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Key Considerations Before A Retrenchment Exercise

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The COVID-19 pandemic has brought devastating effects to businesses and corporations around the globe, including in Malaysia. Many companies have resorted to, or are considering, retrenchment as a cost-cutting measure to stay afloat.

This alert highlights 6 key considerations for employers before undertaking a retrenchment exercise to avoid claims of unfair or constructive dismissal.

Retrenchment – A Prerogative of Employers

At the outset, our courts have repeatedly held that employers are entitled to organise their business in ways they believe can achieve maximum efficiency, effectiveness, and profitability; this includes retrenching any employee that has become redundant. The courts have made it clear that the pre-condition to retrenchment is that there is a genuine redundancy of employees, and as long as that is the case, the Court will not interfere with the retrenchment unless it was capricious, mala fide, or actuated by victimisation or unfair labour practice.

Additionally, employees and employers alike should be aware that a company is under no obligation to offer alternative employment, either within its group of companies or otherwise, to a retrenched employee. Failure to do so cannot render a retrenchment unjust as held by the Court of Appeal in *Nordson (Malaysia) Sdn Bhd v Lee Chin Tao & Anor* [2012] 1 LNS 423. However, this does not mean employers have an unfettered discretion in retrenching employees. Employers must abide by laws and regulations, including those summarised below:

1) PK form must be filed

Under the Employment Retrenchment Notification 2004, employers are required to notify the labour office at least 1 month before the retrenchment by submitting an employment

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notification retrenchment form (Form PK1/98). Failure to do so is an offence punishable under Section 99A of the Employment Act 1955.

2) Foreign workers first

Employers shall not terminate the service of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity like that of the local employee (see Section 60N of the Employment Act 1955 (EA 1955)). Similarly, failure to comply is an offence and is punishable under Section 99A of the EA 1955.

3) Termination notice must be given

For employees coming within the purview of the EA 1955 such as:

(a) Employees whose monthly salary does not exceed RM2,000; or

(b) Employees who, irrespective of the amount of wages he/she earns in a month,
   (i) engaged in manual labour including such labour as an artisan or apprentice;
   (ii) engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;
   (iii) supervises or oversees other employees engaged in manual labour;
   (iv) engaged in any capacity in any vessel registered in Malaysia; and
   (v) engaged as a domestic servant,

employers are required to issue a written notice to the employee prior to the retrenchment as provided under Section 12 of the EA 1955. Similarly, failure to comply is an offence and is punishable under Section 99A of the EA 1955

Further Section 12 provides that, in the absence of any termination notice provision in the terms of the contract of service, the termination notice that must be given shall not be less than:

(a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;

(b) six weeks' notice if he has been so employed for two years or more but less than five years on such date; and

(c) eight weeks' notice if he has been so employed for five years or more on such date.

In cases where an employee is not covered under the EA 1955 (i.e. an employee with a salary above RM 2,000), the length of the termination notice that has to be given will depend on the provision of the employee's employment contract. An employer who fails to do so during a retrenchment will be in breach of the employment contract.

4) "Last-in First-out" should be followed

Employers must abide by the "Last-in First-out" principle. In *Saw Kong Beng v. Mahkamah Perusahaan Malaysia & Anor* [2016] 8 CLJ 891, it was held:

> *The "Last In, First Out" (LIFO) rule is contained in the Code of Conduct for Industrial Harmony. Although contained in a code, the adherence to the principles of LIFO is normally observed unless there are valid reasons to countenance its departure. See the case of Syarikat Eastern Smelting Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Lagon Se-Malaya (Award No. 16 of 1968), it was held that:*
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> *It is well-established and accepted in industrial law that in effecting retrenchment, an employer should comply with the industrial principle of last come first go unless there are some valid reasons for departure.*

Failure to abide by this principle without valid reasons, may lead to a case of victimisation and unfair dismissal.

5) Code of Conduct for Industrial Harmony

Other than the principle of "Last in First Out", employers should, to their best ability, abide by the Code of Conduct for Industrial Harmony (Code of Conduct) during a retrenchment exercise. The Code of Conduct states that, amongst others, employers should:

(a) give as early a warning, as practicable, to the employees concerned;

(b) introduce schemes for voluntary retrenchment and retirement;

(c) retire workers who are beyond their normal retiring age;

(d) assist, in co-operation with the Ministry of Human Resources, the employees to find work outside the undertaking;

(e) spread termination of employment over a longer period; and

(f) ensure that no such announcement is made before the employees and their representatives or trade union has been informed.

Although the Code of Conduct is not legally binding, the Industrial Court often takes into consideration the guidelines in the Code of Conduct when adjudicating a matter. For example, the Court will most likely find a retrenchment to be genuine and done in good faith if the suggestions in the Code of Conduct were followed.

6) Termination benefits must be paid

Although the termination is due to redundancy, employers still have to pay the terminated employees their termination benefits. For employees coming within the EA 1955, the termination benefits that have to be paid will be based on the Employment (Termination and Lay-Off Benefits) Regulations 1980, which provides as follows:

(a) ten days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than two years; or

(b) fifteen days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for two years or more but less than five years; or

(c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more, and pro-rata as respect an incomplete year, calculated to the nearest month.

For employees not covered under the EA 1955, their termination benefits will depend on their employment contract. If there is no provision for the same, then there is no obligation on the employer to pay any termination benefits.

Conclusion

Whilst employers have a prerogative to retrench employees that have become redundant, the decision to do so should not be made without careful consideration and without first obtaining professional and complete legal advice. A properly guided retrenchment exercise will not only be more just and fair for all parties, but also reduce the risk of complaints at the Industrial Court. Employers definitely do not want a situation where the cost of defending claims outweigh the cost saved from the retrenchment. Employers should seek legal advice on other cost-cutting measures such as salary cuts and restructuring of the workforce. After all, retrenchment should always be the last resort.

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How can we help you?

We are operating as usual and clients may pose any queries on employment and industrial relations matters including those in relation to this alert via e-mail to:

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