

# **RETRENCHMENT & REDUNDANCY**

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With the outbreak of COVID-19 across the globe and the government's announcement of the Movement Control Order (MCO), many companies and businesses in Malaysia are facing financial difficulties to sustain their operations, and some even to the extent that their businesses had to shut down completely. The natural event that follows in this unprecedented situation is that many entities are compelled to embark on cost-cutting measures such as restructuring or downsizing the business which eventually led to a retrenchment.

## **1. INTRODUCTION: WHAT IS RETRENCHMENT?**

- 1.1 Retrenchment is a form of dismissal of employees that is justified by an employer on the basis that the role (s) of the identified employees has become redundant or surplus to the need of the organization.
  
- 1.2 The Court of Appeal in the case of **William Jacks & Co Sdn. Bhd. v S. Balasingham (1993) 2 ILR 527** defined retrenchment in the following words: *"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 (per SK Das J in Hariprasad v. Divelkar 1957 SC 121)- 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..."*

1.3 In **Woo Vain Chan v. Malayawata Steel Bhd (currently known as Ann Joo Steel Bhd) [2016] 2 MLJ 848**, the Court of Appeal adopted the definition of redundancy by the learned author Dunston Ayadurai in his book “Industrial Relations in Malaysia”, which states as follows:

*“Redundancy refers to a surplus of labour and is normally the result of a re-organisation of the business of an employer; and its usual consequence is retrenchment, ie the termination by the employer of those employees found to be surplus to his requirements after the re-organisation. Thus, there must be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.”*

## 2. **WHEN RETRENCHMENT / REDUNDANCY TAKES PLACE?**

2.1 When retrenchment takes place?

➤ Retrenchment / redundancy can happen due to:

- a) cessation of business
- b) downsizing of the business
- c) reorganization of the business

➤ Please see Section 12(3) (a), (b), (c) and (d) of the Employment Act 1955.

2.2 The law recognizes that it is the employer’s right and prerogative to manage its workforce or to reorganize its business in such a way as he or she thinks fit, as long as the fair labour practice has been complied with and in the absence of any bad

intention or mala fide. Hence, if a company has a legitimate ground to implement the retrenchment exercise (such as loss of income, reduction in profits and business, closure of branches etc) and this exercise is not done in bad faith and is not a victimization of its employees but due to actual redundancy, the Court will uphold the employer's decision. Otherwise, a retrenched employee has the right to file a complaint of unfair dismissal under **Section 20 of the Industrial Relations Act 1967 (IRA)** to the Industrial Relations Department within sixty (60) days from the date of dismissal, to challenge the Company's decision of retrenchment as a dismissal without just cause and excuse.

### 2.3 Case Laws:

- **Abdul Rahman Sidek v. Forest Plantation Development Sdn Bhd [2015] 1 ILR 378** reiterated the law as stated in **William Jacks & Co Sdn Bhd v S. Balasingham (1993) 2 ILR 527:**

*"It is well-settled that an employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercise bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered or even duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide."*

- **Harris Solid State (M) Sdn. Bhd. & Anor v. Bruno Gentil Pereira & Anor [1996] 4 CLJ 747:**

*"... An employer may re-organize his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a*

*collateral purpose, for example, to victimize his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case."*

➤ **Roshidah Kamisan v. Saatchi & Saatchi World Sdn Bhd (2015) 3 ILR 270:**

*"It is not necessary for the entire company to be making a loss in order for the company to reorganize its business..."*

➤ **Guinness Anchor Berhad v. Rosli Ithnin & 3 Ors (2008) 2 LNS 0077:**

*"...the employer is entitled to dismiss some of his employees who are considered surplus or redundant. However, such right and privilege is limited by the rule that he must act bona fide and not capriciously or with motives of victimization or unfair labour practice or any ulterior motive."*

➤ **Aluminium Company of Malaysia Bhd. vs. Jaspal Singh [1987] 2 ILR 558,** the

Industrial Court observed that:

*"In the law of redundancy, it is important to note that it is the services of the employee which must be made redundant and not his position or title"*.

