

MECA IR CONVENTION 2009 :
CURRENT ISSUES IN INDUSTRIAL RELATIONS
“Downsizing the Company”

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➤ **Downsizing** or carrying out layoffs is itself a problem, within a solution. When used sparingly and executed with careful planning downsizing, it can be an organizational lifesaver. However, when used repeatedly without any perceptible basis, downsizing can destroy an organization's effectiveness. **How you treat people really matters - to the people who leave and the people who remain.**

➤ Downsizing, which essentially involves the reduction of employees or 'head-count', can be effected by several ways:-

- (a) **Retrenchment** of employees ;
- (b) **Voluntary Separation** of employees.

➤ It is established practise that before a retrenchment is carried out, the Employer must have satisfied itself that it has no other viable alternative , for instance:-

- laying off foreign workers (s.60N E.A.1955)
- flexi-time, or fewer working days

- re-deploying employees to other departments
 - pay-cuts, shorten operation time
 - Freeze new recruitment
 - Reduce overtime
 - Reduce working hours
 - Reduce working days
 - Freeze on wage increase
 - Defray bonus
 - Implement pay cut (across the board)
 - Implement temporary lay-off (for determined period)
- Guidelines for Retrenchment of Employees:
- **Code of Conduct for Industrial Harmony**
 - **National Tripartite Committee on Managing Retrenchment Guidelines**

In **Ganda Palm Services Sdn. Bhd. Teluk Intan v. Ng Wah Chiew & 2 Ors** [1986] ILR May 305 , the Industrial Court emphasized:

"It has been well established in Industrial Law that in effecting retrenchment, an employer should comply with the Industrial principle 'last in first out', unless there are sound and valid reasons for departure."

The Court of Appeal in **Kumpulan Perangsang Selangor Bhd. v. Zaid Mohd Nor** [1997] 2 CLJ 11 held that:

"...If the preferential treatment given to juniors ignores the well recognized principle of Industrial Law of "last come, first go" without any acceptable or sound reasoning, the Tribunal will be justified to hold that the action of the management was not bona fide."

In **Zaiton Baharuddin v. Cegelac** [2004] 2 ILR 600, the IC held:

*The non-binding nature of the Code should not detract from its noble objectives of inculcating fair and proper industrial practices. The Code is consonant with the current ethos of **corporate social responsibility** which entail companies showing compassion, concern and care towards their employees. The company should have advised its employees of the likelihood of an impending retrenchment.*

GENERAL PRINCIPLES ON RETRENCHMENT:

In **William Jacks & Co. (M) Sdn. Bhd. v. S Balasingam** [1997] 3 CLJ 235, the Court of Appeal spelt out the definition of retrenchment :

"*Retrenchment*" has been defined as 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... whether the retrenchment exercise in a particular case is *bona fide* or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case. It is well settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised, bona fide, the decision is immune from examination even by the Industrial Court. However the Industrial Court is empowered and indeed duty bound to investigate the facts and circumstances of the case to determine whether the exercise of power is in fact *bona fide*.

In short, save where a retrenchment is a front for ulterior motives, or victimisation, it will be upheld so long as it was done in good faith, even if the company's financial position was the cause of mis-management.

In **Malaysia Shipyard & Engineering Sdn. Bhd., Johor Bharu v. Mukhtiar Singh & 16 Ors Johor Bharu** (OM No. R1-25-31-98), KC Vohrah J held :

"It is not the law of retrenchment that bad management resulting in losses disentitles the employer from retrenching its employees; should that be the case, then every employer facing losses in a company arising from bad management would never be able to retrench its employees."

In **Siemens Malaysia Sdn. Bhd. v. Cheong Kok Leng [2004] 1 ILR 195,** (referring to *Moon v. Homeworthy Furniture (Northern) Ltd.* [1977] ICR 117) it was held :-

"Once a redundancy has been established then it is not open to the tribunal to consider the actions of the employer which led to the redundancy situation. Tribunals are not there to make findings about the way in which the employer has conducted the business."

CURRENT ACCEPTANCE OF THE KAOLIN PRINCIPLE:

Kaolin (M) Sdn. Bhd. v. Samba Sirvana Thanimalai [1998] 2 ILR 637.

In ***Stephen Bong v. FCB (M) Sdn. Bhd & Anor*** [1999] 3 MLJ 411, the High Court held that:

“It is settled law now that redundancy does not mean the job or work no longer exist. Redundancy situation may arise where the business requires fewer employees of whatever kind.”

In ***Chapman & Ors v Goonvean & Rostawvack China Clay Co Ltd*** [1973] 2 All ER 1063 (referred to in *Bayer v. Ng Hong Pau* [1999] 4 CLJ 155) it was held:

“an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.”

CONCLUSION:

Downsizing is always difficult. Its a bitter pill for the retrenched employee to swallow, and also leave its vestige on the remaining workers in the company.

According to a website (www.telonu.com) that records statistics on how ay-offs were executed :-

88% rated their layoff as poor or very poor.

94% rated outplacement support as poor/very poor.

81% of those still employed perceived job security as poor or very poor.

74% of those still employed rated morale as poor/very poor.

For the **12%** who rated their layoff experience as fair or positive, this was due to :-

- Fair or better severance payment and heath insurance support;
- Outplacement support was good;
- Sufficient time , notice was given, to enable them to find other opportunities.

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