

MINIMIZING PSYCHOLOGICAL IMPACT ON WORKERS IN GENUINE REDUNDANCY: FORMULATING GUIDELINES FOR EMPLOYERS

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Abstract

The competing interests of a worker and an employer require that a worker's security of tenure must be balanced against the just expectation of the employer for latitude, under genuine redundancy in the organisation, to retrench the surplus labour or workers. Such redundancy may arise due, among others, to a reduction of business activities, perceived advantages of greater mechanisation and technological change, deployment of capital resources in different ways, reorganisation of business operations with a view to enhancing profitability, and reducing losses either generally or in selected areas. For a retrenchment to be justified, there must be convincing grounds to establish redundancy. Whether a genuine redundancy is established and a retrenchment is justified in any particular case would depend on the factual matrix and circumstances of each case. It is not doubted that a retrenchment of workers would have psychological impact on the affected workers, more so if the worker has been in service for a long time in the organisation. He will likely face difficulty in relocating and/or securing other employment due to various factors. Hence, it is appropriate that certain viable and practicable guidelines are developed for the employer to adhere to in order to minimize the impact of retrenchment exercise on the workers.

It is an established rule that an employer should ensure that retrenchment, if necessary, is carried out in a fair manner. It includes manner of selecting the worker or workers declared to be redundant, giving a fair opportunity to them to make representations on the possibility of re-deployment, etc. The courts would not normally interfere with a *bona fide* exercise of rights of an employer in a retrenchment exercise, which rights are inherent in it. However, any form of victimisation of the employee, whether by arbitrary, perverse, baseless action or otherwise by the employer which is considered to be unnecessarily harsh or was not just or fair, or other *mala fide* action on the part of the employer, may warrant the courts' interference. In light of the above, this paper discusses retrenchment and its psychological impact on workers with particular focus on formulating some guidelines for employers with a view of minimising the impact.

Keywords: Redundancy, Psychological Impact, Guidelines for Employers

1. INTRODUCTION

While the law recognises security of tenure in employment, the employer's overriding interest in operating its business efficiency is equally recognised. It is trite that the employer is entitled to organise his business in the manner he considers best. The employer is empowered to retrench workers based on the operational requirements of the organisation. The services of an employee may become surplus if there is a reduction, diminution or cessation of the type of work the employee was performing. The employer may reduce its workforce due to automation, that can replace what workers previously did by direct labour, or the employer may choose to restructure his business by combining two or more departments or units, etc. Again, when the business is less profitable, the surplus labour may be discharged in order to save costs and to sustain. In the aforesaid circumstances, unless the employer can absorb the workers into performing other jobs in the organisation, the affected workers would have to be retrenched.

Undoubtedly, retrenchment of workers on grounds of redundancy is a difficult area of labour law as it raises considerations on economic efficiency, industrial autonomy and social justice. It involves an employee who has not done any act justifying his dismissal and who is still considered a competent and loyal worker. If the employer does not resort to discharging the redundant worker but carries on the business and loses money, this may lead to insolvency and winding up of the organisation. In such a case, both the employer and the worker will lose their livelihood. The other option is sacrificing some workers (i.e. retrenching them), thereby saving the viability of the business and the employment of the remaining workers. This is where the law cannot give any perfect solution that can satisfy both the employer and the worker, for in such circumstances, both the employer and the employee will have to face the bitter reality.

In order to ensure retrenchment is genuine, it is important that the employer must explore all possible alternatives to retrenchment by taking the necessary interim measures such as cutting down working hours, overtime and the number of shifts; extending time-off without pay; freezing bonuses; freezing increase in salaries; reducing wages (by agreement); ceasing all new recruitment except for critical areas; decreasing the number of contractors or casual labourers; rationalising costs and expenditure; temporary lay-off; early retirement offers; gradual reduction of workforce by way of natural turnover; conducting retraining programmes for skill development so as to enable employees to move into different positions, etc. The decision to retrench should only be made when the job is redundant and that the employer had exhausted all available options to avert retrenchment. In light of the above, this article will deal with minimizing the psychological impact of retrenchment on workers by proposing guidelines for the employer before resorting to retrenchment exercise.

