

ESTHER ONG HUI CHUEN

**From Messrs Esther Ong
Tengku Saiful & Sree.**

**RETRENCHMENT &
TEMPORARY LAY
OFF**



WHAT IS RETRENCHMENT?

Industrial Relations Act 1967 does not specifically define "retrenchment".

In *William Jacks & Co. (M) Sdn. Bhd. V. S. Balasingam* [1997] 3 CLJ 235 Gopal Sri Ram JCA gave the meaning of "retrenchment" as follows:-

'Retrenchment means: "the **discharge of surplus labour** or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per SK Das J, in *Hariprasad V. Divelkar* AIR [1957] SC 121 at p 132).'

CAN EMPLOYER RETRENCH AN EMPLOYEE?

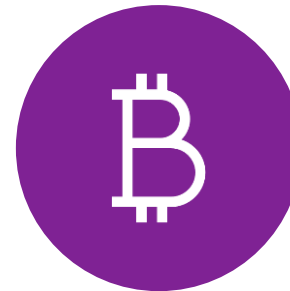


- YES.
- It is prerogative of the employer to take decision in respect of the dismissal of the employee.

4 Key Legal Principles For Ensuring Legal Retrenchment



Redundancy and
Closure of Business



Compliance of Code of
Conduct for Industrial
Harmony (“CCIH”)



Retrenchment Benefits



Industrial Court as a
forum to challenge
retrenchment

1ST PRINCIPLE : REDUNDANCY

The employer may terminate the services of an employee by reason of redundancy as described below:

- i. the business in which the employee was **employed no longer exists** or are **expected to cease or diminish** - Employment Act 1955 (Act 265) s 12(3)(c);
- ii. the business in which the employee was **contracted to work (outsourcing) no longer exists** or are **expected to cease or diminish** - Employment Act 1955 (Act 265) s 12(3)(d);
- iii. the requirement of the work for which the employee was engaged for **no longer exists**;
- iv. **reduction in profit**; or
- v. situation where there is a **surplus of labour**. [*Woo Vain Chan v Malayawata Steel Bhd (currently known as Ann Joo Steel Bhd)* [2016] 2 MLJ 848]

2nd Principle : Compliance of Code of Conduct for Industrial Harmony (“CCIH”)

- The CCIH is an acceptable industrial relation practice and also recognized by law as a factor to be considered in determining whether the **retrenchment was carried out genuinely and justifiably**.
- For example, in circumstances where redundancy is likely an **employer should take positive steps to avert or minimize reductions** of the workforce by the adopting measures such as:-
 - (a) Limitation on recruitment
 - (b) Restriction of overtime work
 - (c) **Restriction of work** on the weekly day of rest
 - (d) Reduction in number of shifts or days worked a week
 - (e) Reduction in the number of **hours of work**
 - (f) **Re-training** and/or transfer to other department/work.

In the event, Employer has no choice but to retrench, foreign employees followed by LIFO principle ('last in, first out') in respect of local citizens is mandatory to be taken into account (Employer may depart from the principle subject to valid reasons) and the following measures should be taken:-

- a) Give early **warning**;
- b) Introducing schemes for **Mutual Separation Scheme (or MSS)** and for payment of redundancy and retirement benefits;
- c) **Retiring workers** who are beyond their normal retiring age;
- d) Assisting in job **searching**;

- d) Spreading termination of employment **over a longer period**;
- e) Ensuring that **no such announcement** is made before the workers and their representatives or trade union has been informed; and
- f) establish **clear and objective selection criteria** in retrenchment. (e.g. (i) ability, experience, skill and occupational qualifications of an individual worker, (ii) length of service and status (non-citizens, casual, temporary, permanent), (iii) age and (iv) family situation) .

3rd Principle : Retrenchment Benefits

- The retrenched employee must be compensated with adequate compensation where the company is in a financial position to afford to do so.
- In **James Lim Hee Meng vs Pengkalen Holdings Bhd [2005] 5 MELR 448**, Muniandy Kannyappan J, Chairman of the Industrial Court noted that the purpose of **retrenchment benefits is to:**

Serves as a cushion against the hardships faced by an employee who has to contend with the loss of his employment and the consequential loss of his immediate means to earn an income.

