THE LAW OF RETRENCHMENT IN MALAYSIA

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MASTER OF LAW
UNIVERSITI UTARA MALAYSIA
DECEMBER, 2016

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Project paper submitted to the Ghazali Shafie Graduate School of Government in the fulfillment of the requirement for the Master of Human Resource Law
UNIVERSITI UTARA MALAYSIA
DECEMBER, 2016

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Abstrak

Pemberhentian pekerja adalah penamatan kontrak pekerjaan oleh majikan dengan pakej pampasan. Pemberhentian pekerja berlaku apabila terdapat lebihan pekerja. Menurut Kesatuan Sekerja Majikan dalam tahun 2015 lebih daripada 20,000 pekerja telah diberhentikan dan meramalkan bahawa keadaan ini akan menjadi lebih teruk pada tahun 2016. Oleh yang demikian, objektif kajian ini ialah untuk mengkaji undang-undang, prosedur dan proses dalam pemberhentian pekerja di Malaysia. Metodologi kajian yang digunakan adalah ialah kajian undang-undang tulen dan sumber data adalah dari kajian ke atas kes-kes yang telah diputuskan, jurnal, dokumen perundangan, artikel dan juga buku teks. Hasil kajian menunjukkan bahawa kebanyakan award pemberhentian dibuat tidak memihak kepada majikan disebabkan tindakan pemberhentian pekerja yang melanggar undang-undang yang berkaitan dan prosedur yang ditetapkan. Kajian mencadangkan bahawa majikan perlu mengikut prosedur yang betul dalam pemberhentian pekerja. Kajian ini juga mencadangkan bahawa pakej pampasan perlu disediakan untuk pekerja-pekerja yang tidak termasuk di bawah Jadual Pertama Akta Kerja 1955.

Kata kunci: Pemberhentian Pekerja, Malaysia, pampasan, prosedur dan proses.

Abstract

Retrenchment is a termination of any employment contract by the employer with a compensation package. A retrenchment happened when there is a redundancy of workers. According to Malaysian Employers Federation (MEF) as in 2015 more than 20,000 employees were retrenched and predicted that it will get worse in 2016. Therefore, the objective of the present study was to examine the law, procedure and process of retrenchment in Malaysia. The methodology used in this research is a pure legal research and data is collected from decided cases, journals, legal documents, articles and text books. The findings revealed that many of the retrenchment awards were made against the employers due to the retrenchment exercise which violated the relevant statutes and the established procedures. The study suggests that the employer should follow the proper procedures in retrenching the employees. The study also suggests that a compensation package should be provided for those workers who do not fall under the first schedule of Employment Act 1955.

Keywords: Retrenchment, Malaysia, compensation, procedure and process.

Acknowledgement

"In the name of God, most Gracious, most Compassionate".

Firstly, I would like to express my appreciation to my supervisor Dr. Marina Bt Hj Hashim for his patience, constructive, suggestions, encouragement, and excellent advice throughout this study. I also appreciate the time he spent discussing the progress of the study.

Furthermore, I am also thankful to all my colleagues and friends at UUM, especially from the faculty of College of Law, Government and International Studies for their help and support, and with whom I shared pleasant times. I am deeply and forever indebted to the people in my life who touched my heart and gave me strength to move forward to something better, the people who inspire me to breathe who encourage me to understand who I am, and who believe in me when no one else did.

Thank you for everything…

Above all, special thanks to my family. Words cannot express how I want to greet my mother who was my source of inspiration, I also dedicate this “simple act” to the soul of the deceased my father Ghaleb Atshan for all his sacrifices that you have made on my behalf, and to the soul of the deceased my brother Faris Ghaleb, who is always in our hearts, and to the soul of my deceased uncle Rashad Daoud(a spirit and heart good). I would also like to thank my dear wife Mrs Hiba Abdulrazzaq Ahmed on her patience, support and praying to me. Lastly I would like to thank all my family members for their encouragement and support throughout the period of my study.

Mr. Nassrullah Ghaleb Atshan

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LIST OF ABBREVIATIONS

SARS	Severe Acute Respiratory Syndrome
MAS	Malaysia Airlines System
LIFO	Last In, First out
VSS	Voluntary Separation Schemes
FWFO	Foreign Workers, although Senior, must go First Out
EA	Employment Act
IRA	Industrial Relations Act

CHAPTER ONE
INTRODUCTION

1.1 Background of the study

The security of employment guarantees the regular income that a workman sustains for himself and look forward towards a secure retirement. When an employer is not satisfied with his job workman does not enjoy security in continuity of employment, he would not be able to meet the needs of his monthly monetary needs respect of himself, his family and schooling children (Marsono & Kamaruzaman, 2008). This highlights the importance of job security in the form of continuity in employment in an organization.

However, during a period of economic downturn, business owners or employers would experience difficulty in maintaining their business. So, to ensure the smooth running of their business an additional responsibility occurs on the employer. Employers are entitled to make their business more efficient through reorganization or other cost saving measures (Mohamed & Baig, 2012). They can also declare redundancies whenever necessary in the interest of the business. The employer had the prerogative to reorganize or restructure for the better business management thereby retrenching surplus labor (Mohamed & Baig, 2012).

Unfortunately the very existence of retrenchment, however, denies a worker the job security which he expects. Losing one's job due to redundancy can be a distressing experience that inflicts severe economic hardship on the affected worker (Mohamed & Baig, 2012). This can sometimes shatter the life of the worker as it has the

financial effects and psychological effects. The distressed worker would be deprived of his major source of income (Benach et al., 2014).

A retrenched worker would face difficulty in finding another job with similar status and the labor market would be flooded with other job seekers possessing very similar job skills and work experience. Furthermore, many retrenched workers would not be able to change from one job to another with complete ease. The effect of job loss would become more apparent if the worker had been in service for a long time and if his job involves only specific skills, which may be of little use to potential employers (Maslach, Schaufeli & Leiter, 2001). Workers who are unable to use their skills in their new employment, are likely to experience psychological adjustments (Maslach, Schaufeli & Leiter, 2001). Coping with these problems in turn can create an enormous amount of physical and mental stress, which may contribute to social and psychological disorders (Macdonald, 2006). This could lead to dissatisfaction with life and general psychological depression, which increases with continued unemployment (Hergenrather et al., 2015).

1.2 Problem statement

The stability of employment is generally dependent on the economic situation of the country. 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 especially 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 (Ramayah, Jantan, & Chandramohan (2004).

Many countries around the world including Malaysia have experienced several economic recessions and downturns over the past years. In Malaysia, for example, in 1986 the price of major export commodities such as rubber, tin, palm oil, among others, fell sharply (Afroz, Hassan & Ibrahim, 2003). The Malaysian economy started undergoing an economic decline with jobs becoming increasingly scarce and a number of large companies previously considered to be stable also undergoing retrenchments. Again, the economic recession in 1997 was the worst Malaysia had ever experienced. It emanated principally from a financial crisis and stock market collapse with a massive reversal of foreign capital flow, which had in turn dramatically affected the economy of the country (Ariffin, 1997).

The September 11 incident in 2001, in the United States of America, has worsened the Malaysian business community. Being an export orientated economy and one of the leading exporters of semiconductors and air-conditioners, Malaysia suffered the effects of the drop-in exports to countries like United States. Two years later, the war on Iraq by coalition forces led by the United States and outbreak of severe acute respiratory syndrome (SARS) also affected the economy of Malaysia (Thavarajah, & Low, 2001).

This resulted in slump in business that led many companies including some of the biggest corporations, into trouble because of severely reduced profits. They suffered

big losses, some even having to restructure or reorganize their businesses in the form of take-overs and mergers; those that were worst affected suffered closure of business. This caused a rise in unemployment owing to retrenchment in many sectors of the economy. Newcomers to the labour market found it even more difficult to get jobs. The hard-hit sectors were mostly in manufacturing. commerce, transport, communication, finance and other business services (Aminuddin, 1999).

However, the retrenchment of workers on grounds of redundancy is a difficult area of labor law as it has to do with the industrial relations. It raises concerns about economic efficiency, industrial autonomy and social justice (Thavarajah, & Low, 2001). Moreover, if the employer carries on business in times of difficulty, it may leads to a situation, both the employer and the worker would be at risk of losing their livelihood. Therefore, to sacrifice some workers thereby saving the business and the employment of the remaining employees there is a need to restructure the organization (Ariffin, 1997).

Now the study will highlight some of the problem in laws of retrenchment in Malaysian context. In Malaysia, the existing provisions on retrenchment are scattered in the form of regulations, codes, Ministry guidelines and decided cases (Mohamed & Baig, 2012). As retrenchment of workers cannot be done solely using labor law as the courts cannot intervene with the management's decisions in the respect to decide how many employees a company should have and how many of them should be retrenched. As 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 cases to determine whether retrenchment was procedurally fair. These provisions, however, have not clearly defined the proper procedure to be followed in an impending retrenchment exercise. Due to this the employer finds it difficult to follow the proper procedures of retrenchment. This has left many employers dismissing workers under the guise of retrenchment when they are actually being dismissed without just cause or excuse (Ayadurai, 1996). For example, in the case of *Harris Solid State (M) Sdn Bh d& Ors v Bruno Gentil Pereira and Ors [1996]*[1]

> *"Where the termination of the claimants was started to be on operational grounds. The claimants were all union members; thus, the court concluded that it was actuated by victimization and unfair labor practices".*

Secondly, retrenchment must follow the justifiable grounds. Retrenchment of workers on grounds of redundancy is a difficult situation as it involves employees who have done no wrong. They are, in most cases, to be regarded as competent and loyal workers to be dismissed due to economic needs. Therefore, the procedure involved in making an employee redundant should be carried out properly and the employer must have been justifiably dismissed. To avoid a claim of unjustified dismissal, an employer must be able to prove that the redundancy was genuine and it follow a fair procedure in implementing the redundancy. For example, in case of *Gabungan Persahaan Minyak Lengkap Sdn V Heng Mee Oo (1990) 2ILR 33*[2] where

the claimant was made redundant but the job with the same duties and functions remained. Retrenchment was held to be not genuine. Therefore, termination of an employment contract must flow from justifiable grounds of redundancy and this includes grounds of redundancy, which must be bonafide and untainted by unfair labor practice. An employer's unilateral decleration of redundancy must be justified on the basis of genuine commercial reasons and the decision to dismiss must be done in good faith and carried out with fairness (Mohamed & Baig, 2012).