➤ **Bayer (M) Sdn Bhd v Ng Hong Pau (1999) 4 MLJ 361:**

*"On redundancy it cannot be gainsaid that the appellant must come to the Court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see Chapman & Ors v. Goonvean & Rostowrack China Clay Co Ltd [1973] 2 All ER 1063). It is our view that merely to*

*show evidence of a reorganization in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal, his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant."*

The principle established in Bayer case has been followed by the High Court in its decision of **Purushotman Govindasamy v. Mahkamah Perusahaan Malaysia & Anor [2019] 1 LNS 983.**

- **Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors (2012) 9 CLJ 21** affirmed the Court of Appeal's decision which held that: *"...their respective jobs and workload were taken over by two other employees, and not eliminated or extinguished, redundancy was not proven, as mere reorganisation was insufficient to justify their retrenchment which was correctly held to be without just cause or excuse."*
  
- **Purushotman Govindasamy v. Mahkamah Perusahaan Malaysia & Anor [2019] 1 LNS 983.** the High Court applied the English case law on redundancy which provides that works can diminish in two ways, namely the work itself cease or it needs to be done by fewer employees. It is held as follows:  
  
*[23] In E.R Sutton v. Revlon Overseas Corporation Ltd [1973] 1 RLR 173, a case on redundancy which was applied by our Malaysian Courts, the English National Industrial Relations Court has held as follows:*

*"Under s. 1(2)(b) of the Redundancy Payments Act 1965, the requirements of a business for employees to carry out work of a particular kind can diminish in two ways. The work itself may cease or diminish, alternatively a reorganization or mechanization may enable the same works to be done by fewer employees. This is true of the present case. The reorganization of the Respondent's business was such that its requirement for a separate and additional employee to carry out the work of a chief accountant had ceased and because the whole of the duties previously performed by the Appellant was absorbed by the remaining staff and not taken over by someone from outside, the Tribunal had rightly held that the employee's dismissal fell within the definition of redundancy." (emphasis added)*

*[24] The case of E.R Sutton has been applied in various Malaysian cases, namely Lim Yu Chee v. Staedtler Marketing Sdn Bhd [2011] 2 LNS 1638; Senjuang Sdn Bhd v. Munirah Mad Nor [2015] ILR 471; Jupiter Securities Sdn Bhd v. Edmund Chang [2009] 2 LNS 0057; Jupiter Securities Sdn Bhd v. Mohammad Mustapha Mohd Ariffin [2008] 2 LNS 0849; Tuan Syed Hashim Bin Tuan Long v. Esso Production Malaysia Inc. [1997] 1 LNS 99."*

- 2.4 In summary, for a retrenchment exercise to be valid, the employer must prove that there is a legitimate ground for retrenchment, the retrenchment exercise is carried out bona fide (not for collateral purpose such as to victimize the employees), and there must be concrete proof on actual redundancy to justify the dismissal, i.e. the duties of the workman had extinguished or diminished or ceased to exist or had been eliminated from the organization; mere evidence of reorganization is not enough

**(Aravindakshan Achyuthan Nair & Ors v. Linfox M Logistics (M) Sdn Bhd (2013) 4 ILR).**

2.5 Therefore, if a company is genuinely suffering from financial constraints as a result of the COVID-19 pandemic, this forms a legitimate ground for retrenchment to minimize the head-counts who are surplus and no longer be required by the company. However, to ensure the legality of the retrenchment exercise, three (3) requirements must be in the forefront of the employers' mind:

- (i) Code of Conduct for Industrial Harmony (1957);
- (ii) the principle of Last in, First out (LIFO); and
- (iii) other measures must be exhausted before the last resort of retrenchment.

**3. CODE OF CONDUCT FOR INDUSTRIAL HARMONY (1957) AND ITS IMPACT ON RETRENCHMENT?**

3.1 The Code of Conduct for Industrial Harmony is established in February 1975 as an agreement between Malaysian Trade Union Congress (MTUC) and Malaysian Council of Employers' Organisation (MCEO) with the approval of the Ministry of Labour. It provides guidelines on the best practices for retrenchment exercises.

3.2 The Code has been given statutory recognition by virtue of **Section 30(5A) of the IRA 1967** which provides that the Industrial Court may in making an award, take into consideration any agreement or code relating to employment practices between representatives of employers and workman respectively where such agreement or

code has been approved by the Minister. However, it has no legal force or sanction and thus not legally binding as a statute.

