2011 International Conference on Economics and Business Information
IPEDR vol.9 (2011) © (2011) IACSIT Press, Bangkok, Thailand

WORKERS' RETRENCHMENT DURING ECONOMIC DOWNTURN AND DISPUTE RESOLUTION UNDER MALAYSIAN LAW

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Abstract. The aim of this paper is to discuss the law of retrechment of workers in Malaysia. Economic down turn has impacted many employers who have to down-size or reorganise their businesses. It resulted in the retrenchment of workers. Although employers enjoy the prerogative to re-organise their businesses, employees too have their rights not to have their employment terminated unfairly. The author adopts the critical legal analysis method by referring to Legal Code and Court cases. The result shows that the Industrial Court has outlined well established principles for retrenchment that employers need to observe and one of them is that the retrenchment exercise should not be actuated with victimisation.

Keywords: Malaysian law, retrenchment, economic downturn, employer, employee

1. Introduction

Malaysia as a developing country is not spared from the impact of globalisation. Over the last three decades Malaysian economy has experienced tremendous economic development expecially with regards to the nation's main commodity. Such economic development requires a large pool of workers. When economic downturn occurs, all workers are effected regardless of whether they are local or foreign. The Malaysian Industrial Court hears cases pertaining to dismissal of workers on reason of redundancy. The Industrial Court is a specialised court established under the Malaysian Industrial Relations Act 1967 (IRA). Any dismissed worker may file his or her complaint under section 20 of the IRA at the nearest Department of Industrial Realations. The Department then will conduct a conciliation aiming to settle the dispute. If the Department fails to resolve the dispute, the case will be referred to the Minister of Human Resources who will make a decision whether to refer the case to the Industrial Court or not. The Industrial Court will seize with jurisdiction to hear the case upon reference of the Minister. (Hassan et al, 2007, Cruz, 2008, Aun, 2006). The Industrial Court has decided many cases on the issues of retrenchment, as shown in this paper.

2. Literature review

The definition of retrenchment is clear and consistent, either given by judges or writers. Basically, retrenchment refers to an exercise carried out by an employer due to redundancy in his or her business organisation (Bidin, 2001). Redundancy occurs because of the surplus of workers in a situation where the operation costs overshot the profit. Employment law recognises the right of employers to re-organise his or her business, and if some employees have to be retretrenced or terminated, the law permits such exercise subject to certain conditions. Surplus of workers occurs not only due to financial difficulties but may also happen in cases of technological use by the employer or subscontracting of workers or certain works or sections of the company. In such situations, redundancy may occur and may follow with retrenchment of employees (Mohammed, 2006).

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Retrenchment is consequent upon a redundant situation. Jobs no longer exists because advanced technology may make certain jobs redundant, or poor economic conditions may result in an over-capacity, or the employer may no longer find it economical to run his business. (Latiff Sher Mohamed, 2006).

2.1. The Law: The Code of Conduct for Industrial Harmony 1975

There is a code that provides for matters concerning redundancy or retrenchment of workers. Under the Code of Conduct for Industrial Harmony 1975 (the "Code") signed between the Ministry of Human Resources and the Malaysian Council of Employers' Organisations (now known as Malaysian Employers Federation) and the Malaysian Trades Union Congress, the employers and employees have agreed to cooperate and resolve all disagreements and issues through peaceful means. The Industrial Court may take such Code into consideration in delivering its decision. The Code establishes ways in handling such retrenchment. Article 20 of the Code explains:

In circumstances where redundancy situation is likely to exist an employer should, in consultation with his employees' representatives of their trade union as appropriate, and in consultation with the Ministry of Human Resources, take positive steps to avert or minimize reductions of workforce by the adoption of appropriate measures such as:

- Limitation on recruitment
- Restriction of overtime work
- Restriction of work on weekly day of rest
- Reduction in the number of shifts or days worked a week
- Reduction in the number of hours of work
- Re-training and/or transfer to other department/work.