Thirdly, provision of termination benefits. The term termination in industrial law refers to the termination of the employment relationship. The employer may terminate the contract when he retrenches the employee. In Malaysia, the Employment (Termination and Lay-off Benefits) Regulations 1980 (the 1980 Regulations), provides legislative protection to employees for involuntary termination of employment. The above Regulations are applicable only to certain categories of "employees" under First Schedule of the Employment Act 1955. The said Act only applies to manual laborers, those whose wages are RM 2000 or below. Workers who do not come within the Act may have their legal rights protected in a collective agreement concluded by the employer and the workers' trade union. However, those not governed by a collective agreement, and in the absence of any specific provision in individual contracts of employment, will not be entitled to any termination benefits in the event of retrenchment (Mohamed & Baig, 2012). Furthermore, when a redundancy situation has caused a worker to be retrenched, the affected worker must be subject to retrenchment benefits based on the length of his service with his former employer. The aim of these benefits is to help the employee

cope with the difficulties of job loss and to reward him for his loyalty and service to the company. Therefore, there is a need to address the compensation of these employees.

The academic studies in the area of employment law in Malaysia are limited but there has been a growth over the years. Over the last two decades, some of the authors who have written about Malaysian employment laws (Ayadurai, 1996; Anantaraman, 1997; 2005, Rozanah, 1998; C'ruz, 1999; Idid, 1993; Rajkumar,1999). Although there are many articles, write ups and coverage on the topic of retrenchment written in the context of Malaysia however, specific academic studies in the laws, process and procedures of retrenchment area are limited. One of the most recent studies on retrenchment in Malaysia was done by Marsono and Yussof (2008) from the perspectives of the employers' legal right to retrench. Therefore further studies on retrenchment law and its implications to human resource management in the Malaysian retrenchment is necessciated.

1.3 Research questions

The research problem stated above can be translated into the following research questions:

1. What are the laws and procedures of retrenchment in Malaysia?
2. What are the process of retrenchment in Malaysia?
3. What could be the recommendations to improve the existing law of retrenchment in Malaysia

1.4 Research objectives

Based on the research questions stated above, the research objectives of the study can be formulated as follows:

1. To examine laws and procedures of retrenchment in Malaysia
2. To examine the process of retrenchment in Malaysia.
3. To recommend improvement in the existing law in retrenchment of Malaysia.

1.5 Significance of the study

This study is significant in at least three different ways. First, the findings of this study will improve both policy and practice in the organization specifically in Malaysia. Second, it also has the potential to add to the corpus of knowledge in the field of the retrenchment. In addition, this study may also benefit and assists the researchers, teachers, law students to serve as a reference. Third, this study is of great importance for the Malaysian context because it examines the issue of laws, process and procedures of retrenchment at a time when the Malaysian government is undergoing large number of retrenchments.

1.6 Conclusion

Retrenchment is very difficult to cope with from both the employer's and employee's side, with the employer trying to save his business viability and the employee having to lose his job and means of sustenance. It is a battle between an employer's prerogative to secure his business and the employee's right to security of tenure.

Retrenchment of workers can arise due to various reasons such as closure, sale of company, shift to automated system, reorganisation and restructuring, among others, A global economic downturn which eventually leads to recession is another reason why change has to be made for the employer to survive in a crippling economy. When a company is fighting for its survival due to recession or economic downturn and a decision to downsize the workforce is set, there is little recognition of the employee's long service or excellent performance. Therefore, the study is conducted to highlight the laws and procedures that should be implemented while carrying retrenchment.

CHAPTER TWO
LITERATURE REVIEW

2.1 Introduction

All retrenchments are terminations, but not all terminations are retrenchments (Mohamed & Baig, 2012). When an employee is retrenched, this amounts to a termination of his services. When an employee's services have been terminated, it does not necessarily mean that he has been retrenched however retrenchment is one of the methods in which an employee's services can be terminated (Mohamed & Baig, 2012). There are other reasons for which an employee's services can be terminated, namely misconduct, attaining the age of retirement and voluntary termination by the employee himself (Mohamed & Baig, 2012).

The most valuable assets of any country are its employees. The highest number of retrenchments within a five-year span was recorded last year 2015. According to the Human Resources Ministry, there were about 38,499 layoffs across all sectors. However, the manufacturing sector had the highest number of retrenchments over the last three years. The highest number of retrenchments was recorded in 2007 (42,336), 2008 (47,145) and 2009 (64,516). In January this year, 5,009 workers were retrenched compared to November (9,986) and December (5,758) last year (Malaysian insider, 2016).

In Malaysia, more than 20,000 employees from various sectors were terminated due to redundancy in the year 2013. In 2014, it was reported that there were more than 10,000 retrenchments. Even though the economy is expected to grow by 4.7%, the

outlook for most sectors is not very encouraging, and it has been very challenging (Malaysian insider, 2016).

Malaysia Airlines' (MAS) has retrenched 6,000 employees during the restructuring and this contributed quite a huge percentage to the total retrenchment in 2015 (Malaysian insider, 2016). By the end of 2015, the total number of retrenchment was about 25,000 employees (of total retrenchments). This is expected to continue in 2016 because this year has not seen as a positive year. Besides this according to the Human Resources Ministry the government sector stops hiring people in the public sector except for critical positions and limited hiring new employees therefore frozen the hiring for 15,000 people (Malaysian insider, 2016).

2.2 The commonly used terminology

In England, the term "dismissal by reason of redundancy" is used for purposes of downsizing the workforce (Whincup, 2014). Whereas in Malaysia, the terms "retrenchment", termination" and "lay-off" are used interchangeably. These terms, however, should be understood individually as they have their own distinct meanings (Mohamed & Baig, 2012). An analysis of the above terminologies forms the basis of this chapter. The discussion is important because there have been inconsistencies regarding the definition of retrenchment and different opinions regarding certain issues on this subject. As retrenchment exercises are to be carried out only under genuine circumstances, it is necessary that a comprehensive definition of retrenchment should be formulated (Whincup, 2014).

2.2.1 Reorganization

The act of organizing or the state of being organized again is known as (Collins English Dictionary, 2012). The term reorganization means the right to reorganize the business for the reasons of better economy that are found to be redundant by an employer (Ayadurai, 1996). Right to reorganize one's business is an inherent right vested in every employer. It is a right to maximize factors of production in the interests of profitability of a business. A reorganization may involve closure or scaling down of business operations in an effort to channel factors of production the more profitable parts of the business. Alternatively, it may involve re-deploying the resources of the business to one location and giving up the other locations, or it may take the form of a merger of two business organisations with the end result requiring only one set of employees (Bidin, Khan & Tan, 2012). The variations or permutations are infinite as far as the business ingenuity of man can suggest (Bidin, Khan & Tan, 2012).

Reorganization is therefore an indication that times are bad and this can normally be followed by retrenchments. After the last economic recession in 1985, Malaysia moved to the status of full employment with rapid economic recovery and growth. The recession in 1997 principally emanated from a currency crisis in the region and initially the sectors most affected were those dependent on foreign exchange transactions. These were largely businesses that were dependent on foreign purchases for their operations like the purchase of raw material or equipment, which invariably was pegged to the US dollar. Thus, the impact on the rest of the economy causing the general downturn in business, was secondary in effect.

In some reorganizations, there will arise situations where the restructuring is left with surplus employee's. This is because once a company is restructured, duties are differently assigned, transfers may take place, the level of production might change, some eliminated completely. It must be acknowledged at this stage that an employer often has good reasons to reorganise his business and to determine the size of his workforce (Hew, 2002).

Reorganization may be caused by various reasons. Financial crisis or closure of business due to slowdown of the economy. Some of the examples of reorganization is in *Wha Hay Mooi v Acterna Malaysia sdn Bhd 2010 LNS 0002(Award No. 2 of 2010), Khadijah Mahmud, Chairman of the Industrial Court*[3] *stated:-*

> "The company has the right to reorganise its business for reason of better economy or better management and to retrench any personnel found to be redundant. When the company reorganises its business operation, the company is entitled to economise its operations including reducing labour cost. It is the company's right and privilege to structure its operation in the manner that best fits its requirements. The court finds that the reorganisation of the company was a bona fide need and as such the court has no reason to interfere with the company's prerogative."

2.2.2 Redundancy

Redundancy has been further defined as superfluity, profusion or abundance (Oxford English Dictionary, 1973). In the context of labour law, it means a surplus and due to

this superfluity, workers need to be removed or retrenched (Ayadurai, 1996). In other words, redundancy occurs when the employer has ceased, intends to cease in continuing the business. It can also arise where work has ceased or diminished. This means that a redundancy would eventually lead to retrenchment. Dunstan Ayadurai, (1996) describes redundancy as follow:-

> "A surplus of labour is normally the result of a reorganization and its usual consequence is retrenchment, i.e.: the termination by the employer of those employees found to be surplus to the requirements of the organization".

2.2.3 Retrenchment

Retrenchment literally means a "reduction or curtailment of cost or expenses". It is a cutting of expenses or spending in response to economic difficulty (Johnson, Latham, & Todd, 1866). The Shorter Oxford English Dictionary (1973) defined "retrenchment as the act of cutting down, off, or out, curtailment, limitation, reduction" This definition does not specifically refer to the labour industry. However, it does spell out the basic idea of retrenchment, that is, a step that has to be taken to cut down expenses. Venkataramaiya's Law Lexicon Desai, 1983 states:-

> "Retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged and the termination of services of all the workmen as a result of the closure of the business cannot therefore be properly described as retrenchment."

The Ministry of Human Resources Malaysia, has defined the retrenchment as the termination of the contract service of the employer due to redundancy. The redundancy situation can arise from several factors such as closure of business, restructuring, reduction in production, mergers, technological changes, take-over, economic downturn and others.

Further, in *Pipraich Sugar Mills LTD v Pipraich Sugar Mills Mazdoor Union, 1957*[4] it was stated :-

> "Retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplus. The termination of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment."

From the above discussion, it is clear that retrenchment basically means, an act by the employer in terminating the services of his employee because the employee has become a surplus to the requirement of the organization. This is due to various reasons such as reduction, diminution, or cessation of the type of work in the organization. It needs to be understood that there will be times when the management suffers losses or sometimes there is a need to reorganize a business. At times, such as these, the employer might need to reduce its staff by terminating their services. This act of termination is called retrenchment (Ayadurai, 1996).

2.3 Reasons for retrenchment

There are various reasons for retrenchment. Few of them are as follows:-

2.3.1 Global Economic Slowdown

Global economic problems do not usually happen overnight except, if they happen the way they did on September 11, 2001, when America awoke to an attack on the World Trade Centre in New York that ruins one of the most famous symbols of its capitalism (Muniapan, 2015). Even before the horrific event of September 11, Asia was preparing for a global economic slowdown, and thereafter the region's countries had to navigate a longer and more painful path to recovery. For example, fear of terrorism coupled with the nosedive in the global economy had hammered the aviation industry.

