

EMPLOYER'S RIGHTS IN DOWNSIZING

By

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WHAT IS RETRENCHMENT?

“ *Retrenchment means the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action*” – **William Jacks & Co. (M) Sdn. Bhd. v. S.Balasingam** [1997] 3 CLJ 235

RETRENCHMENT

- the discharge of surplus labour of staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action;
- question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case;
- employer is entitled to organize his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court;
- Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.

- Whilst implementing a reorganisation scheme for genuine business purpose, employee(s) becomes excess of requirement, the employer is entitled to discharge such excess by retrenching surplus staff.
- The prerogative of the employer is to restructure his business in a manner deem fit wherein he may optimise factors of production in the interest of the profitability of the business.

MANAGERIAL PREROGATIVE

- The Court recognizes the right of the employer to organize its business in the manner it considers best.
- The question of whether the retrenchment exercise is genuine would be a question of fact and degree depending on the particular facts and circumstances of the case.
- The Courts are mindful of the balance between the employer's prerogative and the employee's security of tenure.

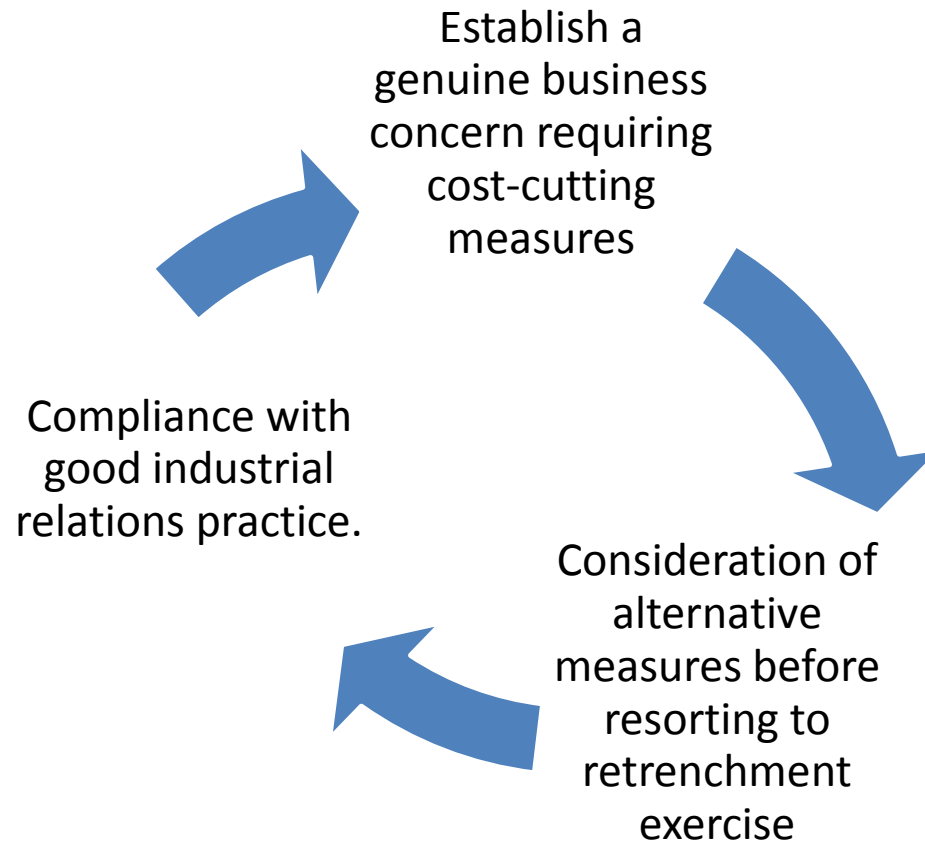
PARAMETRES OF MANAGEMENT PREROGATIVE TO REORGANISE

*“For it is the right and privilege of every employer to reorganise its business in any manner he thinks fit for the purpose of economy or even convenience; and if by implementing a reorganising scheme for genuine reasons or better management and economy the service of some employees become excess of requirements, the employer is entitled to discharge such excess. But this right of the employer is limited by the rule that he must act bona fide and not capriciously or with motives of victimisation or unfair labour practice. Nor does this right for instance entitle an employer under the cover of reorganisation, to rid himself of employees who have offended him in some way or promote the interests of some favoured employees to the detriment of others”- **East Asiatic Company (M) Sdn. Bhd. v. Valen Noel Yap** [1987] ILR 363.*

GENUINE REASONS FOR RETRENCHMENT

- improve efficiency of business;
- forecast of sales drop;
- promoting better economic viability;
- convenience;
- cost-effective;
- reasonable expectation of drop in business;

STEP-TO-STEP : CORPORATE EXERCISE



CODE OF CONDUCT FOR INDUSTRIAL HARMONY 1975

- Given statutory recognition by virtue of **Section 30(5A)** of the **Industrial Relations Act 1967**;
- Adherence is not mandatory and as such, non-compliance of the Code is not fatal;
- Employer should warn and/or consult the employee concerned beforehand on the impending retrenchment;
- Explore alternative measures (amongst others, limitation of recruitment, restriction of overtime work and transfer) before resorting to retrenchment;
- Introduce a voluntary retrenchment scheme;
- Adherence to the Code is recommended in order to establish the *bona fide* intentions of the Company in carrying out the retrenchment exercise.

