive who was his subordinate at the workplace.

[16] IAC Case No. 57 of 1961, [1962] G.G.S. 2391.

[17] *Ibid.,* p. 2392.

the so-called professional and semi-professional workers. Although they are highly-skilled and often well-paid and exert some influence on work place decisions, such workers (*e.g.,* computer programmers and technical assistants) may not fall within the traditional definition of managerial or executive employees.

As was stated in the Ontario Labour Relations Board decision in *Canadian Union of Public Employees – CLC, Ontario Hydro Employees Union* v. *The Hydro-Electric Power Commission of Ontario,*[18] "[w]ith the rapid advance of technology and the use of more sophisticated management tools, an ever increasing number of persons are becoming actively involved, in varying degrees, in all aspects of improving public relations, efficiency, productivity, ... controlling the cost of production"[19] and other aspects of the employment relationship. The above case discussed at length how a non-bargainable manager could be identified:

> The distinction between managerial persons and employees cannot be made on the basis of titles or classifications alone. The distinction can only be based on the evidence of the duties and responsibilities exercised by such persons in the particular case. Such decisions necessarily involve an empirical determination of whether the person who may perform functions which relate to or bear upon [the various aspects of the employment relationship] is in fact controlling or determining the process or is merely implementing a process which has been predetermined by some person in management ... if the person is merely implementing a decision made by another and has little latitude to use any independent discretion except in predetermined circumscribed areas, such a person cannot be said to be exercising managerial functions. If, on the other hand, a person has the independent discretion to formulate policy and methods or sets the guidelines for others to follow, such functions may properly be described as managerial functions. These latter functions are readily distinguishable from the functions performed by persons who merely gather or collate information which will be acted upon by a member of management.
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> In addition, the fact that managerial persons rely on the expertise of senior employees or employees who possess highly technical knowledge and skills, and act upon the advice of such persons, does not change the nature of the functions exercised by the employees. The

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[18] O.L.R.B. August Rep. 669, extracted in D.G. Jeyasengaram and R. Theyvendran, *Industrial Arbitration Court Awards (1960-79),* (listed 1980), pp. 94-95.

[19] *Ibid.,* p. 94.

> fact that an expert employee may recommend a course of action which a member of management may decide to follow does not of itself make the employee's recommendation a managerial function. Although a recommendation may be the basis of the decision taken, however, it is the decision to implement the recommendation which can correctly be described as the managerial function. If a person actively participates in the making of such decisions on a regular basis he may be said to exercise managerial function.[20]

The approach taken in the above case is similar to that adopted by the IAC and the Industrial Court of Malaysia as the following cases illustrate.

1. *Bare supervisory or foreman positions with responsibility for technical functions are not managerial or executive*

In *Pioneer Industries Employees' Union* v. *Far East Levingston Shipbuilding Limited*[21] the IAC was asked to determine whether chargehands rendered supervisory duties which rendered them ineligible to join a rank-and-file union which represented the other employees. The IAC took the view that it should not base its decision on whether other shipyards in Singapore allowed their chargehands to be represented by the same union but on the actual duties and responsibilities performed by the chargehands in the Far East-Levingston Shipyard. The chargehands were ultimately permitted to join the rank-and-file union as the IAC took the view that any supervisory functions they performed were only "peripheral and minor".[22] Although the chargehands' specific duties required them to be in charge of between ten and twelve other employees, they themselves performed similar duties as those over whom they had charge. The IAC did not think such technical functions would lead to any conflict of duty and interest.

In *Singapore Air Transport Workers' Union* v. *Saber Air Private Limited,*[23] the IAC allowed pilots, flight engineers and supervisors to join a rank-and-file union. In the case of the supervisors, the IAC held that their responsibilities in ensuring that maintenance teams discharged their work to a high degree and efficiently did not make them ineligible.[24]

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[20] Note 18, above, pp. 94-95.

[21] IAC Case No. 26 of 1971, [1972] I.R.S. 83.

[22] *Ibid.,* p. 84.

[23] IAC Case No. 35 of 1971, [1972] I.R.S. 1077.

[24] However, in appropriate circumstances, the IAC may make a conditional award suspending the union membership of such supervisors temporarily if by the nature of their work they are required to perform duties of a non-bargainable officer from time to time: see *Singapore Air Transport-Workers Union* v. *Philippine Airlines* IAC Case No. 89 of 1979 (unpublished, IAC's decision delivered on 3 March 1980 per Mr Tan Boon Chiang, President of the IAC).