2. REDUNDANCY A DISTRESSING EXPERIENCE

Losing one's job due to redundancy can be a distressing experience that has financial repercussion and psychological effects on the affected worker. The aggrieved worker would be deprived of his major source of income and also tend to lose accumulated benefits such as seniority, retirement benefits, etc. The effect of job-loss would become even more devastating during economic downturn or economic recession during which time unemployment would be common. A retrenched worker would face difficulty in finding another job with similar status. Often, the labour market would be flooded with other job seekers possessing very similar job skills and work experience. Employees in managerial positions may find it difficult to secure similar position elsewhere or even obtain an immediate alternative job unlike to manual workers. The effect would be more visible when the worker had been long time in service and further and when the worker had only specific skills, which may be of little use to potential employers in the market. In the current modern era with advanced technology moving from one job to another may not be an easy one and it may require some specialist skill in the worker

Coping with all of these problems in turn can create an enormous amount of physical and mental stress, which may contribute to social and psychological disorders. The mental stress encountered by the worker could lead to dissatisfaction in life, lack of self-esteem, lack of personal control and general psychological depression, which will increase with continued unemployment. Workers who are unable to use their skills in the new employment or are not of intrinsic interest to the employers or are not given rewards that commensurate with their efforts and skills, are likely to go through psychological disturbance in the new employment.

Furthermore, resulting from the loss of employment, an affected worker would have to rationalise expenditure such as reduction in immediate consumption expenditures, cancelling insurance policies, using up savings and selling assets, in order to afford the necessities of life during the interim period of unemployment. Even if an alternative employment is secured, the worker and their families may have to accept relatively lower standards of living if the only employment that can be secured involves lower wages

with reduced fringe benefits. It is therefore accurate to conclude that job-loss justified by economic needs can create an enormous amount of physical and mental stress, which may contribute to social and psychological disorders. Hence, every effort must be taken by all relevant parties to eliminate job-loss due to retrenchment and where retrenchment is inevitable due to genuine commercial reasons the decision to terminate the affected worker must be done in good faith and carried out with fairness.

3. REDUNDANCY AND RETRENCHMENT: THE CAUSES

Retrenchment is the termination by an employer of the services of an employee on grounds that the employee is redundant or is a surplus to the employer's needs (Maimunah Aminuddin (2006)). Retrenchment usually occurs when a country is facing economic crisis and companies need to reduce the manpower in order to sustain its operation during the financial crisis. Drop in product market, high production cost, lack of demand for product or service, shift to automated systems, outsourcing of production and sale of company are among the factors that may cause retrenchment of workers (Maimunah Aminuddin (2011)). In *William Jacks & Co (M) Sdn Bhd v Balasingam* (1997), Gopal Sri Ram JCA defined retrenchment as a discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action.

The impact of retrenchment will be felt by the workers whose services would have to be eliminated and they had to suffer the pain of being unemployed. This will be particularly painful when the employee is the sole breadwinner of his family. Thus, when the industry is facing slowdown in business, employer might resort to terminating the employment of the employees to cut the cost and save the current resources. In 1996-1997 financial crisis, it was recorded that some 83,865 workers were retrenched. That was the official figure registered with the Ministry of Human Resources. However, in actual fact the numbers of workers retrenched were much higher and reached about 150,000 workers (Ashgar Ali & Farheen Baig (2012)). Again, when the Severe Acute Respiratory Syndrome (SARS) epidemic affected the world in 2003, the tourism was badly affected. People stopped travelling, forcing the hotels and airlines to retrench staff because of no job to do at that time.

At this juncture, it is worthwhile noting that the term retrenchment and redundancy, although used interchangeably, has different connotation. Redundancy means a surplus of labour, and due this superfluity, workers need to be removed or retrenched (Ashgar Ali & Farheen Baig (2012)). Redundancy occurs when the employer has ceased or intends to cease in continuing the business or the work has ceased or diminished. A redundancy would eventually lead to retrenchment. Thus, it can be said that before a retrenchment exercise can be done, there should be redundancy. Section 12(3) of the Employment Act 1955 provides the reasons for redundancy as follows:

- (a) The employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed;
- (b) The employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
- (c) The requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
- (d) The requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;
- (e) The employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or
- (f) A change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.

The general principles on retrenchment were well laid down in the case of *Cycle & Carriage Bintang Bhd v Cheah Hian Lim* (1992). In this case, the Industrial Court held, *inter alia*, that:

- (a) It is for the management to decide the strength of the workforce which it considers necessary for efficiency in its undertaking. When management decides that the workmen are surplus and that there is, therefore, a need for retrenchment, an arbitration tribunal will not intervene unless it is shown that the decision was capricious or without reason, *mala fide* or actuated by victimization.
- (b) It is the right of every employer to reorganize his business in any manner for the purpose of

economy or convenience provided he acts *bona fide*.

