



## Retrenchment: A battle between employers and employees

Retrenchment, redundancy and lay-off have been in the forefront of international news in recent times. Even large conglomerates worldwide are not spared and are in fact joining in the retrenchment moves during this time of uncertainties, hardships and declining profits.

Companies would inevitably consider scaling down operations and carrying out cost-cutting measures in order to slash off expenditures over the next few months or even years. Companies might also decide to restructure or reorganise their business for the primary purpose of sustaining the continuity of the organisation towards economic productivity and efficiency.

We understand that retrenchment is indeed a delicate and difficult situation to manage, with the employer trying to safeguard his business viability and the employee being in an unenviable position of facing the prospect of losing his means of livelihood and sustenance.

As such, we hope that the overview of the current state of the law in relation to retrenchment provided below would be beneficial to all involved.

### **Bona fide**

The Industrial Court recognises an employer's discretion to reorganise and to manage its business in such manner as it deems fit so long as the employer is able to show a reasonable basis upon which the retrenchment exercise was carried out. The various reasons which have been considered and accepted by the Industrial Court includes recession or economic downturn, losses and declining profits, outsourcing in order to reduce costs and many more.

It is crucial for the employer to show that the retrenchment exercise was done in good faith, i.e., in bona fide manner and not intended to victimize the employee.

### **Redundancy**

Redundancy is a situation whereby a surplus of labour occurs; normally as a result of reorganisation and its usual consequence is retrenchment, i.e., the termination of the employment of employees found to be surplus to the requirements of the organisation.

The occurrence of redundancy is not confined merely to a situation where the employer's business requirement for employees to carry out work of a particular kind had ceased or diminished or is expected to do so. It also includes situations where the position occupied by the employee becomes surplus to the needs of the employer even though his work had neither ceased nor diminished. It is important to note that it is the services of the employee which must be made redundant and not his position or title.

### **Criteria**

The various criteria that must be taken into account are as set out below:

#### **1. The "Last In First Out" principle ("LIFO")**

Senior employees are afforded more protection than junior employees. Employers are required to retain the services of senior employees in favour of junior employees unless there are circumstances that would justify the departure from the LIFO principle.



Such circumstances include the ability, compatibility, suitability and efficiency of junior employees in light of a specific need or interest of the employer.

Failure to comply with the LIFO principle may result in a finding of unfair dismissal unless such failure is justifiable.

## 2. The Code of Conduct for Industrial Harmony

The Code of Conduct for Industrial Harmony provides guidelines and measures which are recommended prior to a retrenchment exercise, which shall be the last resort. The guidelines and measures are as follows:

- 2.1 freezing the recruitment of new employees except in critical areas;
- 2.2 limiting work on rest days and public holidays;
- 2.3 reducing the number of working days in a week or shift work as well as normal hours of work;
- 2.4 retraining and/or transfer to another department and/or work; and
- 2.5 implementing a fair pay cut to all levels as a cost-cutting measure.

In the event a retrenchment exercise is still required despite having taken the proper measures, the employers should then inform and conduct a discussion with the affected employees on a possible retrenchment exercise. The employer should provide retrenchment benefits according to the company's policies or company handbook which form part of the terms and conditions of the contract of employment.

In selecting the employees to be retrenched, the employer shall take into account the ability, experience, skill and qualification, length of service, status of employee, age and family situation of each individual employee.

## 3. PK Form

The employer is required to notify the nearest Labour Department at least 30 days before the intended retrenchment date by way of submission of a PK Form.

### Conclusion

A retrenchment exercise is ultimately a juggling act between an employer's prerogative to safeguard his business and the employee's right to livelihood and security of tenure.

Taking into account the above, employers should be mindful of all the necessary legal requirements and principles prior to the commencement of a retrenchment exercise bearing in mind that the application of the law may vary and differ given that each scenario is distinct and unique.

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