- In the case of **Penang & Seberang Prai Textile & Garment Industry Employees' Union v Dragon & Phoenix Bhd, Penang & Anor (1989) 1 MLJ 481**, it was held that the Code has no legal force or sanction.
- The Court of Appeal decision in **Equant Integration Services Sdn Bhd v. Wong Wai Hung [2012] 1 LNS 1296** confirmed the position and said as follows:

*"The two reasons given by the Industrial Court in allowing the respondent's claim for unfair dismissal both relate to non-compliance by the appellant of the Code of Conduct for Industrial Harmony. The Code, however, is a mere guideline, and cannot be enforced as if it binding statute, on the appellant. The failure to consult and give early warning as required by the Code cannot vitiate the fact that there was a genuine redundancy in the appellant company. The failure to comply with the Code per se cannot be fatal in a proper retrenchment exercise."*

3.3 Having said that, employers do adhere to the Code where it is possible and practicable, to reflect good industry practice as well as being precautionary measures to avoid challenges on the retrenchment exercise or the potential of unfair dismissal claim. A failure to comply with the provisions of the Code may be a factor that the courts will take into account in deciding whether the retrenchment was fair.

3.4 Cases law:



- In **Radio & General Trading Co Sdn Bhd. v Pui Cheng Teck & Ors (Award 243/1990)**, the Industrial Court held that it must consider the following:

*“If there was a redundancy situation, was the consequent retrenchment made in compliance or in conformity with the accepted standards of procedure”*

- **Rocon Equipment Sdn Bhd & Anor vs. Zainuddin Muhamad Salleh & Yang Lain (2005)** emphasized that even if redundancy did exist, another question to be considered is whether the retrenchment is done in accordance with the accepted standards of procedure.

3.5 **Clause 20, 21, 22, 23 and 24** of the Code made provisions on what should be done in the circumstances where redundancy is likely to happen. For example:

- **Clause 22(a)** provides the following measures to be taken by the employer:
  - (i) to give as early a warning as practicable to the workers concerned
  - (ii) introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits
  - (iii) retiring workers who are beyond their normal retiring age
  - (iv) co-operating with the Ministry of Labour and Manpower to help the workers to find work outside the undertaking; spreading termination of employment over a longer period
  - (v) ensuring that no such announcement is made before the workers and their representatives or trade union have been informed.
- **Clause 22(b)** of the Code contains suggested criteria for employers to consider in selecting employees to retrench. This includes:

- The need for the efficient operation of the establishment or undertaking
- Ability, experience, skill and occupation qualifications of individual workers required by the establishment
- Length of service and status (non-citizens, casual, temporary, permanent)
- Age
- Family situation
- Such other criteria as may be formulated in the context of national policies.

3.6 Please see also the following cases:

- **Trident Malaysia Sdn Bhd, Penang v. National Union of Commercial Workers (1987) ILR 196**
- **Mamut Copper Mining Sdn Bhd v. Chau Fook Kong @ Leonard & Ors (1997) 2 ILR 625**

#### **4. THE LAST IN FIRST OUT (LIFO) PRINCIPLE**

4.1 When to consider the LIFO principle?

- Generally, this LIFO principle is applied in retrenchment exercises where the employer is compelled to make a selection from a number of employees from a relevant grouping. This refers therefore to a common category or pool of workman.
- LIFO means the junior employee would have to leave the employment before the senior could be directed to leave (Ramasamy, 2002). In other words, the LIFO formula is in favor of retaining senior employees over junior employees (in terms of years of services).

➤ **Associated Pan Malaysia Cement Sdn Bhd and Kesatuan Pekerja-Pekerja Perusahaan Simen (1986)** held that the LIFO principle is subject to two principles. Firstly, it operates only within the establishment in which the retrenchment is to be made. Secondly, the rules are applicable only to the category to which the retrenched employees belong.