- (c) An employer has a right to determine the volume of his staff consistent with his business and if by the implementation of the reorganization scheme adopted for reasons of economy and better management, the services of some employees become surplus to requirements, the employer is entitled to discharge such excess.
- (d) Retrenchment of an employee can be justified if carried out for profitability, economy or convenience of the employer's business. Services of an employee may well become surplus if there is reduction, diminution or cessation of the type of work the employee is performing.
- (e) In the absence of any express agreement on the point, an employer is not obliged to find suitable employment for redundant workers.
- (f) In effecting retrenchment, the employer should comply with the industrial principle of "Last In First Out" (LIFO) unless there are sound and valid reasons for departure from this. Thus, an employer is not entirely denied the freedom to depart from the principle.

The most important matter that was questioned by the Industrial Court was whether the retrenchment exercise was done in good faith. If the corporate decision was done in good faith, then the court would not interfere with the employer's prerogative. Nevertheless, if a representation is made by the retrenched employee pursuant to section 20(1) of Industrial Relations Act 1967 (IRA) for unfair dismissal, the Court will investigate on the true intention of the employer when retrenching the worker.

It is noteworthy that an employer's prerogative is limited by the rule of *bona fide*, not capriciously or with motives of victimization or unfair labour practice. In *Radio General Trading Sdn Bhd v Pui Cheng Teck & Ors* (1990), the Industrial Court observed that there are two questions that will be asked by the court in a retrenchment case, which are as follows:

- (a) did a redundancy situation arise leading to a retrenchment; and
- (b) if there was a redundancy situation, was the consequent retrenchment made in compliance or in conformity with the accepted standards of procedure.

Interference of the court when the above questions are answered in the negative is important so as to ensure that an employer does not abuse or misuse its managerial prerogative.

When a redundancy situation has caused a worker to be retrenched, the affected worker must be paid retrenchment benefits based on the length of his service with the employer. The aim of this benefit is to help the employee cope with the immediate difficulties of job-loss and to reward him for his loyalty and service to the company. Beside the above, it also provides the employee with the necessary means to sustain himself and his dependents until he finds another suitable employment. The Employment Insurance System Act 2017 was introduced with a view to helping the retrenched employees with temporary financial assistance besides assisting them in finding a job.

3. STEPS FOR EMPLOYER TO ENSURE GENUINE RETRENCHMENT

It is noteworthy that in the event of redundancy in an organisation that necessitates retrenchment of workers, the employer would be expected to take certain steps that go beyond mere payment of retrenchment benefits and compliance with basic legal requirements to demonstrate corporate social responsibility. The Code of Conduct for Industrial Harmony had listed down several positive steps that can be taken by an employer to avert or minimize reduction of workforce. They include freezing new hiring, reducing working hours and overtime, eliminating temporary labour, transfer of workers and considering alternative employment in the organisation. Some of these measures may involve the necessity of employees making some sacrifice or compromise for the good of the company, thereby minimizing retrenchment.

To start with, it is important for the employer to give the affected employees adequate notice before retrenchment to prepare them for the impending retrenchment and to allow them to find suitable alternative employment. The notice must contain relevant information such as reasons for retrenchment, number of employees likely to be affected and their various job categories, selection criteria. It must also state the assistance the employer will offer, when the retrenchment is likely to take place, such as time-off to attend interviews, early release should a new job be found, issuing letters of reference and psychological counselling. Prior notice is a good industrial practice so as to minimise the traumatic impact of the retrenchment on the workers and their families.

It is pertinent to note that there is no specific law in Malaysia that requires the employer to provide a written

explanation to its workers of the reasons for the retrenchment. The Employment Act 1955 and the Employment Termination and Lay-Off Benefits Regulations 1980 are silent on the requirement to provide a written explanation to the affected workers of the reasons for the retrenchment. However, numerous awards of the Industrial Court provide, *inter alia*, that the employer must justify his action and offer reasons showing among others that the retrenchment was carried out with just cause and excuse.

It is noteworthy that the courts have recognised a person's right to livelihood. The term 'right to life' in article 5(1) of the Federal Constitution has been given a broad interpretation to include the 'right to quality of life' (see the decision of the Federal Court in *Bato Bagi & 6 Yang Lain v Kerajaan Negeri Sarawak* (2011) MLJU 699; and the decision of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* (1996) 1 MLJ 261). This article has to be translated into the practical assurance that no employer can dismiss or even contractually terminate the services of his employee save with just cause and excuse. Further, the IRA was enacted to elevate the status of the employee by regulating working conditions, providing various benefits to the workers apart from prohibiting arbitrary dismissal from employment. The Act provides that a workman cannot be dismissed save with just cause and excuse. It thus requires the substantive justification and procedural fairness for a valid dismissal.

This is also in line with the International Labour Conference Convention that requires justification for termination from employment. It provides that an employee cannot be terminated unless there is a valid reason for such termination, and this includes the procedural aspects of termination. It further provides that when an employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers concerned or their representatives as early as possible.