Recession refers to an economic decline of temporary nature, in which trade and industrial activity are reduced. Running a company in a blooming economy is relatively easy and rewarding. However, doing the same in a downturn is less forgiving, with uncertainty in the business climate, and employers having to make decisions they never faced before, most of which would center on cost cutting. In 1974, Malaysia experienced a recession followed again in 1986 on a greater scale. Malaysia tried to overcome this by implementing several shifts in policy since the 1970s and 1980s. However, 1997 saw yet a bigger currency crisis where many corporations went into distress, with some still trying to recover.

2.3.2 Losses and Declining Profits

This is a situation where a company faces losses of any nature, for example, caused by temporary or permanent decline in or loss of trade or work (Muniapan**,** 2006). Due to this reason, the volume of work reduces and therefore results in redundancies and retrenchments. In *Koperatif Perumahan Angkatan Tentera Berhad v Meor Othman Lofti bin Abdul Latiph*, *1994*[5] the Industrial Court stated:-

> "Retrenchment of an employee can be justified if carried out for profitability, economy or convenience of the employer's business. Services of employee may well become surplus if there was reduction, diminution or cessation of the type of work the employee was performing."

2.3.3 Take-Overs and Mergers

Take-overs and mergers are a result of restructuring or reorganisation. Restructuring sometimes causes redundancy and thus workers need to be retrenched. A take-over is where some person(s) acquires a certain number of shares in a company and this gave them the right to control the company. Often it is a full take-over where 100% of the shares are acquired; however a partial take-over is also possible. "Take-overs in Malaysia are mainly regulated by Part IV of the Securities Commission Act 1993 (Act 498), the Malaysian Code on Take-overs and Mergers 2010."

2.3.4 Automation

Automation is better understood as "from manual to robotic"(Muniapan**,** 2006). It means reorganisation due to improved technology. In this case, "it can be seen that

there is no reduction in the volume of work of any kind, but the requirement of the employer for as many persons to do the work may be reduced because of improved mechanisation, automation or other technical advancement (Muniapan**,** 2006)."

2.3.5 Change in the nature of work

Change in the nature of work could also be the consequence of a reorganisation. A good example would be the case of *Amos and others Max-Are Ltd, 1937*[6], where the employees worked at a metal factory. Due to reorganisation, the stainless steel business that the employees had been working in was sub-contracted and the employer expanded to work on black metals. The employees refused to work with black metal because less remuneration was paid for that and they claimed that they had been made redundant and be retrenched (Parasuraman, 2004).

2.3.6 Change in terms and conditions of services

A reorganisation will not always result in redundancies. Sometimes, an employer needs to amend or change a few terms and conditions in the contract of services based on the needs of his business: the employer for example has to change the working time, shift work, withdrawing certain benefits such as transport, and non-essential benefits. Changes like these might not necessarily lead to retrenchment because the job still exists and there is work to do. But some changes that involve mobility, for example, or transfer of employees to an unreasonable distance due to closure of one of the branches, may involve issues of redundancy (Rajkumar, 1999).

2.3.7 Outsourcing

Outsourcing is basically the exercise of contracting out a company's non-core activity or business process to a third party so that the company can concentrate on its core business. The outsourcing company will then make it its core business. It helps companies cut cost as their budgets are tightened due to certain reasons such as economic slowdown (Todd & Peetz, 2001).

2.4 Types of retrenchment method

There are 3 common types of retrenchment in Malaysia:-

1. Involuntary Separation

2. Voluntary Separation

3. Mutual Separation

2.4.1 Involuntary Separation

"This type of retrenchment occurs when an employee has no control over the decision to retrench. Retrenchment planning is fully decided by the employer. It is a common retrenchment exercise where companies can lay off workers due to cost, business or operational factors. In involuntary separation the selected employees should be given reasonable time before retrenching them and the retrenchment should comply with legal requirement when compensation is given to them."

2.4.2 Voluntary Separation

“Involuntary separation provides an employees with the choice to decide whether he/she is willing and ready to accept his/her contract to be ceased or no. This type of retrenchment exercise gives both parties the advantage. Employees can review the criteria and terms and the lay- off package offered before they decide to apply for it. However, for employer, it helps to reorganize their manpower and promote career pathway for younger employees when senior employees are given a choice for alternative employment options along with an attractive lay off package.”

2.4.3 Mutual Separation

“Mutual Separation provides both employer and the employee who are selected to be retrenched to negotiate terms and conditions for retrenchment. However, the employees can still negotiate a better and attractive lay off benefits as long as both parties are agreeable. In this type of retrenchment exercise both the employer and employee are satisfied and happy.”

2.5 Retrenchment management under the Code of Conduct For Industrial Harmony

The Code, in the document on "Areas for Co-Operation And Agreed Industrial Relations Practices" provided under Clause 20, stipulates the guidelines for employers in the event of redundancy and retrenchment (Kuruvilla & Arudsothy, 1995).

Where redundancy is imminent, the Code recommends that the employer should take to minimise reduction of workforce by adopting the following measures:-

- limitation on recruitment;
- restriction of overtime work;
- restriction in number of shifts or days worked in a week;
- reduction in the number of hours of work;
- re-training and/or transfer to other departments/work.

"The Code also recommends that "prior consultation should be made with the employees and the trade union before steps are taken to reduce the workforce, i e. if retrenchment becomes necessary, the employer should adopt the following measures":-

- "provide early warnings to the workers concerned;
- implement schemes for voluntary separation and retirement including payment of redundancy and retirement benefits;
- retire employees who are beyond their normal retirement age;
- spread termination of employment over a longer period;
- ensure that no announcement on retrenchment is made before the workers and their representatives or trade union have been informed."

“The Code also encourages the employer to select employees to be retrenched in accordance with some objective criteria. Such criteria should be worked out in advance with the employees' representative or trade union, as appropriate.”

Although the Code may not be legally binding, the Industrial Court encourages compliance with the Code. Should there be any blatant disregard to the Code, the Industrial Court may conclude that the retrenchment exercise was carried out mala fide and for other co-lateral purposes.

2.6 Principle of retrenchment

The principles that an employer should follow while retrenching an employee are discussed below:-

2.6.1 LIFO Principle:

The principle of LIFO ("Last In, First out) has become entrenched in carrying out any retrenchment exercise. “The Industrial Court allows for a departure from this principle only where there are sound and valid reasons for the departure.” The rule to be applied in determining seniority has crystallized into selecting the most junior from a pool of similar workmen within the whole company to include areas to which the workman is contractually transferable. The common pool spread to involve subsidiaries if the employees could be contractually transferred to such subsidiaries. Where a company departed from the principle of LIFO on the grounds that the more senior employee was only one day more senior and since she was married (as against the more junior unmarried lady), retrenchment would not affect her adversely, the

court disagreed that marriage or indeed any private or personal reason could from the principle of LIFO (Chen, 2007).

In determining the "common pool" or category within which seniority determined, it has become a practice of the court to disregard total service in the company (Chen, 2007). A workman more years of service in the company lesser years in the last grade he is employed in (i.e. he was promoted much later than an employee with lesser service in the company) would have to be retrenched. The Industrial Court has also consistently refused to consider efficiency as a criterion for selection as it could then be used as a weapon to indirectly discipline the workers (Chen, 2007).

In view of the Court's "insistence on selecting junior employees for retrenchment, many employers who wish to retain younger employees often offer Voluntary Separation Schemes (VSS) with substantial benefits for the more senior employees as an inducement for them to leave the companies (Chen, 2007)."

2.6.2 Foreign workers, although senior, must go first (FWFO) principle

There are few provisions regarding the employment of foreign worker under the Employment Act 1955. In case of retrenchment By virtue of employment of foreign employee i.e:-

60M:-Prohibition on termination of local for foreign employee

"No employer shall terminate the contract of service of a local employee for the purpose of employing a foreign employee."

60N :- **Termination of employment by reason of redundancy**

"Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee."

For example, in case of Section 60M and 60N of the Employment Act 1955. *Qdos Microcircuits Sdn Bhd v Gurmeet Kaur Kaka Singh & ORS (2001)* 1ILR 786[7], where foreign employees were retained and the locals retrenched. Moreover, the foreigners did not have the skills possessed by the locals and it was more expensive to maintain the foreigners as compared to the locals. It was held that the dismissals were unjustified and that the foreigners should have been retrenched first.

2.7 Unfair dismissal

The Industrial Court has made it clear that the prerogative to dismiss is very much a qualified prerogative, but that if it is properly exercised, the court will not interfere with its exercise. In *Great Wall Shopping Sdn Bhd and Gan Shang Eng* (Award 241 of 1988)[8] it declared:

> "It is well-established and well-known that for an employer to dismiss any workman, there must be just cause or excuse. cause or excuse. The just

cause or excuse must be based on the facts of each case, either a misconduct, negligence or poor performance. The onus is on the employer to prove just excuse."

And in *Federal Hotels International Sdn Bhd and KC Fong& CT Mak* (Award 113 of 1989)[9] it stated:

"The court has often stated that for it to uphold dismissals for being with just cause or excuse, the employer has the obligation first to provide competent and convincing evidence in court. The employer bears the burden of proof. In short, the employer must supply convincing evidence that the workman committed the offence(s) for which he was dismissed. It is up to the employer to prove the workman guilty'. Were this not so. the protection given to workmen against dismissal without just cause or excuse would be worthless. Secondly, the employer must show that he acted reasonably in forming his view of the facts. Thirdly, the evidence must show that he had adopted a reasonable procedure of inquiry before making a decision to dismiss, and if he did not, good reasons for not doing so. Lastly, he must convince the court that he acted reasonably in deciding that dismissal was warranted in the circumstances of the case."

Employees who has alleged being dismissed without just cause or excuse by employers, can invoke section 20 of the IRA. In *Khoo Heng Choon & Co and Geeta Devi* (Award 345 of 1992)[10] it remarked:-

> "This case is on all fours with the *High Court case of Holiday Inn v Elizabeth Lee* [1991] 2 LLR 1239 where the respondent, who initially sought reinstatement, later sought compensation in lieu of reinstatement."

In this regard, Haidar Mohd Noor J said:-

> *"It would appear, therefore, that if a workman does not require reinstatement, there would not be a reference to the Industrial Court under section 20. In my view, the respondent here could not come within the provisions of section 20, as the legislature intended that recourse to the Industrial Court is available under that section only in respect of reinstatement, and once reinstatement is no longer applied for, the Industrial Court ceases to have any jurisdiction. On the authority of this decision, this court does not have the jurisdiction make an award in this case. As such, the claim is dismissed."*

Therefore, from the above industrial court decision it has been made very clear that the prerogative to dismiss is very much a qualified prerogative, but that if it is properly exercised, the court will not interfere with its exercise.