➤ **Alam Arena Management Sdn Bhd v. Norfadzilah Surip & Anor (2011) 1 ILR 590** held that:

*“The question of the comparative senior or junior status of a workman for applying the principle of ‘last in, first out’ had to be determined with reference to the workman working in the same category of employment, ..., not on the length of service of the workman in a different category.”*

4.2 Hence, the LIFO principle is not applicable where there is only one workman in the particular job category or position:

➤ In **Kelab Sukan Pulau Pinang & Anor v. Vijayapal Singh Hira Singh & Anor & Another Appeal (1998) 1 CLJ 415** wherein the Court of Appeal referred to AC Malhotra's book Dismissal, Discharge, Termination Of Service & Punishment (7th Edn.) in which it is stated: *“But the rule of ‘Last Come, First Go’ would have obviously no application to the case of retrenchment of the only employee in a particular category of workmen. In such a case it is retrenchment of the post itself and therefore, if for reasons of economy and any genuine interest of reorganisation the services of a single employee of a category have to be dismissed, there is no scope for the application of this principle.”*

- Similarly, the High Court in the case of **Stephen Bong v FCB (M) Sdn Bhd (1999) 3 MLJ 411** held that *“it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind (‘Harvey on Industrial Disputes’). In the case before me, it is the Company's case that there was reduced work and reduced business, which made the applicant's position as an executive director in charge of one group redundant. The Industrial Court is right when it held that the applicant was redundant.*

*Finally, with regard to the application of LIFO, I find that there was no breach of the principle. Kwat Fatt, being the Account Director, was not in the same category as the applicant who was the Executive Director, in so far as the job function is concerned. Thus, the termination of the service of the applicant was therefore proper.”*

- Please also see the following cases:

- (i) **Maybank Discount Bhd v Nooraini binti Mohd Ishak (1994) 2 ILR 822**
- (ii) **Firex Sdn Bhd v Ng Shoo Wau, Award No 69 of 1990** (followed by the Industrial Court in the case of **Norzaifizy Bin Khalid Nordin v. Murphy Sarawak Oil Co. Ltd [2019] 2 LNS 1866:**

*“In Award No. 16/68: Sharikat Estern Smelting Bhd. v. Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Peleboran Logam Sa-Malaya, the Court had said:*

*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 (Soon-vala p. 746). This court adopts that principle as indeed has the former Industrial Arbitration Tribunal of Malaysia. This means that the employer is not entirely denied the freedom to depart from that principle but that he can do so only for sufficient and valid reason."*

- 4.3 In cases where there are foreign workers occupying posts similar to that of local employees, the **Employment Act 1955 (Section 60N)** requires that the services of foreign workers be terminated first.
- 4.4 Nonetheless, the LIFO principle is not the only consideration in selecting employees to be retrenched. The employer can depart from the LIFO principle and adopt its own standard selection criteria in selecting employees for retrenchment, such as performance, skills, qualification, expertise and experience etc, so long as the selection criteria are fair and reasonable, which must be applied equally across the board with sufficient transparency. Therefore, it is important for the employer to document the selection criteria and process and to be able to show in detail the selection procedure in how they picked those unlucky one. The Industrial Court in **National Union of Cinema & Places of Amusement v. Shaw Computer & Management Services Sdn Bhd (1975)** held that the court will usually require the employer to show how, by whom, and on what basis the selection for redundancy was made.
- 4.5 When is departure from the LIFO principle acceptable?

- Employers can depart from this LIFO principle only for sound and valid reasons. The burden is on the employers to show to the satisfaction of the Court that it has sound and valid reasons to depart from the LIFO principle.
- See:
  - a) **Supreme Corporation Bhd v Dorren Daniel a/p Victor Daniel & Anor Award No. 349 of 1987**
  - b) **KSM Credit & Leasing Sdn Bhd v Wong Yoke Chin & Anor, Award No. 323 of 1988**
  - c) **Sarawak Shell Bhd v Ismail Sahat & Ors (2002) 2 ILR 371**
  - d) **Malaysian Shipyard & Engineering Sdn Bhd Johor Bahru v Mukhtiar Singh & Ors (1991) 1 ILR 626**
  - e) **Kesatuan Pekerja-Pekerja Shipyard & Engineering Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd (1996) 2 ILR 1199**
  - f) **Kok Lam See v. Hanson Quarry Products Sdn Bhd (2014) 2 LNS 1152**  
*"Moreover, the "LIFO" principle is not immutable and for valid and sufficient reasons an employer may depart from it. This rule is not inflexible and extraordinary situations may justify variations. For instance, a junior recruit who has special qualifications needed by the employer may be retained even though a more senior employer is retrenched..."*
  - g) **Norzaifizy Bin Khalid Nordin v. Murphy Sarawak Oil Co. Ltd. [Award No.: 1866/2019]** where the Court held that the Company's selection criteria were not transparent nor codified for the Claimant to understand and appreciate, and were unreasonable. In trying to depart from the LIFO rule, it was for the Company to discharge the onus of justifying the departure by adducing substantive and

