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Retrenchment and Redundancy: Impact of COVID-19 on Human Resources & Industrial Relation

Suria Fadhillah Md Pauzi[1], Muhammad Asyraf Azni[2] & Ida Rosnita Ismail[3]

[1] Faculty of Law, Universiti Teknologi MARA, Cawangan Pahang, Kampus Raub, 27600 Raub, Pahang, Malaysia

[2] Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

[3] UKM-Graduate School of Business, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

suriapauzi@uitm.edu.my

ABSTRACT

Retrenchment is a form of dismissal done by the employer when the role of the employees becomes redundant. In contrast, redundancy occurs when the position of the employee is no longer required. The law gives liberty and flexibility for the company to manage its organization to maximize profits as long as it is done in accordance with the law. COVID-19 has had a devastating impact on the economy throughout the world, and Malaysia is no exception. Due to this pandemic, Malaysia has faced economic turbulence whereby many companies have suffered losses, revenues are negatively affected, and business is crippled. To minimize the pandemic's impact, many companies decided to restructure and thus redundancy of position arises, and retrenchment has been carried out. This paper provides legal insight into the labour regulations, statutory provisions, and current court standing on this matter. Although the law recognizes the practice of retrenchment and dismissal due to redundancy as part of management prerogative right, strict observation and adherence to the Bona Fide rule, Last in First out (LIFO) principle, and existing statutory provisions is a must in avoiding legal litigation and unfair labour practice.

Key Words: retrenchment, closure of business, dismissal, unfair labour practice.

1. INTRODUCTION

Retrenchment of employees may occur when the employer found that the number of employees is surplus to its new structure. Whether the company's reorganization is necessary at that particular time and it is an exercise with bona fide for the company's interest is one of the pertinent issues to be discussed by the court in arriving at the correct judgment.

COVID-19 pandemic has created an unprecedented situation and resulted in economic fallout worldwide, and Malaysia is no exception. With the spread of the viruses, the Malaysian government issued a Movement Control Order (MCO) starting from 18th March 2020. Only essential businesses and services were allowed to operate, and others were instructed to be closed.

This paper aims to provide legal insight into the labor regulation revolving around the retrenchment issue in this exceptional event. It is also intended to provide an insight into the effect of non-compliance on the Code of Conduct for Industrial Harmony and *Last In First Out* (LIFO) principle.

2. LITERATURE REVIEW

The legal provision on the right of the management of to terminate an employee's service due to redundancy or reorganisation of a business is being recognized in Section 13(3)(d) of the Industrial Relation Act 1967. However, based on the case of East Asiatic Co v. Valen Yap (Award 130 of 1987), the court stated that this right must be exercised in bona fide. Meanwhile, in the case of Hotel Continental v. National Union of Hotel, Bar & Restaurant Workers (Award 57 of 1984), the court recognizes the right of an employer to close, either part of or the entire business, which eventually leads to termination of service of an employee. However, in exercising this right, the employer must act with a genuine intention for the company's interest and not a mere tactic to avoid legal obligations. The case of William Jack & Co. (M) Sdn. Bhd. v. S. Balasingam [1997] 3 CLJ 235 on the other hand stressed out that, as long as the management exercises its prerogative power in accordance with bona fide rule, its decision to terminate the respective employees cannot be questioned at the court of law. Bona fide is characterised as being real or genuine (Merriam-Webster Dictionary,2020). An action is regarded as bona fide action when no fraud or deceit involved and it is done in good faith (lexico.com,2020).

Meanwhile, the practice of retrenchment, for Peninsular Malaysia and Federal Territory of Labuan, is governed by the Employment Act 1955 and the Employment (Termination and Lay-off Benefits) Regulations 1980. On the other hand, retrenchment practices in Sabah and Sarawak are governed by the Labour Ordinance (Cap. 67) and the Labour Ordinance (Cap. 76) respectively. For the purpose of this paper, the researchers will only discuss the position of the law for Peninsular Malaysia and the Federal Territory of Labuan.

Besides the above-mentioned laws, in order to protect the rights of the employees, the fairness of the employer's conduct and to maintain harmony relationship between the employer and the employees, the Code of Conduct for Industrial Harmony has been introduced by the Ministry of Human Resources and the Malaysian Council of Employers' Organizations (i.e., the predecessor to the Malaysian Employers Federation and the Malaysian Trades Union Congress).

Last but not least, the LIFO principle must also be complied with by the employer in order to justify the exercise of the right of retrenching an employee. The LIFO principle can be seen in the case of Radio & General Trading Sdn Bhd v. Pui Cheng Teck,Gan Sek Teng, Foo Say Tuan & Goh Tok Eng [1990] 2 ILR 242, where the court held that the most senior employee will be retained and the most junior one will first be retrenched.

