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Restructuring of Workforce – Rules & Principles

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The impact of the Coronavirus disease 2019 (COVID-19) on businesses is devastating. To survive, many employers have resorted to retrenchment as a cost-cutting measure. However, there are other measures that an employer can implement during this difficult time to optimize its workforce, such as transferring and relocating its employees, before resorting to retrenchment. This article discusses:

- the employer's prerogative in respect of transfer and relocation of his employees; and
- key considerations for a successful and litigation-free exercise of the prerogative.

Right to Re-organise and Downsize

First and foremost, an employer is entitled to organize his business in the way he deems fit, which includes restructuring or downsizing his company or parts of his company. The Court of Appeal in *William Jacks & Co. (M) Sdn. Bhd. v S Balasingam* [1997] made it clear as follows:

"It is well-settled that the employer is entitled to organise 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."

Thus, an employer has the right to organise its business in order to achieve maximum efficiency, effectiveness, and profitability and the Court will not interfere with the exercise of this managerial power unless it is discovered that the exercise of the power was capricious, mala fide or actuated by victimisation or unfair labour practice.

Right to Transfer Employees

However, does an employer have the power to transfer his employees?

Generally, the answer is yes; the Court of Appeal in *Ladang Holyrood v Ayasamy Manikam & Ors* [2004] cited with approval the case of *Soon Seng Cement Products Sdn. Bhd & Anor. v Non-Metallic Mineral Products Manufacturing Employees's Union* [1996] which held:

“It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye’s Misconduct in Employment (at pages 254 and 255), the following well recognised restrictions:

- a. *there is nothing to the contrary in the terms of employment;*
- b. *the management has acted bona fide and in the interests of its business;*
- c. *the management is not actuated by any indirect motive or any kind of mala fide;*
- d. *the transfer is not made for the purpose of harassing and victimizing the workmen; and*
- e. *the transfer does not involve a change in the conditions of service.”*

Therefore, the law is clear that an employer, regardless of whether there is an express provision in the employment contract with his employees, has the right to transfer his employees to another department, another position, another location and more. However, that power is not unfettered.

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If the order to transfer by the employer is *bona fide*, and there are no drastic changes to the terms of employment to the detriment of the employee, then the transfer order is a valid order; and employee must adhere to the transfer order. If the employee refuses to accept the transfer in those circumstances or fails to show up at the new workplace or department pursuant to the transfer, he may be terminated for insubordination as decided in *Nestle Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2013].

Transfer of Employees to Another Subsidiary – Key Considerations

However, does the right to transfer includes transferring an employee from a company to another company? The current legal position appears to be slightly uncertain.

In the case of *Ladang Holyrood*, it was mentioned that an employer has a right to transfer his employees from “one company to another within the organization”.

However, the Court in the case of *MCSB Software Development Sdn Bhd v Mr. Leong Mun Kam* [2004], which cited the Court of Appeal case of *Barat Estates Sdn. Bhd & Anor v Parawakan Subramanian & Ors* [2002] held otherwise:

“[30.] Despite the exhortation of the Employer’s representative to dismiss the Claimant’s claim, this Court held that based on the evidence adduced and the law, the Employer had no power to transfer the Claimant to another company a separate legal entity without the Claimant’s consent and without negotiations terms to ensure the Claimant did not lose out on all the benefits he had accumulated in serving the Employer since 1989. This was not addressed by the Employer which only relied on a general clause in the Employees Handbook which they themselves have warned that it is not to be treated as part of contract of employment. This Court finds that the Employer had breached its contract, and conclude that the Claimant was dismissed without just cause or excuse.”

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[31.] In addition and in support of this decision, this Court also relies on the decision of the Court appeal in Barat Estates Sdn. Bhd & Anor v Parawakan Subramanian & Ors [2000] 3 CLJ 625 . His Lordship Gopal Sri Ram JCA at page 636 had stated “of course, art 6(2) prohibits forced labour. That much is clear from a reading of its plain words. However, upon closer examination it does more than that. When the principles of construction established by our courts are applied to the article, it reveals a further meaning. By its spirit and intendment it vests in an employee the right to be employed by an employer of his choice. That is because compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour”.

Therefore, MCSB Software Development Sdn Bhd suggests that an employee cannot be transferred to work for another legal entity as it is akin to transferring an employee to another employer which violates the fundamental liberty of an employee to choose his employer and is a breach of his employment contract.

This conflicting situation, however, is not surprising, as the Industrial Court is a court of equity and good conscience where it strives to do justice as the situation demands. This occasionally leads to a situation where cases have similar facts, but their outcome are different.

Another case that is instructive on this issue is the case of *Ng Bee Yoong v Capital Development Sdn Bhd* [2016]. In that case, the Industrial Court held the following:

“[54] The pertinent issue that must be determined before this Court is whether the PNBC Group of Companies and more specifically the Company and Petaling Garden Hotel Sdn. Bhd. are within the essential unity of a group enterprise or alternatively separate entities functioning independently.”

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The case of *Ng Bee Yoong* therefore suggests that if the two companies involved in the inter-company transfer are companies within the essential unity of a group enterprise, as opposed to separate entities that function independently to each other, then the transfer may be within the employer's right to transfer and not a breach of the employment contract of the employee. The Court relied on the often cited case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980].

Conclusion

In conclusion, as an employer has an inherent right to transfer its employees, Courts will not interfere with the transfer unless there was unfair legal practice or victimisation involved.

Be that as it may, the right is not absolute. It must be used with caution and care. A failure to do so will only lead to disputes and lawsuits, which will only hurt the business' bottom line further instead of cutting cost for the company.

As such, employers are encouraged to seek professional human resource management advice and legal advice before ordering a transfer to minimize risk of unfair or constructive dismissal claims. Furthermore, if a prosecution or lawsuit is anticipated or pending, employers should promptly engage a legal counsel familiar with this area of law to ensure the company's interests are protected.

Authored by Louis Liaw, a Senior Associate with the firm's Employment & Industrial Relations practice.

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