2.8 Lay off

Lay-off means suspension or termination of the employee's employment contract arising from the company's temporary or long-term business strategy or economic conditions (Bhalla, 2016). For example, during a recession or an off-season, there is

temporary inactivity or rest. It has been an industrial practice to lay-off part of a labour force because there is not that much work to warrant that many workers. Regulation 5 of the Employment Termination and Lay-off Benefits (Regulations 1980) provides:-

(1) Where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, he shall for the purposes of regulation 3(b), be deemed to be lay off if" :-

"(a) the employer does not provide such work for him on at least a total of twelve normal working days within any period of four consecutive weeks and:-

(b) the employee is not entitled to any remuneration under the contract for the period or periods (within such period of four consecutive weeks) in which he is not provided with work. Provided that any period during which an employee is not provided with work as a result of a rest day, a public holiday sick leave, maternity leave, annual leave, any other leave authorized under any written law, or any leave applied for by any employee and granted by the employer shall not be taken into account in determining whether an employee has been laid-off.

(2) The continuity of a contract of service of an employee shall not be treated as broken by any lay-off as a result of which no lay-off benefits payment has been made.

The word "termination" is meant to include dismissal by way of retrenchment, inclusive of its other modes. Lay-off on the other hand, stands on its own. It is merely a suspension of the employee from employment for a certain period of time.

If the employee is laid off due to temporary diminution in the particular kind of work done by him, and subsequently he is re-engaged without claiming lay-off benefits payment, it will be considered that there is no break in the continuity of his contract of service. However, if the employee considers himself to have been constructively dismissed, he will have a right to terminate benefits by virtue of Reg (1)(b) of the regulations and the rate of his entitlement is stated in Reg 6 of the Regulations. But once he has been paid the benefits, there will be a break in the continuity of his service, even he re-employed in the same organization later in time."

2.9 Burden of Proof

The burden of prove lies on the employer to prove the actual redundancy. "In *Bayer (M) Sdn. Bhd. v. Ng Hong Pau*[13], the Court of Appeal opined that 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."

"The standard of proof that needs to be met by the employer in a redundancy case is the civil standard on a balance of probabilities." This standard is said to be flexible so that the degree of probability required is proportionate to the nature and gravity of the issue. Further, section 30(5) IRA 1967 also emphasized that "the Industrial Court

should not be burdened with the technicalities regarding the rules of evidence and procedure that are applied in a court of law."

2.10 Obligation to Pay Retrenchment Benefits

"Where an employee is retrenched, the employer should pay him termination benefits if he is entitled to it. However, in *Mamut Copper Mining Sdn Bhd v Chau Fook Kong* [1997] 2 ILR 625[14], "the Industrial Court in considering the question of whether an employer may proceed with the retrenchment of its surplus employees without providing reasonable compensation to its that the provision of retrenchment benefits 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." This obligation, however, is limited to the employer who is financially capable. An employer who is facing financial and resorting to retrenchment in the hope of keeping itself financially afloat is not expected to fulfil this obligation."

2.11 Advantage and Disadvantages of Retrenchment

Retrenchment has some advantages and disadvantages. "The major advantages of retrenchment include an effective adjustment policy, and should therefore be associated with high organization productivity and not strike (Cascio, 2002:52)." It should also be associated with high quality of work life of the employees. Many retrenchment programs have been implemented in Nigeria but report shows that these programs have not indicated how the immediate impact affects especially in

terms of immediate work and organizational outcomes have been addressed (United Nations, 1999).

Some said that organizational performance and innovation increase as a result of retrenchment and reflected to improve service delivery, (Namatovu, 2000:64), isolated some of the advantages of retrenchment to include:-

a. Restructuring of job and departments;

b. Reducing of over-staffing;

c. Reducing redundancy and overcrowding;

d. Improved performance;

e. Inculcating discipline and efficiency in workers;

f. Bringing innovation, training and allowances and salary enhancement.

Besides the advantages, retrenchment also has some disadvantages. Among disadvantages as found by (Levine, 2000) are: -

1. Fiscal stress and human resources shrinkage that caused many difficult problems for workers and individual government managers. The major problem is decrease of human resources that result from cost cutting measures, which bring lower standard of living and abject poverty, loss of skills, energy, morale commitment, physical and mental health degradation, that results from employees withdrawing physically and emotionally.

2. “Decremental also cause reduced co-operative attitudes, greater fear and distrust; poor communication, lowered performance goals, restriction of production and increased turnover (Biller, 2000)”. “Retrenchment may create demoralization in an organization productivity and increase voluntary retrenchment, discourage the organization’s most talented and productive employees who will end up leaving the organizations (Hehn, 2001).”

3. Retrenchment threatens one’s faith in the value of contribution to the organization and sense of control over the future (Wilburn & Worman, 2000).

4. Retrenchment causes industrial unrest. (Biller, 2000), notes that people whose status, income and future are dependent on the programs that employ them will inevitably resist the change. This is further enhanced by trade unions, which resist un-called-for layouts (Wilburn and Worman, 2000).

5. Denga (2001) states “retrenchment of workers, inflamed psych-social problems, for example reduced self-esteem, general irritability, stomach ulcers, tendency to commit crime, high blood pressure, heart disease, financial emaciation and depression.”

6. Cutbacks and cutback management can introduce threatening environmental changes and pressures and internal organizational response (Levine 20003).

7. Downsizing can generate a fear of losing their jobs in employees. Which in turn reduce employee loyalty, innovation, creativity and risk taking (Adrian et al., 2007)

8 Retrenchment impacts on workers' job security Schermerhorn (1999).

9. Morale and commitment the Survivors of organization downsizing was adversely affected (Doherty et al., 1996).

10. Managers should give special attention to the morale of surviving employees in downsized organizations as it is low among them (Bolman & Deal, 1997).

Retrenchment has effects that extend beyond those who lose jobs. Adrian et al. (2007) state that "downsizing can generate a range of reactions that can undermine the organization's objectives for downsizing. Downsizing also alters the work environment of those employees and managers who remain in the organization, known as survivors (Westman, 2007)." Retrenchment is often a traumatic experience and it can involve major personal, career and financial changes. Shaw (2002) observes "rightly that employees, including managers, are more fearful than ever of losing their jobs. At the workplace, fear of unemployment can easily create suspicion, dampen employee loyalty, and reduce innovation, creativity and risk taking. However, job security seems to be an important aspect of employee motivation."

Retrenchment refers to an exercise carried out by an employer due to surplus of workers in a situation (Bidin, 2001). Surplus of workers occurs not only due to financial difficulties but it may happen in subcontracting of workers in the company due to technological use (Mohammed, 2006). In retrenchment jobs no longer exists due to the use of advanced technology that took over the human labor and make certain jobs redundant. As result the employer may no longer find it economical to run his business therefore, he retrenches some labor (Latiff Sher Mohamed, 2006).

2.12 Conclusion

Retrenchment means termination of the contract of service of the workmen in a redundancy situation which arises from several factors such as restructuring, reduction in production, mergers, and others. The right of the employer to close the whole or part of business has been recognized by the Industrial Court. There are several reasons for retrenchment that has been discussed. In the end the chapter highlighted the relevant prior studies from the worldwide were also explained.

CHAPTER THREE
RESEARCH METHODOLOGY

3.1 Introduction

This chapter illustrates the research methodology on how the study will be executed. The objective of this chapter is to discuss the legal process that the research encompasses such as the research design, research scope, types of data, data collection method, data analysis and limitation of the study.

3.2 Research design

"Legal research, or law research, usually refers to any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Jacobstein, Mersky, & Dunn, 1994)."

In connections to legal research, there are two types of research namely doctrinal research and non-doctrinal research. In this sense, doctrinal research is concerned with the legal issues and principles while on the other hand non-doctrinal research involves people, social values and social institutions (Murray & DeSanctis, 2009).

Research design for this study is based on a doctrinal research where it will be a "library based research". Hence, "a library based research generally relies on published material and it includes academic journals and books as well as any other

information which is available in the public domain, for example newspapers, magazines or reliable online resources."

There are four methods of legal research. They are historical, analytical, comparative and philosophical. These methods differ from each other in terms of characteristic and how researchers can employ them in legal research (Jacobstein, Mersky Dunn, 1994). "Perusing into history, it is a recollection of past events or combination of events and historical analysis is therefore a method of divulging from records and accounts on what had happened in the past (Murray & DeSanctis, 2009)." Researchers contemplate various sources such as old case law and legislation in finding reasons for the position of law which could be drawn from scrutinizing the case law (Amin, 1992).

Analytical on the other hand relies heavily on critical thinking and application of an area of research and this act as a tool to gain data. Thoughts are done and recorded for the purpose of analysis (Aminuddin, 1999). Comparative research focuses on comparing on two or more issues or problem. Through comparison, the similarities and differences and the strengths and weaknesses will be identified. The last type of research is philosophical where research is done based on the nature or existence of ideas from a particular area of study (McConville & Chui ,2007).

The present study is pure doctrinal research as it is concerned to the legal process and principles in carrying out retrenchments.

3.3 Research Scope

This study focused on highlighting the laws and principles that should be followed in the retrenchment process. Emphasis on the study covers the approaches by the judiciary in trial regarding retrenchment. Analysis on the legal provisions under the Industrial Relations Act 1967, Employment Act 1955, International labor Organization and The Code of Conduct of Industrial Harmony 1975 will be made and from there the problem and workable solutions will be identified.

3.4 Types of data

The sources used for gathering information in the present study were primary and secondary sources.

1. "Primary sources are those sources which are direct, authoritative and are not influenced by the opinion of others. Under this category will fall documents of an original nature, legislation, statute, treaties and any other document of similar nature (Murray & DeSanctis, 2009)."

2. "Whereas, the secondary sources are those sources which are not of a primary nature. Opinions of experts, books and published articles generally are examples of secondary sources of information. All such materials are called 'reference materials' because a researcher, in support of his views or to disagree to others' views, refers to them (Murray & DeSanctis, 2009). In other words, secondary sources provide interpretation and analysis of primary sources (Murray & DeSanctis, 2009)."

As the present study was to observe the laws and process of retrenchment therefore, the primary as well as secondary source will be used to collect the data.

3.5 Data collection method

The data collection method for this research is mainly interpreting and analyzing both primary and secondary sources. The study have been carried out using the library based approach as mentioned earlier. The undertaking of this research requires careful reading and thorough understanding of the laws, process and procedure of retrenchment. Besides perusing law books, other legal research method will be used by going through case laws related to the research topic. The cases will be used to obtain information from the practical point of view and also understand the extent to which the provision used by the legal enforcers.