3rd Principle : Retrenchment Benefits

- In the context of good industrial relations practice, it serves to minimise resistance and opposition to genuine reorganisation measures undertaken by management.
- It acknowledges a workman's security of tenure and recognises the fact that through no fault of his, **such security of tenure has to be given away to his employer's overriding interest of economy and efficiency.**

Issue: whether there ought to be an award of compensation for this breach of the Code.

- **quantum of compensation** for redundancy benefits and/or compensation need **not necessarily be based on the full measure** as in ordinary case of a **dismissal**
- Here there was a **genuine redundancy situation. The company had arrived at a bona fide decision to retrench** the claimant pursuant to the closure of its Sabah office.
- **NOT** the case of an employer who had used the excuse of redundancy and the exercise of retrenchment as a **cloak for victimisation of an employee.**
- **Failed to give notice** AND to **provide some benefits** when undertaking the discharge of surplus staff
- HELD: 1.5 month's salary for each year of service, NO BACK WAGES

- The relevant provisions are found in regulations of the
- **Employment (Termination and Lay-off Benefits) Regulations 1990**. These provisions are only applicable to employees under the purview of the Employment Act 1955.

Length of Service	Termination Benefits	Length of Notice
Less than 2 years	10 days' wages for every year of service	Not less than 4 weeks
2 years or more, but less than 5 years	15 days' wages for every year of service	Not less than 6 weeks
5 years or more	20 days' wages for every year of service	Not less than 8 weeks

and pro rated in respect of an incomplete year, calculated to the nearest month.

For employees not covered under the Employment Act 1955, their termination benefits would depend on the terms of their contract.

Dr.H.C Huang Consultancy Engineers Sdn.Bhd v Encik Lim Choon Ntia [2000] ILJU 93

4th Principle : Industrial Court as a forum to challenge retrenchment

- Employee can always challenge retrenchment.
- The **burden of proving** that the retrenchment was bona fide lies on the **employer**, and it is not on the employee to show that the retrenchment was unfair.
- Employer must prove that the retrenchment is **conducted fairly**, for **valid reasons** and be untainted by any unfair labour practice

What have to be done before the actual retrenchment?

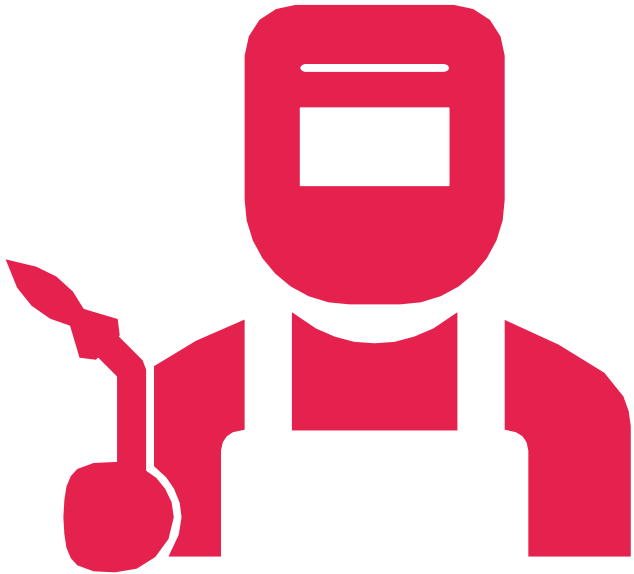
Must inform the retrenchment to the Labour Office before any act of termination action through the prescribed Termination Form [lodgement of PK Form].

The PK Form is filed in parts and in stages, the first taking place 30 days before the actual retrenchment, and the rest to be filed within 14 days and 30 days after the date of retrenchment.

The PK Form is a notification requirement and employers do not need approval from the labour office for retrenchment.

Failure to submit the retrenchment report within the specified timeline is an offence and can be fined for not more that RM10,000 for each offence.

What is Temporary Lay-off?



- The Employer is
- **unable to provide works** to the employee and
- the factory/office has to **shut down temporarily due to certain genuine reasons** or emergency such as cut back in production and non-delivery of materials by suppliers due to MCO.