reliable evidence of the grounds or reasons justifying a departure, which the Company had failed to do so. Further, the Company did not show any evidence that the other Project Engineers were more qualified than the Claimant to be retained or that the Claimant could not perform the roles that they were performing. The retrenchment of the Claimant is therefore held to be without just cause and excuse.

h) **Nor Aini Binti Sabil v. Murphy Sarawak Oil Co. Ltd [Award No.: 2751/2019].**

the Court held that the Company's dismissal of the Claimant by way of retrenchment was without just cause and excuse. The Court found that the Company failed to provide the necessary documentation to establish that a fair selection criteria was indeed used. This lack of documentation went against the Company and the Court held that the Company has failed to discharge its burden to prove that the selection process of the Claimant to be retrenched was transparent, fair and reasonable or that the Claimant's job scopes and functions are no longer required and deemed as surplus to the organization. The Court further held that:

*“When carrying out the retrenchment, the employer must ensure that the existing laws, rules and procedures are adhered to. In this regard, it has been the practice of the Industrial Court to look at the Code of Conduct for Industrial Harmony in determining the issues of fairness. Though the code has no legal force and its acceptance is voluntary, it is still relevant for the purpose of considering the overall reasonableness of the employers' action.*

i) **Salim Abd Sama v. Central Sugars Refinery Sdn Bhd [2020] 2 LNS 0545**

This case was heard together with 16 other cases, where a total of 17 employees all of whom worked as security guard were retrenched by the Company, due to the fact that the Company had decided to reduce the workforce of the Security Section to four (4) security guards and outsourced the Security Section to a third party company. The 17 Claimants contends that the Company has violated the last in first out principle, in selecting them to be retrenched and in selecting the 4 security guards to be retained. The Company avers that it retained the 4 security guards and retrenched the Claimants based on the Company's "Performance Management System" ("PMS") and disciplinary record where the 4 security guards retained were always amongst the top performers based on the PMS with good disciplinary records. The Court came to the findings that the Company's selection for retrenchment based on its "Performance Management System" ("PMS") is fair and justifiable, which held as follows:

***"[36] Surprisingly the Claimants never challenged COW-2 during the trial about the selection done by the Company in retaining the 4 security guards and retrenching the 17 Claimants.***

***[37] All the performance data of all employees in the Security Section of the Company extracted from the Performance Management System of the Company marked as Exhibit "11" in COB-1 was available and served on the Claimants before the trial. However, the Claimants never at all challenged those records neither adduced any evidence to show that the Company's selection to retaining the 4 guards and retrenching the 17 Claimants was not a fair selection. As such, the Claimants are deemed to have agreed with the Company's selection in retaining the 4 guards and retrenching the 17 Claimants.***



*[38] As the Claimants did not challenged the Company's selections at all neither adduced any evidence to the contrary, the Court is of the opinion that the Claimants acknowledged that the Company's selection was a fair selection where the Company is seen to have acted fairly and did not departed with the LIFO rules in retrenching the Claimants.*

*[39] It is trite law that the LIFO is not an absolute mandatory rule as it is not a statutory provision, which cannot be departed from by the Company when retrenching their employees. The Court is satisfied that the Company's selection based on the Company's "Performance Management System" ("PMS") and disciplinary record was a justifiable way of selecting the retention of employees during a retrenchment exercise."*

## **5. OTHER MEASURES: RETRENCHMENT – THE LAST RESORT**

5.1 Due to the Covid-19 pandemic and the ongoing MCO, it is likely to give rise to a genuine need of the company to downsize its workforce in order to sustain operation. In the circumstances, it is strongly advised that the Company to exhaust other means first before opting the drastic course of retrenchment. The other measures which could be adopted includes:

- reduce working hours or overtime;
- reduce or freeze recruitment of new employees;
- reduce employees' salary or reduce/ freeze bonuses and salary increment; or
- reduce operational costs.