2. *Power of suggestion and advance notification of decisions not indicative of managerial status*

The IAC in *Singapore Air Transport Workers' Union* v. *Saber Air Private Limited*[25] also held that neither the supervisors' ability to make suggestions on company policy not affecting the main policies of the employer nor their privilege of receiving advance notification of company decisions made them ineligible to join the rank-and-file union. That decision was followed in *E.M.I. (Singapore) Private Limited* v. *Singapore Industrial Labour Organisation,*[26] where salesmen were consulted on sales and product information and given advance information on new releases but were nevertheless held not to be either managerial or executive employees.

3. *Training positions not managerial or executive in nature*

In *Evatt & Co. & Ors.* v. *Singapore Manual & Mercantile Workers' Union,*[27] the IAC held that trainee audit assistants who would be eligible for appointment to higher (and non-bargainable) positions after training and acquisition of more experience were nevertheless entitled to join the rank-and-file union so long as they remained in such training positions.[28]

The IAC's award in *Evatt & Co. & Ors.* v. *Singapore Manual & Mercantile Workers' Union*[29] on this point is consistent with the earlier award of the Industrial Court of Malaysia in *Non-Metallic Mineral Products Manufacturing Employees' Union* v. *United Asbestos Cement Berhad.*[30] *The* Industrial Court there held that an employee who was designated as a "production trainee (assistant foreman)" was, in substance, primarily occupied with learning the trade to acquire the knowledge of and the skill in the basic responsibilities, objectives and supervisory functions of a foreman's job. Although it was held that a foreman's job in that company was a managerial position, it was held that the trainee position could not be deemed a managerial post. In *Singapore Industrial Labour Organisation* v. *Shinsei (Singapore) Pte. Ltd.,*[31] the IAC held that in such circumstances it would look at the duties and responsibilities of such "supervisor" or "foreman" to see if conflict of duty and interest was likely to arise, for example:

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[25] Note 23, above.
[26] IAC Case No. 198 of 1973, [1974] I.R.S. 2011.
[27] IAC Case No. 87 of 1973, [1974] I.R.S. 2005, [1974] 2 M.L.J. vii.
[28] See also note 7, above.
[29] Note 27, above.
[30] Malaysian Industrial Court Case No. 12 of 1969, [1968-1969] M.L.L.R. 229.
[31] Note 7, above.

> ... if [the employee] were to be a member of the union, would he have to take, for example, orders, say, in the case of the witness who testified, in regard to union matters from one of the persons he is supervising because that person holds office as an executive member of his branch? Would he have, in other words, as a supervisor in control of his section or department or whatever the Company wishes to call that section of the Company's operations, in relation to union matters somehow the situation turned against him and he has to take orders from the same person over whom he lords in regard to work in the company? If there is that kind of conflict of duty and interest then ... he ought not to be allowed to become a member of the union.[32]

In *Singapore Industrial Labour Organisation* v. *Shinsei (Singapore) Pte. Ltd.*[33] the IAC ultimately held that the positions of the employees in question were still bargainable although they might be sent in the future for overseas training and observation at the company's headquarters which might qualify them for senior managerial and executive positions which would then render them non-bargainable.

4. *Discretionary power and responsibility indicative of managerial function*

The Industrial Court of Malaysia in *Non-Metallic Mineral Products Manufacturing Employees' Union* v. *United Asbestos Cement Berhad*[34] also decided that persons could be in managerial positions even if they had immediate superiors, were not at the top of the company hierarchy and lacked absolute power. In the context of the entire organisational structure of the employer, the Malaysian Industrial Court decided that it was enough to establish a managerial function if they exercise a certain amount of discretionary power and were, at their own level, ultimately responsible for all operations and staff within the group under their charge. Such discretion and responsibility was demonstrated where their duty and function was "not only to ensure that the matters entrusted [to them were] efficiently conducted but also to devise means by which the overall plans or objectives of the company [and their superiors were] effectively carried out".[35]

5. *Salaries and fringe benefits not decisive but nevertheless relevant factors*

Although the IAC in *Singapore Manual & Mercantile Workers' Union*

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[32] *Ibid.,* p. 5.
[33] Note 7, above.
[34] Note 30, above.
[35] *Ibid.,* p. 234.

v. *Business System & Equipment Limited*[36] decided that the salary received by an employee was not the only criterion of whether he occupied a managerial post, the IAC nevertheless considered the salary paid to be a relevant and important factor to be taken into account in that case and in *Sime Darby Holdings Ltd.* v. *Sime Darby Holdings Local Executives Union.*[37] In the *Singapore Air Transport Workers' Union* v. *Saber Air Private Limited,*[38] the IAC expressly considered the salaries paid to supervisors in determining that they should be regarded as bargainable employees.