By reading the case law and process of retrenchment in Malaysia, the present study will add a better scope to the research questions which has been formed. Therefore, it is important to look into case law when undertaking legal research as court on many occasions take into consideration the principles which relates to each cases on its facts. Moreover, reading and extracting information from legal journal articles will also play essential part of data collection method.

3.6 Data analysis

The analysis of data will be done by interpreting, accessing and scrutinizing the data which have been collected. Since this is pure legal research, primary and secondary sources are ultimately incorporated to undertake the research. Through a careful

reading and study of those sources, the data analysis will allow the researcher to gain insights into retrenchment laws, procedures and process. In order to endow with full insight of this area of law, an overview of retrenchment will be presented. Besides that, researcher will also identify, interpret and analyze the Malaysian laws, process and procedure in carrying out retrenchment under the relevant provision and its impact on this area of law. Each position will be discussed correspondingly.

Content analysis will be applied where it focuses on the reading and analysis of judgment, legislation as well as policy documents relating to a particular area of law. The present study will use the content analysis method to analyse the primary and secondary data. Content analysis is a method which is used for analysing systematically the contents of a document and examining, summarising, and drawing conclusions from the information contained in the raw data (Murray & DeSanctis, 2009).

3.7 Limitation of the study

The present study has certain limitations such as in the context of the data collected the researcher faced the difficulty due to the lack of online material. Some material, especially textbooks, older cases and journal articles were only available in print that constraint the researcher in designing and executing his research plans. Furthermore, few articles were not provided free to access. These were some of the limitations that the researcher went through while conducting the research.

3.8 Conclusion

The present chapter illustrated the research methodology that will be used in conducting legal research such as its design, type of data, the steps that the researcher will use to conduct the data followed by methods he will use to analyze the content of the data gathered and in the end the obstacles that the researcher faced while conducting the present study.

CHAPTER FOUR
RETRENCHMENT: THE LAW, PROCESS AND PROCEDURE

4.1 Introduction

Once a position is identified as redundant, it is essential that the selection of the employee(s) to be retrenched be carried out in conformity with accepted norms and practice. In this chapter the researcher will discuss on the law, procedures and the process before, during and after carrying out retrenchment. This chapter is divided into three sections. The first section of the chapter will discuss about the Malaysian laws of retrenchment, second section focuses in respect the principles to the courts have generally adopted contained in the Code of Conduct for Industrial Harmony and LIFO. Whereas, the last section discusses in detail the process of carrying retrenchment.

4.2 Management prerogative to reorganize

There have been many awards by the Industrial Court involving retrenchment. All awards observe the principle of the reorganisation in business is a function within the power and prerogative of the management and no arbitrator should intervene with the bona fide exercise of that power. It is not up to the courts to dictate to the management the number of workers it should have retrenched (Chen, 2007)

The argument that the company was not making profits had not been accepted either as it was not necessary to show loss in order to justify retrenchment. The Court, while recognising the right of the employer to determine the size of his workforce,

has however consistently maintained that it must be convinced that the exercise of that power was carried out without any semblance of victimisation or unfairness (Chen, 2007).

4.3 Law, Procedure and Process Governing Right To Retrench

As the laws, codes and regulation of retrenchment are scattered, therefore all the laws, the procedure (before, during and after retrenchment) the employer should followed has been gathered under this heading. The relevant rules on retrenchment exercise are discussed with reference to Industrial Relations Act 1967, Employment Act 1955, The International Iabor Organization and The Code of Conduct for Industrial Harmony 1975 are as follows.

4.3.1 Industrial Relations Act 1967

Every employer has the right and privilege to organize his business in the manner he thinks fit for the purpose of economy or convenience. "Section 13(3) Industrial Relations Act (IRA) 1967 recognizes the employer's right to terminate any workman by reason of redundancy or by reason of the reorganization of an employer's profession, business, trade or work. However, this right of the employer is limited by the law that he must act bona fide and not capriciously." Where it is shown that the exercise of these prerogatives is mala fide or amounts to unfair labour practice or indicates victimisation, the Industrial Court will not hesitate to strike down such exercise as bad (*Adam Abdullah v. Malaysian Oxygen Bhd.* [2012] MELR 357)[15].

"In the case of *Chay Kian Sin v. Measat Broadcast Network System Sdn. Bhd (2012)*[16] the Industrial Court held that the employer has the right to organize its business in the manner it considers best." Nevertheless, in doing so the employer must act *bona fide* and not capriciously or with motive of victimisation and unfair labor practice. It was again reiterated in the case of *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc;* where the Court stated that the right to reorganize the company is the prerogative of the management to achieve maximum efficiency and effectiveness. It is important that the employer acts fairly and conducts the retrenchment *bona fide* and untainted by any unfair labour practice.

In the case of *Harris Solid State (M) Sdn. Bhd. & Anor v. Bruno Gentil Pereira & Ors*[18] the court succinctly stated as follows:

> "An employer may re-organize his commercial undertaking for any legitimate reasons 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 the managerial power was exercised bona fide or for a collateral reason is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case".

While in the case of *William Jack & Co. (M) Sdn. Bhd. v. S. Balasingam* [1997] 3 CLJ 235[17], the Court of Appeal ruled that:

> "Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that 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 a particular case to determine whether that exercise of power was in fact bona fide".

Predominantly, the Industrial Courts have held that the managerial prerogatives of the employer are qualified rights and there are important principles to be taken into consideration. It is for the management to decide on the strength of the staff which it considers necessary for efficiency in its undertaking.

The employer's right to reorganize his business is limited by the rule that they must act bona fide and not with the motives of victimization or unfair labor practice. A retrenching employer's obligation is not limited to proving actual redundancy. A more important obligation is proving bona fides. The courts in deciding the issue of whether the employer had made a bona fide decision to retrench will examine the facts and events leading up to the retrenchment to determine, inter alia, whether the employer had complied with the principles of good labor practice. When the management decides that workmen are surplus and that 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 or unfair labour practice (Chen, 2007).

Once a position is identified as redundant, it is essential that the selection of the employee(s) to be retrenched be carried out in conformity with accepted norms and practice. In this respect the courts have generally adopted the principles contained in the Code of Conduct for Industrial Harmony.

Whilst it is true that the Industrial Court accepts the prerogative of the management in carrying out rationalisation of its businesses, it is abused for other elementary note that this prerogative must not be collateral purposes with a view of getting rid of certain employees

In *Harris Solid State(M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira Ors* [1996] 3 MLJ 489[18], the Court of Appeal at p 511 forewarned that a retrenchment exercise which is driven by mala fide motives would be struck down by the courts. The Court found that the termination of several employees was carried out for a collateral purpose of getting rid of a trade union and to punish the employees for their union activities. In doing so, the following observations were made.

> "An employer may reorganise 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".

Therefore, while retrenching an employee the employer should follow the principles that are been provided in Code of Conduct of Industrial Harmony.

4.4 Retrenchment Must Be Genuine and Procedurally Fair

Although retrenchment is an incidence of the running of a business but it must be conducted for valid reasons; fairly and untainted by any unfair labour practice.

To justify retrenchment, the employer must prove redundancy. To prove redundancy, the employer must show firstly, there is a surplus of labour. Secondly, the requirement of the job functions of the employee has ceased or has greatly diminished to the extent that the job no longer exists. Thirdly, the business requires fewer employees of whatever kind resulting from a reorganisation exercise or due to whatever other legitimate reasons (Chen, 2007).

Once a redundancy situation has been established, the next step is to institute the procedure for retrenchment. The are several procedural requirements that an employer must comply with when carrying out a retrenchment exercise. Compliance with these procedural requirements is equally important to justify a retrenchment exercise (Chen, 2007).

4.5 Employment Act 1955

In Malaysia, termination of employment is regulated principally by "the Employment Act 1955 (EA), the Industrial Relation Act 1967 (IRA) and the Employment (Termination and Lay-Off benefits) Regulations." The EA and IRA

both perceive the employer-employee relationship as being essentially contractual in nature. While the EA describe such relationship in terms of "contract of service".

Section 12(3) Employment Act (EA) 1955 provides that an employee may be terminated from service by an employer when such termination of service of an employee is attributable wholly or mainly to the fact that :–

"(a) the employer has ceased, or intends to cease to carry on the business for the purpose of which the employee was employed;

(b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;

(c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish; and

(d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish."

Therefore, when the contract period on a fixed-term contract expires, when the employee attains the retirement age and when he resigns voluntarily from his job his employment contract may be terminated according to Employment Act 1955.

4.6 Procedure of retrenchment

In retrenching the employee due to reorganizing or redundancy, the employer has to follow certain procedures such as highlighted below:-

4.6.1 The Code of Conduct for Industrial Harmony 1975

The Code of Conduct for Industrial Harmony (the Code) was introduced in 1975 as guidelines to employers and employees on the practice of industrial relations for achieving greater industrial harmony. Clause 20-24 of the Code emphasizes on the redundancy and retrenchment situations.

Clause 20 of the Code provides that in circumstances where redundancy is likely an employer should take positive steps to minimize reductions of workforce by the adoption of appropriate measures such as:-

i. To stop recruitment of new employees except for critical areas;

ii. To limit overtime work;

iii. To limit work on weekly rest days and public holidays;

iv. To reduce weekly working days or reduce the number of shifts;

v. To reduce daily working hours;

vi. To conduct retraining programmers' for workers;

vii. To identify alternative jobs and to transfer workers to other divisions/other jobs in the same company;

viii. To implement temporary lay-off (temporary shut down by offering fair salary and to assist the employees affected in obtaining temporary employment elsewhere until normal operation resumes); and

ix. to introduce pay-cut in a fair manner at all levels and to be implemented as a last resort after other cost cutting measures have been carried out.

Clause 21 of the Code explained that the ultimate responsibility for deciding on the size of the workforce must rest with the employer. However the above steps should be taken by the employer after consultation with his employees' representatives or their trade unions.

Clause 22 (a) of the Code further provides that if retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures :-

i. giving 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. assisting in co-operation with the Ministry of Human Resources, the workers to find work outside the undertaking;

v. spreading termination of employment over a longer period;

vi. ensuring that no such announcement is made before the workers and their representatives or trade union have been informed.

In Industrial Court there are some awards that indicated an obligation to pay retrenchment benefits although an employee may not fall under any collective agreement, the EA or where there are no contractual obligation (in the contract of employment) which mandates payment of such retrenchment benefits.