## 6. OUTSOURCING

### 6.1 What is Outsourcing?

- Outsourcing means the employer privatizes a section of work or certain functions to an outsider or a third party which triggers a situation where the current employees have no sufficient work to perform.

### 6.2 Can outsourcing result in the retrenchment of employees?

- The answer is yes.
- Cases law:

a) **Kelab Sukan Pulau Pinang v Vijayapal Singh a/l Hira Singh (1997) 3 MLJ 421**

b) **Kelab Gymkhana Miri v Lim Ngiang Wei & Ors (2000) 3 ILR 409**

*"In the context of privatization of certain services of an employer, there is as reflected in this case, a serious misapprehension that the hiving off or contracting out of the said services to a third party and the continued employment of employees by the said third party does not entail a termination of the contract of employment between the employer and the employee. There can be no essential difference in law between the purported transfer of an employee pursuant to a transfer of the employer's business to a third party and the purported "rolling over" of an employee from the employment of an employer to that of a third party pursuant to privatisation. In both situations there is a termination of employment by the employer to which is attached all the legal obligations consequent thereto..."*

c) **Hume Industries (M) Bhd v Mohamad Shafie & Ors [2005] 3 ILR 421**, the Court held that the company has the right to conduct outsourcing and retrench its labour.

d) Natseven TV Sdn Bhd. v. Shahirman Sahalan & 21 Ors [2007] 1 ILR 413

*"...since it is within the rights of the company to restructure and reorganize its business operations as it considered best which entailed, as in this case, the outsourcing of some of its functions primarily because of its serious financial problems, the claimant's contention that the company has failed to establish actual redundancy involving them because their functions and duties were given to others to perform, with respect, cannot be sustained."*

e) Mohd Ruslan Mohd Yusof & 24 Ors v. Malayan Banking Berhad [2009] 3 ILR 51

*"The cause of industrial harmony and the rule against unfair labour practices disentitles the bank from forcing any employee to transition to another employer against that employee's will. That being the case, the bank could have and indeed should have allowed for the lateral movement of this claimant (on her refusal to be transitioned) into another department of the bank. Moreover, the bank was contractually bound to do this by virtue of the terms and conditions of her contract of employment.*

*Outsourcing, though recognised as a legitimate managerial prerogative, cannot be used as an excuse to disregard the right to security of tenure. The decision to terminate this claimant on her refusal to be transitions amounts to a flawed management decision that invites the intervention of the court acting with equity and good conscience to hold the balance between management prerogatives, on the one hand, and the right to security of tenure and protection from unjust or unfair labour practices, capriciousness and arbitrariness, on the other."*

f) **Sim Chit Siong & Ors v. Instacom Group Berhad [2017] 1 ILR 242**

*“As such, I do believe that the company did restructure by outsourcing its remaining smaller workload to subcontractors to deliver the jobs... Consequently, as the company's remaining smaller workload were outsourced to subcontractors to deliver the jobs, there was no jobs left in the company for the claimants to do. When the smaller workload of the company was given to the subcontractors to deliver, the positions of the claimants in the company obviously no longer exist and the claimants became redundant to the needs of the company.”*

7. **PROCEDURE OF RETRENCHMENT**

7.1 In implementing retrenchment, employers are required to submit an employment notification retrenchment form (PK Form) to any Labour Office at least 30 days before conducting the retrenchment exercise, failure which would carry a punishment of a fine of RM 10,000.00. The PK Form is a notification requirement, and not an application for approval. Hence, employers do not need approval from the Labour Office to carry out the retrenchment exercise.

7.2 The **Employment Act 1955 (EA)** (which governs the employees who earn the wages of RM 2,000.00 or below) requires notice to be given to the employee for the impending retrenchment. The length of notice period to be given depends on the years of service.

7.3 For employees who are not covered under the EA 1955 (i.e. for those who earn more than RM 2,000.00), the requirement of notice would be in accordance with their contract of employment.