The relevance of employees' salaries is also seen in *E.M.I. (Singapore) Private Limited* v. *Singapore Industrial Labour Organisation,*[39] where the IAC was asked to determine whether salesmen could join a rank-and-file union. The IAC held that if the salesmen were truly regarded as personnel with executive and confidential status, their remuneration would have reflected such status. The IAC concluded that the relevant salaries were no better than those of many salesmen in other companies and did not accept that the relevant salesmen were paid salaries "commensurate with the position of executive and confidential personnel".[40]

In *Evatt & Co. & Ors.* v. *Singapore Manual & Mercantile Workers' Union,*[41] the IAC held that increases in salaries and better fringe benefits were not in themselves conclusive factors but could corroborate a contention that a position was non-bargainable.

6. *Onus of proof when employees are existing union members and job functions are unvaried*

As illustrated by *Otis Elevator Company* v. *The Singapore Manual and Mercantile Workers's Union,*[42] if the history of the establishment shows that supervisors claimed by the employer to be "executive" employees were in fact formerly members of a rank-and-file union before their promotion and they continue to perform substantially the same duties as executives as before, the onus then falls on the employer to substantiate by evidence whether conflict of duty and interest have in fact arisen in the past and is likely to arise again in the future.

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[36] Note 12, above.
[37] Note 14, above.
[38] Note 23, above.
[39] Note 26, above.
[40] *Ibid.,* p. 2013.
[41] Note 27, above.
[42] IAC Case No. 6 of 1971, [1972] I.R.S. 717.

D. *Representing the Interests of the Employer in Labour-Management Matters: Guideline Criterion (d)*

Guideline criterion (d) prohibits employees who represent the employer in labour-management matters from joining rank-and-file unions. Such employees are in such clear conflict of duty and interest positions that they are almost invariably non-bargainable and ineligible for membership in even officers' unions. Unions have invariably abandoned claims to represent such employees, as illustrated in *Singapore Bank Officers' Association* v. *Bangkok Bank Limited,*[43] where the officers' union did not seek to represent the personnel officer of the bank.

E. *Access to Confidential Information Relating to Labour Management Matters and Policies: Guideline Criterion (c)*

Guideline criterion (c) prohibits employees with access to confidential information from joining rank-and-file unions. The principle behind the criterion is that such employees would be in a position of conflict of duty and interests. In *Singapore Manual & Mercantile Workers' Union* v. *Overseas Union Enterprise Limited,*[44] the IAC explained that the very nature of the type of work done by confidential staff such as the private secretaries of managers, section chiefs or departmental heads excluded them from the ambit of union representation. It was said that their work gave such staff added knowledge and advantage over other employees and such information might be deliberately or unintentionally disclosed in the course of the inevitable union consultations which precede collective bargaining.

As the very nature of collective bargaining between unions and employers often involve issues of financial and accounting information of the company, employees privy to or in the possession of such information are generally regarded as confidential staff who are ineligible for union representation. The overriding consideration is that the information must pertain to matters relevant to negotiations between the employer and the union or employees generally. Otherwise, as was held by the IAC in *Sime Darby Holdings Ltd.* v. *Sime Darby Holdings Local Executives Union,*[45] information such as trade secrets may be better protected by appropriate restrictive covenants in the service contract of employees.

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[43] IAC Case No. 6 of 1981, [1983] I.R.S. 4753.

[44] IAC Case No. 85 of 1980 (unpublished, IAC's decision delivered on 4 March 1981 *per* Mr Tan Boon Chiang, President of the IAC).

[45] Note 14, above.

It must be noted that the prohibition does not apply to employees with access to *any* sort of information about the employer or its customers. In 1979, a dispute arose between the Singapore Manual and Mercantile Employees' Union and a service company which employed the non-professional employees of a major law firm. The employer claimed that, out of 61 non-professional employees, only nine messengers could be represented by the Union. The employer claimed that the rest of the employees (mainly clerks, typists and secretaries) were confidential staff as they handled clients' documents. The dispute was resolved by the Ministry of Labour without reference to the IAC and, eventually, 40 employees were allowed to be represented by the Union. Although they handled confidential documents, the Ministry's view was that they were not "confidential staff for the purposes of collective bargaining unless such confidentiality related to the employer's own matters, not the matters of its clients.