In *Pengkalen Holdings Bhd v James Lim Hee Meng* [2000] 2 ILR 252[19], "the Industrial Court observed that Art 22(c)(ii) of the Agreed Practices annexed to the Code of Conduct for Industrial Harmony stipulates that should a retrenchment be necessary, the employer must, *inter alia*, make provisions for the payment of redundancy and retirement benefits. The Court also took note that the provision on retrenchment benefits serves as a cushion against the hardship 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." The Court made the following observation regarding the payment of retrenchment benefits:

> "In the context of industrial relations practice, it serves to minimize resistance and opposition to genuine reorganisation measures undertaken by management. It acknowledged a work's security in tenure has to give way to his employer's overriding interest of economy and efficiency. The court finds that there were indeed of breaches of Code of Conduct with regard to the failure of the company to give the claimant adequate notice and to provide compensation for his loss of employment".

From the above, it is clear when an employer want to retrench an employee he should follow the process the certain procedures that has been provided by the Employment Act 1955 and Court of Industrial Relation IRA Act 1967.

4.6.2 Compliance with the Principle Last in First Out (LIFO)

Besides the Code the employer has to follow the principles of LIFO as a basis to select the employee(s) to be retrenched. However, for the foreign workers the principle of although senior, must go first (FWFO) rule is applied. Basically, the LIFO principles states that:-

> "All things being equal, the employee with the least number of years' service should be the first employee to be identified to be retrenched (*Radio & General Trading Sdn Bhd v Pui Cheng Teck, Gan Sek Teng, Foo Say Tuan & Goh Tok Eng* [1990] 2 ILR 242.[20]"

This principle is infinitely fair. It ensures that the senior employee is rewarded for his loyalty and lengthy service. The junior who is retrenched, although will suffer some hardship as a result of the loss of employment, will find it less difficult to secure or retain for another job when compared with a senior member of the workforce (Parasuraman, 2004). It is fair not only on the employees but also on the employer. Retrenchment in accordance with the LIFO principle will be less costly to the employer, in terms of retrenchment benefits that are payable (Chen, 2007).

An early exposition of this principle may be found in "*Sharikat Eastern Smelting Bhd v Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Logam Sa Malaya* (Award No 16 of 1968)[21] wherein the Industrial Court made the following observation in respect of this principle:"

> "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. This means that the employer is not entirely denied the freedom to depart from that principle but that he can only do so for sufficient and valid reason."

The principle of LIFO is to avert the discrimination of employees in retrenchment exercises. The principle of LIFO accords with the principle of equality and unlawful discrimination guaranteed by Art 8 of the Federal Constitution, which precludes persons in a similar situation to be treated differently. LIFO operates on the premise that management should retrench the latest recruit in a particular category.

Firex Sdn Bhd v Cik Ng Shoo Waa [1990] 1 ILR 226[22] provides a clear illustration of the principle of LIFO. The Court held, *inter alia*, as follows:

> *"When an employer claims to have dismissed a workman in accordance with seniority, i.e.' last come, first go, he must show that he made the choice from among workers doing like work. If the evidence shows otherwise, the dismissal may be regarded as not being made bona fide."*

4.6.3 Limitations of the LIFO principle

The limitations of the LIFO principle were elaborated by the industrial Court in *Association Pan Malayisa Cement Sdn Bhd v Keatuan Pakerja-pekerja* Perusahaan *Simen (M) Perak* [1986] 2 ILR 1612, which adopted the principle laid down by the Supreme Court *in Indian Cable Co Ltd v Its Workmen* 1962 (1) LLJ 409[24]. In the *Associated Pan Malaysia Cement Case*[23], the learned Chairman observed that "the LIFO principle is subject to two limitations; Firstly, it operates only within the establishment in which the retrenchment to be carried out. Secondly, rule applies only to the category to which the retrenched the workers belong. According to the Chairman :-

> "The "establishment" should be construed in its original sense, which means "the place at which the workmen are employed, and it is of essence of the concept of an industrial establishment that it is local in its set-up".

LIFO requires the employer to select the more junior employee in the category of employment for retrenchment. Category refers to a particular description of work and is distinguishable from a grade or scale within the employment structure. Category essentially means similar or like work; while a grade is generally closely linked to the salary structure (Malhotra, 1973).

Malhotra in *The Law of Industrial Disputes* provides a distinction between grade and category:

"The doctrine of last come first go' has to be borne in mind only with respect to different categories of workmen working in an industrial establishment and not to the whole industrial establishment (Malhotra, 1973). There is, however, a clear distinction between a class or category and a grade. The class or category is a group in which posts of particular description are included and the grade has reference exclusively to scales of pay. The word 'category' is therefore, not synonymous with grade. Category means a class or trade such as turner, motor mechanic, electrician, etc. But for this safeguard, very absurd and anomalous situations giving rise to a spate of industrial disputes would arrive" (Malhotra, 1973).

An illustration of the distinction between category and grade is also found in *Guoman Port Dickson v Ahmad Akmal Mohd Yunos* [2001]1 ILR 875[25]. In this case, an assistant beverage manager was retrenched. He claimed that there was a breach of LIFO as he was more senior in service to another Chinese restaurant manager who joined the hotel after him. The Industrial Court ruled that there was no breach of the LIFO principle as the Chinese restaurant manager was employed as full manager, which was a position higher and more senior in rank (or grade) as compared to the position of assistant beverage manager. Similarly, in case of Dr HC *Huang Consultancy Engineers Sdn Bhd v Lim Choon Ntia* [2000] 2 ILR 330[26], there was no breach of LIFO as the employees who were retained were employed as draughtsman and clerks, which were of a different category from the claimant, who was employed as an engineer.

If there was failure to comply with the LIFO principle, the retrenchment is *prima facie* invalid and the dismissal would be without just cause or excuse, unless the employer is able to show reasonable and cogent excuse for departing from the principle. The Industrial Court would then have the power to order reinstatement of the employee to his former position together with the necessary monetary compensation.

Where there is only one employee in a particular category, LIFO would not be applicable. This is because there would be no basis for a comparison to be made when there is only one position to be discharged. This can be seen in case of *Behn Meyer & Co (M) Sdn Bhd v Puan Jariah bte Baharum & Anor [1994*] 1 ILR 165[27],

> "The Industrial Court held that the LlFO principle could not apply to the claimant as she was the only employee in the category of executive in the insurance department in the company."

4.6.4 Factors to be considered while applying the LIFO principle

The following are to be borne in mind when applying the LIFO principle:-

"1. The employer is merely required to examine the length of service in the category and not the entire length of employment in the organization.

2. The application of the LIFO principle is limited to within the establishment in which the retrenchment is to be made and the category to which the redundant employees belong."

The case of *Associated Pan Malaysia Cements Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Simen(M) Perak [1986] 2 ILR 1612*[28]:- "

"The company found it necessary to retrench 21 of its employees due to the economic downturn, excess production capacity and low consumption of the company's product (cement). The company selected 21 of the most junior lorry drivers for retrenchment but that 12 of those drivers were more senior to some of the lorry attendants. The company then offered alternative employment as lorry attendants to the 12 drivers and 11 of them accepted. In the result, 11 lorry attendants with the least service were retrenched to make way for the lorry drivers. The union alleged infringement of the LIFO principle. The union argued that in selecting the employees for retrenchment, the company did not take into consideration the employees of the company at another location."

The Industrial Court held that it would be impractical to take into account the employees at another location because the two works were entirely separate operations. It also ruled that the company in viewing the lorry drivers and lorry attendants as one unit (ie the sale fleet unit) was reasonable (Malhotra, 1973).

From the above case it is clear that the company had the inherent right to select how the workmen would be retrenched so long as its decision is not capricious, without reason or is *mala fide* or actuated by victimisation or unfair labour practice. The selection must not be unfair between or among comparable employees, for such

reasons related to trade union activities or against an agreed procedure with the trade union or against customary practice (eg the principle of "LIFO") (Malhotra, 1973).

A starting point of inquiry would be examine the corporate history to the company, and its affiliation with its related companies (Malhotra, 1973). One should also enquire whether the companies operate their business alike, whether the terms and conditions of employment are generally consistent with each other, whether an employee is transferable within the group companies and whether the composition of board of directors of the respective companies is substantially similar. The factors that may influence the court are not exhaustice

Guidance on what may constitute a single industrial establishment is found in the Indian case of *Tulsidas Khimji v F Jeejeebhoy* [1961] I LLJ 42[29] in the case High Court laid down the test to determine whether a group of companies may constitute a single industrial establishment, thus necessitating the application of LIFO principle that is the best based on a group basis as follows:-

> "1. Have the employers recruited the workmen on the basis that they belong to one particular category of the various departments, branches or units taken as an integrated whole or is the recruitment made on the basis of that particular category belonging to each of the departments separately?
>
> 2. Can the of clerk be regarded as employment in a single category of clerks by reasons of

(a) The unity of ownership of the different departments;

(b) Geographical proximity of different departments; or

(c) The fact that there is head office supervision of different departments and ultimate amalgamation of the accounts?

3. Are the different departments functionally integrated by reasons of the condition of transferability amongst the clerical cadre, or can the departments be treated as forming a single integrated industrial establishment?"

The fact that an employee is transferable from one unit to another is a persuasive factor that may influence the Industrial Court to conclude that LIFO must be applied on a group basis, though this is not conclusive. In *Koperasi Jayadiri (M) Sdn Bhd v Lai Chui Yin* [1993] 1ILR 74[30], the claimant was employed by the Koperasi as sales clerk and was subsequently transferred to another subsidiary company. Two years later, she was again transferred to another company where she was retrenched a year later. The claimant contended that her retrenchment amounted to a dismissal without just cause on the ground that it was in violation of the LIFO principle .She also contended that she was senior to three other clerks in the Head Office who were not retrenched. The Court, after taking into account the fact of transferability of the employees and the uniformity of grade and scales of pay, ruled that the Koperasi and its branches were not functionally independent and separate but were in fact functionally integral. All the clerks of the Head Office and the branches came within

one category notwithstanding differences in the job functions. As such, there was an unjustified departure from the LIFO principle.

4.6.5 Circumstances whereby the LIFO principle may be departed

There are few circumstances in which the employer may deport from LIFO in terminating the employees:

i) "where the employer has adopted an objective and fair selection criteria in the retrenchment exercise

ii) where it can be established that a more senior employee who was retrenched (in breach of LIFO) had a record of poor performance

iii) where it can be established that a more junior employee who was retained in favour of a more senior employee has special skills or qualifications."