In order to understand this paper better, it is beneficial to know the definition of the terms that will be used throughout this paper which are retrenchment, lay-off, and redundancy. Retrenchment occurs when a company needs to discharge its employees due to a surplus of labor for any reason except disciplinary action (William Jacks & Co. (M) Sdn. Bhd v. S.Balasingam, 1997). Lay-off on the other hand, occurs when the employer is unable or fails to offer work to the workmen with work that he is engaged to do for at least a total of twelve normal working days within four consecutive weeks and the employee is not paid for remuneration for the period of which he is not offered with work (Regulation 5(1), Employment (Termination and lay-off Benefits) Regulations 1980). Meanwhile, redundancy arises when there was a reduction in the volume of works and business operation, making the employee's position redundant (Stephen Bong v. FCB(M) Sdn. Bhd.& Anor, 1999). The researchers would like to highlight that the reason why redundancy came into this discussion is because redundancy could be the reason for the company to retrench or lay -off their employees.

3. METHODOLOGY

This paper applied a doctrinal research methodology, or also known as the black letter approach, where the researchers collected the materials from primary sources, namely, cases decided by courts and provisions of the laws. These materials were collected by employing library-based methods. The researchers obtained the decided cases, Act and Regulation from online databases such as LexisNexis and Current Law Journal, and official government websites such as agc.gov.my. The materials collected

were then analyzed using the content analysis method to achieve this paper's objective, as mentioned in the introduction's part.

4. RESULTS & DISCUSSION

The relation between the employer and employee is contractual. Thus, each party must adhere to the terms as agreed by them, including the terms with regards to termination and retrenchment of employees. The COVID-19 pandemic has placed a burden upon a company to continue their project and business. Also, the MCO has resulted in businesses to cease its operation if they did not fall under the category of 'essential services'. Once the government re-opened the business sector on 4 May 2020, many businesses had already affected and faced with financial difficulties. Thus, the company has no choice but to undergo cost-reduction measures to save the business. As the law recognizes that the management has the prerogative right to re-organize the company's structure as long as it is for the company's interest and benefit, retrenchment, lay-off, and closure of business have become a legitimate method to cut the cost in this unprecedented situation. Therefore, based on the legal position highlighted in Section 13(3)(d) of Industrial Relation Act 1967 and the decisions in the case of East Asiatic Co v. Valen Yap, 1987, Hotel Continental v. National Union of Hotel, Bar & Restaurant Workers (Award 57 of 1984), and William Jack & Co.(M) Sdn. Bhd. V. S. Balasingam,1997, retrenchment is lawful as long as it is made fairly and for the business's best interest.

The case of William Jack & Co. (M) Sdn. Bhd. v. S. Balasingam [1997] 3 CLJ 235 has defined retrenchment as a circumstance where the company has to terminate the employee due to its excess whereas Regulation 5(1), Employment (Termination and lay-off Benefits) Regulations 1980 has defined what is deemed as lay-off. Based on the definition of lay-off given, the employee is said to be laid off when he is suspended from work for a specified time due to no more work available for him. The situation of no work to be given to employees could be due to redundancy. Redundancy is a situation where a company has too many employees for the same work but the work is not enough to be given to all employees. Redundancy can occur due to several reasons, such as the reorganization of the company and changing of business operations. However, it has to be noted that, the continuity of the contract of service is considered not to be broken if the employee is laid off, and, subsequently, he is employed without claiming the lay-off benefit (Regulation 5(2), Employment (Termination and lay-off Benefits) Regulations 1980).

Even though retrenchment and lay-off are allowed by law, specific requirements need to be followed to safeguard the employees' interest, the fairness of the conduct and maintain social harmony within the workplace. The Code of Conduct for Industrial Harmony is introduced for this purpose. The code is an effort made by the Ministry of Human Resources and the Malaysian Council of Employers' Organizations to establish principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony. It guides the employer on the procedures to be followed in the area of industrial relations. Unfortunately, the code has no binding effect. Therefore, the employer is under no obligation to adhere to its content. However, it is worth noting that the court, in arriving at its decision, may take into consideration any code or regulation relating to industrial practice between employers and employees, which was approved by the Minister (section 30(5A), Industrial Relations Act 1957).

Positive measures must be taken by the employer to abate retrenchment. It may include actions such as cease new recruitment, reduce numbers of the working hour, reduce overtime work, fairly introduce pay cut regardless of level and category of employees, or transfer the employee to other section or department and implement temporary lay-off (Article 20, Code of Conduct for Industrial Harmony). However, suppose the retrenchment cannot be circumvented, the employer should take several steps such as notifying respective employees as soon as possible, introducing schemes for voluntary retrenchment, deliberating with the trade union on the best method for the benefit of both sides, retiring workers who are beyond their normal retiring age, and supporting employees to search other types of employment with assistance from the Ministry of Human Resources (Article 23, Code of Conduct for Industrial Harmony). These procedures are of utmost importance to ensure the retrenchment to be fair and without malice. Nonetheless, failure to notify the employee of the impending retrenchment does not

make the retrenchment order unlawful and unfair. No obligation is imposed by law for the employer to consult its employees before exercising the retrenchment (Nirmala Devi N. Letchumanan v. Informatics Training Technology Sdn Bhd, 2011).