## **8. REDRESS AVAILABLE TO THE RETRENCHED EMPLOYEES**

8.1 Under the law, an employee (or workman) may seek redress upon his retrenchment in one of these several ways:

- under **Section 69 of the EA 1955** or a claim for termination benefits under the **Employment (Termination and Lay-Off Benefits) Regulations 1980, Regulation 6**, for the employees who fall within the scope of the EA 1955:

*“For an employee who falls within the scope of EA is entitled to benefits if he has been employed for at least 12 months. The termination benefits payable are as follows (or the amount in the employment contract if it is higher):*

*1-2 years of service:                    10 days wages for each year of service*

*More than 2 years - 5 years: 15 days wages for each year of service*

*More than 5 years:                    20 days wages for each year of service”*

- For the employees who do not fall under the EA, it depends on whether the contract of employment contains the provision for termination benefits. If the contract is silent, then it is up to the employer whether or not to pay termination benefits, and how much to pay.
- (b) reinstatement under **Section 20(3) of the IRA 1967**, i.e. the claim of unfair dismissal.
- (c) damages under common law.

## 9. BEST PRACTICES FOR RETRENCHMENT

9.1 For a start, employers should, where possible, comply with the Code (mentioned above) in order to strengthen their case that the retrenchment exercise was bona fide.

Some of the best practices include, firstly, consider whether there are other alternatives for cost-cutting as opposed to retrenchment **(Clause 20)**:

- Limitation on recruitment (head count freeze)
- Restriction of overtime work
- Restriction of work on weekly day of rest
- Reduction in number of shifts or days worked a week
- Reduction in number of hours of work
- Re-training and/or transferring to other departments or work

9.2 Where a retrenchment becomes necessary, **Clause 22(a)** of the Code encourages employers to take the following measures:

- Giving as early warning, as practicable, to the workers concerned
- Introducing schemes for voluntary retrenchment and retirement
- Retiring workers who are beyond their normal retiring age
- Assisting the workers to find work outside the undertaking
- Having a (well documented) objective selection criteria
- Spreading termination of employees over a longer period
- Ensuring no such announcement is made before the workers and their representatives of trade union has been informed.

9.3 In selecting employees to be retrenched, the employers must adopt a fair and transparent selection procedure with strict adherence to the principle of LIFO or a reasonable and objective set of standard selection criteria if the employers find that there is good reason to depart from the LIFO principle.

## CONCLUSION

Companies are entitled to retrench employees, if it can be established that the management has a legitimate ground to embark on a re-organization or restructuring exercise which led to an actual redundancy, and the accepted standard procedure (as discussed above) are complied with. In addition, there is no bad faith or victimization involved in the retrenching the employee. In other words, the retrenchment exercise has to be a bona fide action by the Company and it should not be used as a tool for other colourable exercise. In the recent case of **Mohd Zakir Yusoff V. Telarix (M) Sdn Bhd [2020] 2 LNS 0349**, the Industrial Court affirmed that the following matters need to be considered in cases of dismissal by way of retrenchment:

*"Basing on the settled principles pertaining to retrenchment, therefore the issues before the court is whether there existed circumstances which justified the retrenchment exercise taken by the company and whether the company has acted bone fide in retrenching the claimants. The need to have these issues taken into consideration has been propounded by Soonavala in "The Supreme Court on Industrial Law" Vol. II, second edition. In the said book, the author at p. 424 wrote as follows:*

*Therefore, when a company gives notice of retrenchment to its workman and the dispute arising therefrom is referred for adjudication to a tribunal, the only questions for its decisions are*

- a) Whether the retrenchment was justified by the circumstances of the case,*
- b) Whether the grounds for the retrenchment given by employer are true, that is, whether there had in fact occurred a reduction in the business of the company due to*

*circumstances such as scarcity of raw material on the availability of which the running of the factory depends or stoppage of work under the orders of the government, or changes in economy, which made it impossible to continue the business except at a loss or on meagre profits; and*

*c) Whether the order of retrenchment was motivated by bad faith and a desire to victimize or harass the workman whom for some ulterior reasons the employer wanted to discharge or dismiss".*

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*The End*

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