The employer must produce documenting evidence to satisfy the Industrial Court that it had cogent reasons for departing from the rule. Attendance records, performance appraisals, the quantum of annual increments or bonuses or the lack of the same, in addition to warning letters, minutes of counselling sessions, etc, are some of the evidence. In the absence of any such documentary evidence, it is unlikely that the Court would endorse the departure from the LIFO principle. The Court would be reluctant to rely on subjective or purely oral evidence. The are few circumstances on which LIFO principles may be departed. The circumstances are as follows :-

a) Objective and fair selection criteria

A valid departure from the LIFO principle would be where the employer is able to justify that the selection criteria adopted by it was fair, objective and reasonable. In fact, the LIFO principle is merely one of the considerations that the company has to take into account in a retrenchment exercise. Article 22(b) of the Code of Conduct of Industrial Harmony stipulates that:

22(b) The employer should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employee's representative or trade union, as appropriate, may include:-

(i) "need for the efficient operation of the establishment or undertaking;

(ii) ability, experience, skill and occupation qualifications of individual workers required by the establishment or undertaking under(i);

(iii) consideration for length of service and status (non-citizens, casual, temporary, permanent);

(iv) age;

(v) family situation;

(vi) such criteria as may be formulated in the context of national policies."

A case that has left an indelible mark in Malaysia industrial jurisprudence was "*Malaysia Shipyard & Engineering Sdn Bhd D Mukhtiar Singh & 16 Ors [1991] 1 ILR 626*[31]." In this case, an independent selection criteria adopted by the company

was expressly endorsed by the Industrial Court. Instead of adopting the LIFO principle, the company applied a selection criteria which was based on a point system that took into account age performance, medical and disciplinary records of the employees in the organisation. The Industrial Court observed that the burden of proof is on the employer to show the selection criteria that he has relied upon in selecting employees for retrenchment was fair. The employer is also expected to act reasonably in his determination of the issue. The Industrial Court held that in evaluating the alternative selection criteria, the test is not whether the decision of the management was "wrong" but rather "whether the criteria was so wrong that no sensible or reasonable management could have relied on the decision which was arrived at in redundancy selection"

b) Poor performance

The Courts have in the past, accepted records of poor performance of an employee as a justification for a departure from the LIFO principle. Nevertheless, it may be noted that the requirement of giving warnings is mandatory if the employer attempts to depart from LIFO on grounds of poor performance. In *Swadesamitran* Ltd *v Their Workmen* AIR 1960 SC 762[32], the Supreme Court of India held that:

> "When it is said that, other things being equal, "the rule of last come first go must be applied, it is not intended to deny freedom to the employer to depart from the said rule for sufficient and valid reasons. The employer may take into account considerations of efficiency and the trustworthy character of

the employees, and if he is satisfied that a person with a long service is inefficient, unreliable or habitually irregular in the discharge of his duties, it would be open to him to retrench his services while retaining in his employment employees who are more efficient, reliable and regular, though they may be junior in service to the retrenched workman. Normally, where the rule is departed from, there should be reliable evidence, preferably in their recorded history of all the workmen concerned, showing their inefficiency, unreliability or habitual irregularity*"*

c) Special skills

Another justifiable departure from the LIFO principle is where junior employee is retained in employment by virtue of possessing additional skills compared to a senior employee within the organisation.

In *Supreme Corporation Bhd v Pn Doreen* Daniel [1987] 2ILR 522[33], "the claimant, who was employed in the capacity as secretary. She alleged that there were other secretaries whose lengths of service were less than hers but who were not retrenched. The company explained that these secretaries were doing work of a special nature (confidential secretary) and possessed knowledge and skills peculiar and unique to their jobs. The Industrial Court accepted this explanation and upheld the retrenchment of the claimant."

This principle although fundamental, may be departed from if the employer has valid and sufficient reasons to do so. It is pertinent to note that whilst the Industrial Courts

have consistently insisted on strict adherence to the LIFO principle, it has on several occasions, accepted departures from LIFO for valid reasons. In this context, the *Industrial Court in Supreme Corporation Bhd v Doreen Daniel G Ong Kheng Liat* [1987] 2 ILR 522[34] ruled that:

> "LIFO is not an absolutely mandatory rule which cannot be departed from by an employer when retrenching staff. That the employer is not denied the freedom to depart from the LIFO procedure is made obvious by cl 22(b) of the Code of Conduct for Industrial Harmony 1975."

> "If however, in the light of other objective criteria and special circumstances, the employer has sound and valid reasons for departure from the LIFO procedure, all authorities agree that he should be allowed to do so. This is the position in our own industrial law. This is the guiding principle adopted by this court."

As discussed above , the LIFO principle may be departed from where there are valid reasons. What of critical importance is that the criteria used for retrenchment of workers must be fair and reasonable and should be discussed with employees.

4.6.6 Breach of the LIFO principle

The LIFO principles states that: all things being equal, the employee with the least number of years' service should be the first employee to be identified to be retrenched. A breach of the LIFO principle, in the absence of any justifiable reason,

renders the retrenchment unfair. As a consequence, the dismissal of the retrenched employee would be without just cause or excuse. "In *Dismissal, Discharge, Termination and Punishment* by OP Malhotra, 10th Ed Vol I at p 791, the author opined that:"

> "If the preferential treatment given to juniors ignores the recognised principle of industrial law of last come first go without acceptable or sound reasoning, the Tribunal would be justified to hold that the action of the management was not bona fide."

4.6.7 Definition of secondment

OP Malhotra in The Law on Industrial Disputes, Vol I, 3rd Ed defines secondment as follows:-

> "Therefore so long as the contract is not terminated, a new of the not made and the employee continues to be in employment of the orignal employer even if the employer orders the employee to do certain work for another person. The employee still to be employment. The only thing is that the employee carries out the orders of the master; hence he has a right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time he has hired his services, but that is because of his agreement with his real employer. However, that does not have the effect of transferring the service of the employee to the other employer. The hirer may exercise

control and discretion in doing of the thing for which he has hired the employee or even the manner in which it is to be done. But if the employee fails to carry out his direction, he cannot dismiss him and can only complain to the actual employer. The right of dismissal is vested in the employer(s).”

The position of employees on secondment is an important consideration in a retrenchment exercise. The law on secondment is clear: an employee is still under the retrenchement of the seconder company although the employee is instructed to carry out his services for the secondee company.

Hence, in a retrenchment exercise, the company must take into account its employees that are serving elsewhere with a secondee company. This is premised on the basis that the ultimate employer is still the seconder company and a secondment exercise does not entail a change in the employer. On the other hand, where the entity carrying out the retrenchment exercise happens to be the secondee company, it need not take into account “seconded employees" that are serving a their premises since the secondee company is not the employer. The employee on secondment would therefore have to be reverted back to his ultimate employer as his retention may affect the justification of the reorganisation exercise. What is essential here is to note that the position that is found to be redundant must be the position to which the employee is appointed and not merely seconded to.

4.6.8 Foreign Workers Must Be Retrenched First.

Apart from LIFO, “there is a requirement that mandates all employers to comply with s 60N of the Employment Act 1955 when carrying out a retrenchment exercise (Malhotra, 1973).” With effect from 1998, where an employer is required to reduce workforce by reason of redundancy, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by a capacity similar to that of the local employee.

Should there be a breach of s 60N, a local employee has the option of lodging a complaint to the Labour office claiming that he is discriminated against in relation to a foreign employee in respect of his terms and conditions of employment. “The Director General of Labour may then issue a directive under s 60I(1) as may be necessary and expedient to resolve the matter. Anyone who fails to comply with any directive of the Director General commits an offence under the *Employment Act 1955* and shall be punishable with a fine not exceeding RM10,000".

4.6.9 Bumping

“Bumping occurs where an employee whose job is redundant bumps another employee out of their job so that the employee who was bumped is the one employee who is actually made redundant (Malhotra, 1973). This could happen when a more senior employee is prepared to take a more junior role to avoid redundancy. This may be considered a genuine redundancy. However, it may be difficult for the employer to justify that the retrenchment of the "bumped" employee is fair.

In practicing the LIFO principle, the practice of bumping is widely accepted in the UK and the USA, and it would appear that the practice is, to a certain extent, acceptable in Malaysia as well.

For example in Malaysia In "*Associated Pan Malaysia Cements Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Simen* (M) Perak [1986] 2 ILR 1612[35], the Industrial Court described the doctrine of "bumping" as follows:"

> "If there is a reduction in the requirements for employees in one section of an employer's business and an employee who becomes surplus or redundant is transferred to another section of the business, an employee who is displaced by the transfer of the first employee and is dismissed by reason of that displacement is dismissed by reason of redundancy (*W Gimber & Sons Ltd v Sprunett* (1961) ITR 308 (DC)."

4.7 International Labor Organization

The International Instruments which set out the key principles relating to the dismissal of employees, including redundancy situations are:

"(a) Termination of Employment Convention, 1982 (No: 158) (Convention 158); and

(b) Termination of Employment Recommendation, 1982 (No: 166) (Recommendation 166)."

The Convention No: 158 requires member states “to specify the grounds upon which an employee can be terminated from employment. This Convention is supported by the Termination of Employment Recommendation, No: 166, which contains further specific guidance with regard to retrenchment situations. Like many member states, Malaysia has not ratified Convention No: 158. However, many of the principles under Articles 1-11 in the Convention No: 158 have been implemented into Malaysia redundancy law (Chen ,2007).

4.8 Process of retrenchment

The process of retrenchment is divided into 3 phase i.e pre-retrenchment, retrenchment, and post retrenchment

4.8.1 Pre-retrenchment

During Pre-Retrenchment phase, the following steps must be undertaken.

“a. Notification in writing to a employees on company's planned retrenchment exercise detailing the reasons, selection process and procedures;

b. Notify the Labour Department pertaining to the retrenchment exercise and file Form PK 1/98;

c. Prepare retrenchment package in accordance to the required regulations;

d. Conduct individual meeting session with selected employees and explain clearly every detailed Information on terms and lay off package offered and possible other assistance if required; and

e. Issue a comprehensive offer letter with details of the lay-off package, job hand-over process, checklist of documents and other relevant information."

4.8.1.1 Notice of retrenchment

Impending notice of a retrenchment is also a factor to be considered as the courts do not look favorably upon employers who take employees by surprise (Chen ,2007). In *Jupiter Securities Sdn Bhd v Edmund Chang* (Award No 57 of 2009)[36], the claimant had complained of not having had prior warnings or notice of his impending retrenchment. The Court however was satisfied that he as a Human Resource Manager, had known of the first retrenchment exercise and the reducing headcount as well as the reasons therefore. The writing was on the wall for him to have seen it. He had played his role as Human Resource Manager in such an exercise. He cannot be heard to now say that he was when his turn came. There was no legal requirement, in these circumstances for the respondent to hold discussions and give the claimant prior warning of the possibility of retrenchment.