Article 21 continues to state that:

The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but before any decision on reduction is taken, there should be consultation with the workers or their trade union representatives on the reduction.

- If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures (Article 23):
- Giving as early a warning, as practicable, to the workers concerned;
- Introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;
- Retiring workers who are beyond their normal retiring age;
- Assisting, in co-operation with the Ministry of Human Resources, the workers to find work outside the undertaking;
- Spreading termination of employment over a longer period;
- Enduring that no such announcement is made before the workers and their representatives or trade union has been informed.

Based on the above, the employers are required to treat their employees fairly and in accordance with the law. For example, an employer is not allowed to single out an employee for retrenchment as an easy means of avoiding a process of performance review of the employee or to avoid a claim of unfair dismissal by the employee. The exercise of retrenchment by an employer thus must be *bona fide* and must not be a pretext for termination for some other reasons (CCH, 2009).

2.2. Notice of Retrenchment

Issuance of notice by the employer to the employee is intended to soften the impact that retrenchment will cause on the employee. Losing of jobs is no small matter to any employee and with the serving of such notice at least the employee will not be caught by surprise. Where employees are not governed by provisions on retrenchment in a collective agreement an employer is bound to give notice as in accordance with section 12 of Employment Act 1955 (MEF, 2009).

2.3. Procedure for Retrenchment

Having known the problems and pitfalls that employers have and may create, it is pertinent for employers to know and observe the procedure that needs to be followed before embarking on any retrenchment exercise, otherwise such retrenchment may be viewed as a lay-off or may lead to a finding of unreasonableness on the part of employer by the Court. Employers need to observe the following procedures:

- Firstly, the employers must consider Articles 20 to 24 of the Code in the course of the retrenchment exercise. The Court may under section 30(5A) IRA interprets a retrenchment being unfair, without just cause or excuse if an employer is not adhering to the Code. By itself, the Code has no legal force but it is a relevant factor for the purpose of determining the overall reasonableness of the employer's actions in dismissal cases (Nor Salehan Ahmad v Alcatel-Lucent Malaysia Sdn. Bhd., 2008). In the same vein, the Court found that the employer's failure to heed to the listed measures in the Code compromised the reasonableness of the retrenchment exercise (Mat Desa Saad & Another v Langkawi Ferry Services Sdn. Bhd. 1999*)*.
- Secondly, appropriate notification under section 12 of EA must be complied with. The Court will be very unsympathetic to employers if they fail to provide adequate notice to the employees.
- Thirdly, notice to the trade union for those employees with collective agreement.
- Fourthly, notice to the Labour Department in accordance with section 63 of the EA Form PK 1/98 with various stages in the course of the retrenchment exercise. Thereafter, written particulars of statements must be issued to the employee stating amount of the termination benefits and breakdown of calculation under Regulation 12 of Employment (Termination and Lay off Benefits) 1980.

2.4. Reasons for Retrenchment

Employers often use the impact of economic slowdown or downturn as the main reason to change the current mode of operations, in particular, reducing their manpower. Thus, employers often retrench employees under the guise of economic reason even though sometimes it may not be necessary to do that. While the law recognizes the rights of employers to take actions such as retrenchment due to economic or other justifiable reasons, employees too have the rights over their retrenchment and such rights derive from the reason or excuse used by employers.

2.41. Financial Difficulties

The retrenchment of an employee due to financial difficulties afflicting the company can be justified if it is carried out for profitability, economic or operational convenience of the employers business. The Courts will not interfere in the right of a company to run its business in any manner deemed fit by its own management including retrenchment of employees provided it is done in good faith. Financial difficulties could result in reorganizing, restructuring, closing or changing of the company's operational mechanism (MEF, 2009: 89).

If a company scheme for re-organisation resulted in surplus of employees, the employer should not be expected to carry the burden of economic 'dead weight' and retrenchment should be inevitable (United Services & Automotive Industries Sdn Bhd v Khong Pheng Kee & Others, 1997).