Examples of confidential employees ineligible for union membership are:

1. *Confidential secretary*

In *Singapore Manual and Mercantile Workers' Union* v. *The Far East Representative of the Borden Foods Company,*[46] the employee was designated as a confidential secretary and had access to confidential information, such as details of the annual budget, advertising quotas in different territories, programmes of such advertising and terms and conditions of sale to different agencies. The employer argued that the position should be beyond the scope of unionisation as it was the essence of such a position that the employer must have complete trust in the loyalty and discretion of the employee and that the employee must identify completely with the employer's interest. Following its earlier decision in *Sime Darby Holdings Ltd.* v. *Sime Darby Holdings Local Executives Union,*[47] the IAC held that there would be conflict of interest and duty and conflict of loyalties if the union was allowed to represent the employee.

2. *Accounts staff*

In *Singapore Industrial Labour Organisation* v. *Singapore Fujitec Elevator Corporation Limited,*[43] the IAC held that clerical employees engaged to work in the accounts department were ineligible for union representation. The IAC held that:

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[46] IAC Case No. 48 of 1967, [1968] **I.R.S.** 1973.
[47] Note 14, above.
[48] Note 8, above.

> In accounts departments generally there would always be a considerable amount of confidential information to be handled. Companies would be at a loss if they did not have the opportunity to employ and to specify that their appointments would be treated as confidential.[49]

However, it should be noted that in *Non-Metallic Mineral Products Manufacturing Employees' Union* v. *United Asbestos Cement Berhad,*[50] the Malaysian Industrial Court took a restrictive approach and held that certain accounts staff (the senior accounts clerk and the senior cost clerk) could be represented by the union. Whilst the Industrial Court appreciated the employer's concern to guard against disclosure of confidential information to unauthorised persons, it did not consider the compilation of the company's cash flow and the clerical payroll as having any material and direct bearing on issues involving negotiations with the union or staff relations generally.

VII. CONCLUSION

As can be seen from the series of cases brought before the IAC since 1960, the Court has adopted a common sense approach in giving effect to Section 16(3) of the Industrial Relations Act. It has been made clear beyond doubt that mere official designation of the positions as being "executive" or "managerial" is not decisive on the issue of the eligibility of a relevant employee to be represented by the rank and file union. As was pointed out in *Sime Darby Holdings Ltd.* v. *Sime Darby Holdings Local Executives Union,*[51] the overriding concern of the Court is to determine as a matter of fact on a case by case basis whether the recognition of a union for membership and representation purposes will place particular employees in a position of conflict of duty which is detrimental to the interests of the employer and their fellow employees. The only way in which a peaceful and healthy industrial relations can be achieved is to ensure that employees are not placed in a position of conflict between duty and interest. Indeed, this common sense approach has enabled the Court to extend the operation of Section 16(3) of the Industrial Relations Act to "confidential" employees.

The recent Ministry of Labour Guidelines on eligibility of employees to join rank-and-file unions are a timely reminder of the overriding factor governing such determinations. The consistent theme running through the four criteria in the Guidelines is that employees should be restricted from

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[49] *Ibid.,* p. 685.
[50] Note 30, above.
[51] Note 14, above.

representation by rank-and-file unions where there is a potential for conflict of duty and interest inherent in their duties and responsibilities.

As can be seen from the above analysis of the Guidelines in the light of decided cases, a clear line is often very difficult to draw in practice as every case must be decided on its own merits. However, the Guidelines provide some assistance in determining where the line should be drawn in normal circumstances with respect to front-line supervisors.

Certainly, 'grey areas' will continue to perplex employees and the unions in the future. For example, the status of highly-skilled and well-paid professional and semi-professional staff is becoming more important with greater sophistication in employment and has not been conclusively determined. The Ontario Labour Relations Board's decision in *Canadian Union of Public Employees - CLC, Ontario Hydro Employees Union* v. *The Hydro-Electric Power Commission of Ontario*[52] shows that such issues are not easily resolved. Ultimately, the onus will fall on the IAC to articulate the tests to be applied in these and other areas in such cases as are referred to it for determination.

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[52] Note 18, above.

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