

Chapter 13

Business Sustainability from the Perspective and Management of Malaysian Retrenchment Laws

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ABSTRACT

The chapter is based on the analysis of the relevant statutes on retrenchment in Malaysia and criterion based sampling of the Court awards to analyze the cases and to provide recommendations to practitioners. Findings from these cases analyses reveal that many of the retrenchment awards were made against the employers due to the handling of the retrenchment exercise itself which violated the relevant statutes and the established procedures. The author suggests that retrenchment should not be viewed as a reactive but a proactive exercise aligned with the organizational strategic plan. The retrenchment exercise should be seen as a last resort when other measures have been exhausted. The author hopes with many proactive measures, the number of unfair retrenchment claims made to the Industrial Relations Department will be reduced. This will eventually improve or maintain the harmonious employment relations.

1. INTRODUCTION

Retrenchment means termination of the contract of service of the employees (workmen) in a redundancy situation which arise from several factors such as restructuring, reduction in production, mergers, technological changes, business take-over, economic downturn and others (Muniapan, 2010).

Retrenchment is the legal expression used to describe an exercise where a business entity terminates the services of employees that it considers as surplus to its business requirements. It is pertinent to note that a retrenchment exercise is distinguishable from an exercise involving a closure of business as in a business closure all employees are discharged as result of cessation of operation. Therefore, a closure of business is separate and distinct from a retrenchment (Thavarajah and Low, 2001).

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This distinction was drawn by the Supreme Court (now Federal Court) in *Hotel Jaya Puri Bhd vs. National Union of Hotel, Bar & Restaurant Workers & Anor* (1980). In that case, the Court accepted the following observation:

Retrenchment connotes in its ordinary acceptance that the business itself is being continued but that portion of the staff or labor force is discharged as surplus-age. The termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment. Though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is awarded under the law, not for discharge as such but for discharge on retrenchment, and, as retrenchment means in ordinary parlance, discharge of the surplus, it cannot include discharge on the closure of business.

The term “retrenchment” has also been explicitly explained by his Lordship Datuk Gopal Sri Ram, JCA in *William Jacks and Co (M) Bhd vs. S Balasingham* (1997) as follows:

Retrenchment means the discharge of surplus labor or staff by an employer for any reasons whatsoever otherwise than as a punishment inflicted by way of disciplinary action. Whether the retrenchment exercise in a particular case is bona fide or otherwise is a question of fact and degree depending on the peculiar circumstances of the case. It is well settled that the employer is entitled to organize 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.

In the Indian context, Section 2 of the Indian industrial Disputes Act 1947 defines “retrenchment” (cited in Pathmanathan, et al, 2003, pp.129) as:

... the termination by the employer of the service of a workman for any reason whatsoever, otherwise than punishment inflicted by way of disciplinary action, but does not include:

- a) *voluntary retirement of the workman; or*
- b) *retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*
- c) *termination of service of a workman on the ground of continued ill-health.*

An organization may have surplus employees due to a downturn in business, installation of new labor saving machinery or device, standardization or improvement of plant or technique which may result in retrenchment. Retrenchment occurs when organization have excessive workers but with little job to do (redundancy). This will result in the reorganization of the employers’ undertaking and consequently some employees may be found redundant, and therefore be retrenched.

In *Baxter Healthcare S.A. (Malaysian Operations) vs. Mazlina Abu Bakar* (1992), the Industrial Court held that retrenchment is necessary incidence of running an industry, but retrenchment is justified only when due to shortage of work, whether permanently or for an indefinite period, there has arisen a surplus in the number of workmen in the employment of a company or redundancy.

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