To justify retrenchment, the employer must follow specific requirements. Among others, the employer must prove that there is a surplus of labor in that respective organization. Such a condition has resulted in the employee's function no longer required and ceases to exist (Sistem Televisyen Malaysia Bhd. & Anor V. Suzana Zakaria, 2005). The court will not interfere with the decision of the company to reorganize the business operation. It is the employer's prerogative right to determine the strength of the workforce and the excess of the service, which is not needed and to be discharged as long as it is exercised with bona fide for the interest of the company (Firex Sdn Bhd v. Cik Ng Shoo Waa, 1990). Besides, to justify whether the retrenchment was exercised with bona fide for the interest of the company, the court will look at the circumstances surrounding the case, the real ground of retrenchment, and whether such retrenchment is motivated by malice and victimization (Arkitek Akiprima Sdn Bhd v. Liang Slew Fate & Anor, 2002).

Besides procedures provided by the Code of Conduct for Industrial Harmony, the LIFO principle, as highlighted in the case of Radio & General Trading Sdn Bhd v. Pui Cheng Teck,Gan Sek Teng, Foo Say Tuan & Goh Tok Eng [1990] 2 ILR 242, must be strictly followed for justifiable retrenchment. Therefore, the employer should strictly observe the principle even though it is not a mandatory rule unless there is reason to depart from it (Supreme Corporation Bhd versus Puan Dorean Daniel a/p Victor Daniel and Ong Kheng Liat, 1987). In selecting employees to be retrenched under the LIFO principle, they must be selected from the same work category and perform similar job descriptions (Kumpulan Perangsang Selangor versus Zaid Mohd Nor, 1997). It should be noted that the LIFO principle operates only within the organization in which the retrenchment is conducted and only from a similar category of the employee with a particular job description (Associated Pan Malaysia Cement Sdn Bhd v. Kesatuan Pekerja-pekerja Perusahaan Simen (M) Perak, 1986). However, before the LIFO principle is exercised, the foreign employees must be reduced and dismissed first even though the respective foreign employee is the most senior. Section 60M of Employment Act 1955 provides a prohibition on the termination of a local employee so that a foreign employee can be kept employed. Besides, section 60N of Employment Act 1950 also states that where redundancy occurs, the employer shall terminate all foreign employees' service in the same work category with similar job descriptions before retrenching the local employees. Where there is a failure to observe the LIFO principle, the retrenchment may be declared invalid. Thus, dismissal would be without just cause unless the employer can prove there is just and reasonable cause for departing from the principle.

From the above discussion, it is concluded that the regulations and provisions on retrenchment are not codified in one document as it is distributed in several authorities such as statute, cases, and Ministry guidelines. Consequently, it is challenging for employers to observe the correct procedure before retrenching their employees. Nonetheless, as long as the employers exercise their right with bona fide for the company's interest, their decision cannot be questioned by the court of law. However, the court is still entitled to examine the case's surrounding circumstances to determine whether the retrenchment is exercised with just cause. In retrenching its employees, the retrenchment must be genuine as to avoid the claim of unjustified dismissal.

Once termination is made, the employees are entitled to termination benefits under the Employment (Termination and Layoff Benefits) Regulations 1980. The regulation provides for protection against employees who are involuntarily terminated by the employer. Unfortunately, the Employment Act 1955 and the above regulation only apply to specific categories of 'employees', namely, manual laborers whose wages are RM2000 and below (paragraph 1, First Schedule, Employment Act 1955). Employees who do not fall within the ambit of the Employment Act 1950, their rights are protected in a collective agreement. Nevertheless, the collective agreement is not a legally binding document unless it is written and stated to be so or incorporated into the respective employee's contract.

5. CONCLUSION & RECOMMENDATION

The devastating effect of COVID-19 towards the business operation has compelled the management to downsize and re-organize the business and its operation, leading to retrenchment and lay-off of the employees. Therefore, if the company is legitimately facing financial difficulties due to loss of profits and lack of business during this unprecedented event of the COVID-19 outbreak, the company may reduce its employees whose service is no longer required or ceased to exist. Even though the law declares that it is within the employer's prerogative right to retrench its employee, certain rules need to be observed before such retrenchment may be allowed. The court will not interfere with the managerial decision provided it is done in good faith. Thus, the employer cannot use the COVID-19 pandemic as the only excuse or sole ground to retrench or lay-off its employees. In facing financial difficulties, demotion and salary reduction can be the alternatives for the company instead of retrenchment, but if the company has no choice but to close its business, the company has no choice but to discharge its employees with the observance towards their retrenchment benefit. Transparency in imparting information, fair deliberation, and open communication between employers and employees should be encouraged to avoid any claim of unfair dismissal or future disputes.

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