However, in the case of closure of business, the Court in had made a distinction between retrenchment due to redundancy and discharge of workmen following the business closure. If the company or employer continues with the business, the action of termination the employees is called retrenchment but if the employer close its business altogether, then the employee is said to be discharged (Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor, 1980).

In a situation where employers have no choice but to close their business for whatever reasons, the employers are understood to have full prerogative to do so; it is nothing much the law could do other than ensuring the employees receive their dues. As a result of the economic crisis, employers face financial difficulties and there is a necessity to re-organise itself. As a consequent to that, a redundancy situation existed in the company at that time leading to the claimant's retrenchment with the other staff in the laminates channel division. Based on the circumstances, the Court held that the company had established, on a balance of probabilities, that the retrenchment exercise was bona fide, and the Courts have since accepted that save for errors and mala fide, employers have the prerogative to retrench their employees using LIFO

principle as a way out of managing their financial difficulties during economic down turn (Formica (Malaysia) Sdn Bhd v Jeffrey Tham Kwok Chiew, 2003).

2.5. Process of Retrenchment

The Industrial Court has outlined well established principles for retrenchment, which are as follows:

- It is for the management to decide on the strength of the staff it considers necessary for efficiency in its undertakings. When management decides that workmen are surplus and therefore there is a need for retrenchment, an arbitration tribunal will not intervene unless it is shown that the decision was capricious or without reason or was mala fide or was actuated by victimization.
- It is the right of every employer to re-organise his business in any manner for the purpose of economy or convenience, provided he acts bona fide.
- An employer has a right to determine the volume of his staff consistent with his business and if by the implementation of the re-organisation scheme adopted for reason of economy and better management, service of some employees become excess of requirement the employer is entitled to discharge such excess.
- In the absence of any express agreement on the point, an employer is not obliged to find suitable employment for redundant workers.
- In effecting retrenchment, the employer should comply with the industrial principle of LIFO (Last In First Out) unless there are sound and valid reasons for departure. Thus an employer is not entirely denied the freedom to depart from the principle.
- Retrenchment of an employee can be justified if carried out for profitability, economy or convenience of the employer's business. Services of an employee may well become surplus if there was a reduction, dimunition or cessation of the type of work the employee was promoting (Cycle & Carriage Bintang Bhd v Cheah Hian Lim, 1992*)*.

2.6. Exceptions to LIFO

Given that LIFO is not mandatory and not a statutory provision, the employers are not bound to follow. Employers can depart from applying LIFO. The departure must however be objective and using fair selection criteria. The senior employee who was retrenched had a record of poor performance and the junior employee who was retained in favour of a more senior employee has a special skill or qualification (Supreme Corporation Bhd v Doreen Daniel Victor Daniel & Ong Kheng Liat, 1987).

3. Result Analysis

- Employers have prerogative to retrench workers but such prerogative is not without limit.
- There are parameters on how employers would implement it which includes process and procedure. The employee on the other hand could challenge the retrenchment exercise conducted or conducted by his employer on the following grounds: (i) the exercise was not done in good faith, (ii) non-compliance to any of the rules or laws or collective agreements and (iii) non-observance of the Code.
- Through the decided cases and to a certain extent from the unofficial feedback from the previous retrenchment exercises reported in the news, there were problems and pitfalls during the implementation stage.
- There is a need for improvements in the area of providing sufficient information in due time to both unions and workers involved, consultation and assistance from authority concerned, prior study of the selection criteria to be adopted, empathy towards workers and their families and proper planning and execution in accordance with the suggested process and procedure as discussed above.
- The Court plays a balancer act to keep the relationship between employers and employees in harmony. Courts' principles and the Code demonstrate that the law in Malaysia is adequate in safeguarding the rights and interests of employees in times of economic downturn where retrenchment is unavoidable.

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