The emphasis here is that the employer must ensure that any retrenchment exercise in an organisation is carried out in a fair and justifiable manner and was not capricious or carried out with motives of victimisation or unfair labour practice. Fairness in the retrenchment exercise would include consultation and prior warning of the impending retrenchment. The above is basically to encounter the immediate hardship consequent upon retrenchment. The giving of an early warning and an explanation is basically to prepare the workers for such immediate hardship.

Further, consultation with the employees likely to be affected by the proposed retrenchment must be carried out. The discussion could be focused on finding ways, for example, to avoid retrenchment, ways to reduce the number of people retrenched, ways to limit the harsh effects of retrenchment, and the method and criteria for selecting workers to be retrenched, etc. The consultation would reflect the genuineness of the retrenchment and establish that the employer cares for his workers and that he is doing his best to cope with a difficult time.

Apart from the above, the employer ought to explore possible suitable alternative employment in the organisation for the affected workers, a generous gesture of the employer in an impending retrenchment exercise. The employer should take constructive action to place employees in alternative positions either within the organisation or at its subsidiaries. Workers should not be retrenched until all avenues to place the affected workers elsewhere in the organisation have been exhausted.

Although there is no legal duty on the employer to offer alternative employment to the affected employees, nevertheless, effort must be made to avert retrenchment by exploring alternative employment within the organisation. The courts have held, *inter alia*, that terminating the employee without looking into the possibilities of transfer, re-designation or alternative employment may constitute as dismissal without just cause and excuse (see the decision of the Federal Court (Kuching) in *John Lee & Anor v Henry Wong Jan Fook* (1981) 1 MLJ 108; the decision of the Court of Appeal in *Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd (Langkawi Beach Resort & Langkawi Airport Sdn Bhd (Hotel Helang)) & Anor* (2018) 1 MLJ 248; and the decision of the High Court (Kuala Lumpur) in *Wan Kamaazmi bin Wan Hasan v Ayamas Food Corp & Anor* (2011) MLJU 728).

A significant part of any retrenchment plan is a strategy to help the affected workers find new employment. The employer could assist the retrenched workers to secure alternative employment by way of submission of names to labour exchange organisations or programmes and to local companies known to be recruiting new employees. The company could also make arrangements with outsourcing companies to employ these workers.

Another commonly used alternative to retrenchment is requesting the selected workers to take an early retirement under a scheme called "Voluntary Separation Scheme (VSS) or Mutual Separation Scheme (MSS)" by offering an attractive retirement package, which is normally more attractive than the statutory minimum for retrenchment. By the very nature of the scheme, it is done on a voluntary basis without the

employee being forced into retirement. Voluntary retrenchment offers should preferably be considered initially during consultation before being offered to the employees. The VSS should then be offered to an employee who has been advised that his position has been declared redundant, after all possible redeployment, retraining, relocation or transfer options available in the organisation have been explored.

4. CONCLUSION

Workers have a reasonable expectation of continuity in the employment until they attain the age of retirement. Undoubtedly, the very recognition of retrenchment means a hole in job security when job-loss is justified by economic need. This is an inevitably painful sequel of a restructuring or reorganisation process. Be that as it may, it is the prerogative of the employer to effectively manage its business, and in the event the retrenchment is inevitable, the employer must ensure that any retrenchment exercise in the organisation is carried out in a fair and justifiable manner. It is incumbent upon the employer to prove that there was a situation of redundancy in the organisation leading to the retrenchment exercise and that the consequential retrenchment was made in compliance with the accepted standards of procedure and this includes consultation with the affected workers and furnishing them with the reasons for the retrenchment.

Beside LIFO, the Code also lays down the guidelines for selection of workers who are going to be retrenched. The Code suggests, among others, selection of workers according to ability, experience, skill, age, the length of service, family situation and several other factors. It is a common practice that an interview may be held particularly if the position is a very important one to the employer. Thus, from the interview, the employer would have the opportunity to know the level of competency of a worker to fit the position. Etc. In some cases, the employer might find that the worker is competent to fill in the position, however, it may be revealed during the interview, he is no longer interested to continue working subject the current policy or under a new management of the employer. Thus, interview session is very important in the selection process.

When the representation for termination on grounds of retrenchment is referred to the Industrial Court, the Court has to determine, *inter alia*, whether the consequent retrenchment was in compliance with accepted norms and practices. This necessarily means that as long as the retrenchment is carried out in accordance with the accepted practice, the retrenchment exercise will not be interfered with by the courts. Where there was no warning or prior consultation before retrenchment exercise, the court may rule that the retrenchment was without just cause or excuse.

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