THE MALAYSIAN LAW REGARDING TO TEMPORARY LAY-OFF¹⁷

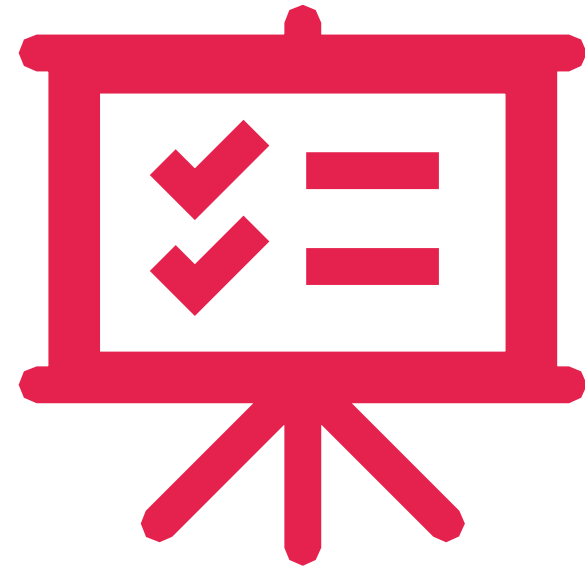
Dunlop Malaysian Industries Berhad v. Dunlop Malaysian Industries Employees Union [1982] 1 MELR, Industrial Court.

Harun J

- In the **absence of legislation in this country on temporary (suspensory) lay-off and short-time**, it may be necessary for the parties to make **provisions for some form of compensation** to be paid to the employees during periods of temporary shutdown or cut-back in production
- We are in agreement with the Company that **it is not fair that it be required to pay full wages to its employees during the period of the cut-back in production when the employees did no work at all**, but as there is **no provision in its Collective Agreement** with the Union for part-payment or salary deduction during periods of temporary lay-off and short-time we **cannot order the deduction of the salaries** of the 299 employees affected in this case.

FACTORS TO BE CONSIDERED BEFORE TAKING THE OPTION OF TEMPORARY LAY OFF

- Therefore, in considering whether the Employer should opt for temporary lay off during MCO period, the Employer may consider the following:-
 - (i) Whether there is any **provision in the Employment Contract / Collective Agreement** for temporary lay off?
 - (ii) If there is provision for temporary lay off in the Employment Contract/Collective Agreement, how much is the **temporary lay off remuneration** being stated there?
 - (iii) If there is no such provision in the Employment Contract/Collective Agreement, possibility of the Employer to **negotiate with the Employee** for the temporary lay off as well as the sum of of temporary lay-off remuneration?



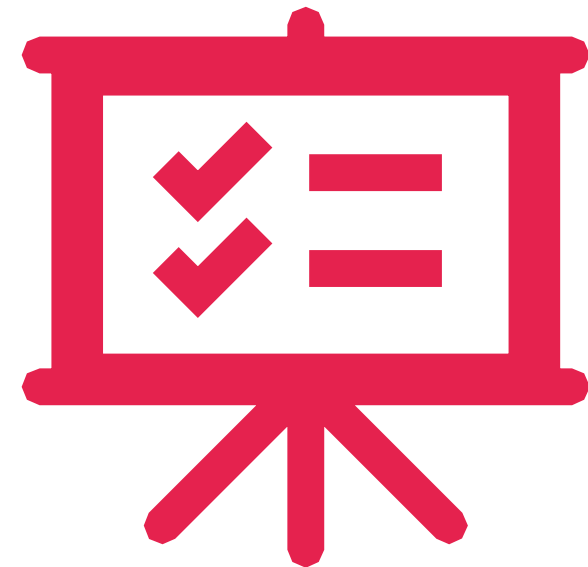
JOHORE PLYWOOD MANUFACTURING CO SDN BHD VS TIMBER EMPLOYEES UNION 1983 1 MELR 38

- This is a complaint of non-compliance with a term of a collective agreement. Article 30:
 - (i) ..due to stoppage/shutdown, full wages for 1st 4 days
 - (ii) But the situation is non supply of raw materials & declining demand for the Co's products

Court Finding: Court found insufficient evidence **to vary the agreement upon special circumstances**

& ordered the Company to pay full 4 days' wages

Q: Can Covid19 be considered a special circumstance



THANK YOU

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