POSITIVE STEPS TO AVERT OR MINIMISE REDUCTION OF WORKFORCE

It is recommended that employers consider alternative measures before resorting to retrenching employees. Possible options include:

- Limitation on recruitment;
- Restriction of overtime work;
- Restriction of work on weekly day of rest;
- Reduction in number of shifts or days worked a week;
- Reduction in the number of hours of work;
- Re-training and/or transfer to other department/work.

CONSIDERATIONS PRIOR TO RETRENCHMENT

Two issues to be addressed in retrenchments as a result of reorganisation:-

- i. Whether there exist a genuine redundancy;
- ii. Whether the employer has managed the retrenchment exercise in compliance or in conformity with accepted standards of good industrial relations practice.

RETRENCHMENT BECOMES UNAVOIDABLE

Despite resorting to alternative measures, retrenchment may be unavoidable and as such, the following measures should be resorted to:

- i. provide warning as early as practicable to employee(s) concerned;
- ii. Introduce voluntary separation schemes;
- iii. Retiring workers who are beyond normal retiring age;
- iv. Assist in seeking for alternative employment;
- v. Ensure announcement made by employer after informing employees, their representatives or trade union.

LAST IN FIRST OUT “LIFO”

- Selection criteria must be **reasonable**;
- Well established in industrial relations jurisprudence that recognition is given to the principle of ‘Last In First Out’(LIFO) wherein the most junior employee is the first to be retrenched;
- Courts have acknowledged that LIFO principle can be departed from if the employer has reasons that are **sound and valid**;
- Employer to consider capability, compatibility and suitability for the particular job position.
- Employer must adhere to **fair procedure** that is not tainted with bad faith;

RETRENCHMENT BENEFITS

*“The provision of retrenchment benefits serves as a cushion against hardships faced by an employee who has to contend with the loss of his employment and the consequential loss of his immediate means to earn an income. In the context of good industrial relations practice, it serves to minimise resistance and opposition to genuine reorganisation measures undertaken by the management. It acknowledges a workman’s security of tenure and recognises the fact that through no fault of his, such security of tenure has to give way to his employer’s overriding interest of economy and efficiency”- **Pengkalen Holdings Bhd. v. James Lim Hee Meng** [2000] 2 ILR 252.*

LEGAL OBLIGATIONS OF THE EMPLOYER

- Obligations pursuant to Statutory Laws;
- Obligations pursuant to Contracts of Employment or Service Agreements;
- Obligations pursuant to applicable Collective Agreements.

LEGAL OBLIGATIONS-STATUTORY LAWS

- The employer is under an obligation to lodge report of the retrenchment exercise at least one month before taking the measures (Form PK1/98).
- Forms PK2/98, PK3/98 and PK4/98 concern voluntary separation, lay-off and pay-cuts respectively must be submitted in instances where these measures are resorted to by the employer.

SECTION 20 INDUSTRIAL RELATIONS ACT 1967

- Burden on employer to demonstrate the genuine need for the restructuring;
- Employer has to show that the employee(s) concerned are a surplus to the Company's human resource requirements;
- Burden must be discharged to the satisfaction of the Court;
- Cogent proof must be adduced to support contention of genuine business decision to reorganise and subsequently retrench (e.g. profit and loss accounts, balance sheet).

DISMISSAL WITHOUT JUST CAUSE AND EXCUSE

The employer should take note of the following instances wherein the Courts found in favour of the employee:

- i. Absence of genuine basis to retrench employee(s);
- ii. Arbitrary and capricious decision taken by management;
- iii. Purported reorganisation was a sham;
- iv. Lack of evidence;
- v. Failure to adhere to fair labour practice.

CONSEQUENCES OF WRONGFUL RETRENCHMENT

In the event the Industrial Court makes a ruling that the retrenchment/termination was done without just cause or excuse, the said Court can decide on awarding the employee backwages (maximum of 24 months for confirmed employee and 12 months for probationers) or reinstate the employee to his/her original position in the Company.

SAFETY NET

Employers are at all times advised to:

- i. Adhere to fair labour practice;
- ii. All forms of documentation are to be kept safely (correspondence, notices, minutes of meetings, organisational chart, etc);
- iii. Up to date with labour and employment rules, practices and guidelines.

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