4.9 Length of notice period

It is the duty of the employer to prior warning to his employee before retrenching, the length of notice period varies among different grades of employee.

4.9.1 Unionised employees

In respect of unionised employees, the notice of termination must be given in accordance with the collective agreement in existence between the employer and the trade union at the material time. In most instances, the notice of termination provided under the collective agreement would be more favourable than what is provided for in the EA 1955 (Parasuraman, 2004). The provision on length of notice. In the collective agreement, where taken cognizance or handed down by the Industrial Court, would supersede the provisions of the EA (Chen ,2007).

4.9.1.1 Employment within the Employment Act 1955

For non-unionised employees, the length of notice would primarily depend on the contract of employment. In the absence of any express stipulation, then the provisions of the Employment Act 1955 would apply where the employees concerned fall within the ambit of the aforesaid Act.

Section 12(1) of the EA provides that either party to a contract may at any time give to the other party notice to terminate such contract of service. Section 12(2) further provides that the length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such in the terms of the contract of service. In the absence of such provision in writing, the minimum length of termination notice and the termination benefits are as follows in table 4.1:-

Table 4.1 length of service and minimum notice period of termination

Length of service	Minimum notice period
Less than 2 years	4 weeks
2 years or more year of service but less than 5 years	6 weeks
5 years or more	8 weeks

[Per section 12(2) of the Employment Termination and Lay-off Benefts Regulations 1980]

From the table above the minimum length of termination notice and the termination benefits are clear provided by the Employment Act, 1955. Those employees whose service is less than 2 years, the minimum time period that the employer should provide is 4 week. Furthermore, the employee who has been in service for less than 5 years shall be given termination notice at least 6 weeks before. Moreover, those employees that served for more than 5 years, the employer shall inform at least 8 weeks before termination time. "Under EA 1955, Regulation 6 an employer is mandated to provide a notice of termination to the employee where the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to diminish. In short, these provisions are related to retrenchment situations."

4.9.2 Non-unionised employees who do not fall under the ambit of the EA

Where the employees concerned are not unionised employees and do not fall under the ambit of the EA, the length of notice would primarily depend on the contract of employment. In the absence of any express contractual clause, their employment

may be terminated by giving reasonable notice. There is no hard and fast rule as to what would amount to reasonable notice and it is a question of fact for the courts to decide. In *Richard v Koefod [1969] 3 All ER 1264*[37]*, Lord Denning* MR held that:

> *"The law is clear that in the absence of expressed stipulation, a contract of employment is determined by reasonable notice."*

This principle has been applied by the Supreme Court in *Quek Chen Yen v Majlis Daerah Kulai [1986]2 MLJ*[38] which held reasonable notice for six months required to terminate the employment of Secretary of the Local Council of Kulai.

Generally, the length of reasonable notice would depend on the following factors:-

(a) nature of the industry that the employee is engaged in;

(b) the rank of employee; and

(c) the length of service of the employee.

In *D'Cruz v Seafield Amalgamated Rubber Co Ltd* (1963) MLJ 154[39], Gill J provided a detailed explanation of the principle of reasonable notice. According to him:

> "It is therefore clear from that the right of the private employer to dismiss his servant is limited by terms of the contract. Thus, a contract provides for the services of an employee to be terminated on a month's notice, the employer can dismiss the servant by giving him one months' notice without stating any reason for doing so, and any reason for doing so or indeed for the most for

wicked reasons. It is equally clear that except where the hiring is a definite period the contract must be terminated by notice."

The case of *Payzu v Hannaford* (1918) 2 KB 348[40] is an authority for the proposition that where there is a contract of hiring of a workman and nothing is said on either side as to any notice to be given to determine the contract, it is an implied term of the contract that it can be terminated only by either party giving a reasonable notice. The court stated that:-

"Where the parties have not declared their intention as to notice, then the notice will be such as custom or usage prescribes, provided known to the parties at the time when the contract was made. The custom must be general and uniform, certain and reasonable in its terms, of reasonable antiquity and so notorious that persons would contract on the basis of its existence."

4.9.2.1 Failure to give sufficient notice

Once the management decides to embark on retrenchment it is advisable to inform the employee as soon as practicable. Information at such an early stage need not be in the form of a termination notice but a mere announcement of the company's intention, or otherwise, consultation with the union would suffice (Chen, 2007).

"Failure to consult or warn an employee of their impending redundancy, especially if the employee is a member of the management or senior management team, may lead the Industrial Court to conclude that the termination is mala fide as been decided this

case been seen in the case of *Gabungan Perusahaan Minyak Langkap Sdn Bhd Heng Mee Oo* [1990] 2 ILR 33[41]".

In the case of *Web Printers Sdn Bhd v Nandah Kumar s/o P K Menon* (1992) 124[42], "The administration manager was issued with the letter of termination. The company paid him one month's salary in lieu of notice. The letter was handed to the employee at 5.30 p.m. and at the end of the same day, at 6.00 p.m., he was sent off. The Industrial Court held that the action taken by the company was not reflective of a termination arising from a normal redundancy. Therefore, the company fail to give a sufficient notice of termination."

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4.9.2.2 Notice to Labour Department

The employer is also required to notify the Labour Department closest to the employer's place of business of its intention to carry out the retrenchment exercise (Chen, 1997). Notification is effected by completing a submitting the prescribed form (PK Form) at least one month before the retrenchment date. This is an

administrative requirement and is prescribed in the guidelines issued by the Ministry of Human Resources.

Failure to comply with this requirement per se does not affect the validity of the retrenchment in so far as the Industrial Court's deliberations are concerned but may influence the Court's decision on whether or not the retrenchment is bona fide.

Under the Employment Notification 2004 [PU (B) 430], the employer is required to submit an employment notification retrenchment form, in the PK Form, to the nearest Labour and Manpower Department. The requirement to submit the PK Form arises the following actions are taken:-

- Retrenchment of employees;
- Voluntary Separation Scheme ("VSS");
- Temporary lay-off, and
- Reduction of wages.

The employer is obliged to complete the PK Form and lodge the necessary copies in stages at the Labour Department. The PK Form contains six parts. Parts I to IV must be submitted within 30 days before the retrenchment of employees. Part V must be submitted within 14 days after the date of retrenchment while Part VI must be submitted within 30 days after the date of the retrenchment exercise. Parts V and VI must be submitted if the action involves a retrenchment or voluntary separation scheme.

The duty to submit the form not only applies to an employer but also to an owner or occupier of land who employs a person to work for him. An "owner' is defined as a registered owner of the land whereas an "occupier" refers to a person who resides or has the place of business on the land. A failure to submit the PK Form is an offence under s 99A of the Employment Act 1955 which carries the punishment of a fine not exceeding RM10,000.

4.9.2.3 Consultation with Trade Union

There are collective agreements that impose upon the employer a requirement that prior to any retrenchment exercise being undertaken advance notice must be given to the trade union and/or its employees. The purpose of such advance notice is to enable the trade union to assist the employees to find alternative employment.

It is mandatory to comply with such requirement, failing which 56 of the trade union may lodge a complaint of non-compliance under s *Industrial Relations Act 1967* ("IRA")

In the absence of a contractual obligation, the employer is still expected to put into practice the Code of Conduct for Industrial Harmony that advocates consultation with the workmen or their trade union representative.

A case in point relating to the requirement of giving advance notice is "*Dunlop Industries Employees union v Dunlop Malaysian Industries Bhd & Anor (*1987) 2 MLJ 81[43]. In this case the employer and the trade union had entered into a collective

agreement that required the employer to give such advance notice as is reasonably possible to the trade union in writing of any redundancy or retrenchment but such notice shall not be less than two months prior to the retrenchment. The employer only informed the union of its intention to retrench some of its employees and issued the notice of retrenchment on the same day. The trade union vigorously protested and subsequently lodged a complaint with the Industrial Court for non-compliance of the collective agreement."

"The Industrial Court ruled that there was non-compliance of the aforesaid article and ordered the employees to be reinstated to their former positions. On appeal to the Supreme Court, the Supreme Court reaffirmed the decision of the Industrial Court and the order was properly made in accordance with the provisions of s 56 (2)(b) of the IRA."

4.9.2.4 Retrenchment benefit package

A retrenchment benefit package should also be worked out for the employees identified to be retrenched. If the terms and conditions of the provide for benefits to be payable and the of benefit, the benefit that is made available must comply with the terms and conditions of service (Chen, 1997). In Malaysia, the Employment (Termination and Lay-off Benefits) Regulations 1980 (the 1980 Regulations), provide legislative protection to employees for involuntary termination of employment. The requirement to pay retrenchment benefits would depend on which category the employee as being discussed below:

4.9.2.4.1 Unionised employees

In respect of employees within the scope of a collective agreement, the requirement to pay retrenchment benefits would depend on whether there is an express term that provides for the payment of such benefits.

4.9.2.4.2 Employees covered by the EA

In respect of employees falling within the ambit of the EA, Reg 3 and 4 of the Employment Termination and Lay-Off Benefits (Regulations 1980) provided that an employee would be entitled to termination benefits calculated in accordance with the aforesaid regulations. According to Regulation (3) :-

"An employee shall not be entitled to any termination benefits payment if, not less than seven days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of service or to re-engage him under a new contract, so that :-

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not be less favourable than the corresponding provisions of the contract as in force immediately before the termination of his services; and

(b) the renewal or re-engagement would take effect on or before the date with effect from which his services are to be terminated, and the employee has unreasonably refused that offer.)

Reg 3 of Regulation 1980 states that:- if their employment is terminated for any reason other than:

(i) the attainment of the age of retirement;

(ii) on grounds of misconduct and

(iii) or on a voluntary basis by the employee.

Regulation 4 of Regulation 1980 provides that:-

An employee shall not be entitled to any termination benefits payment where he leaves the service of his employer before the expiration of any notice given to him by his employer in accordance with section 12 of the Act:-

"(a) without the prior consent of the employer, which consent shall not be unreasonably withheld; or

(b) without having made payment to the employer in accordance with section 13."

Termination on grounds of redundancy and benefits would attract the payment of termination benefits to the affected employees. It is also pertinent to note that under Reg 3, the employee must be employed under a continuous contract of employment for a period not less than 12 months before the date of termination to be entitled for

termination benefits. The quantum of termination besides benefits. The quantum of payable provided for under Reg 6 is as follows as shown in the table 4.2

Table 4.2 Length of Service and amount of wages of termination

Length of service	**Minimum amount of termination benefits**
Less than 2 years	10 days' wages for every year of service
2 years or more year of service but less than 5 years	15 days' wages for every year of service
5 years or more	20 days' wages for every year of service

Reg 6 of the Employment Termination and Lay-off Benefits) Regulations 1980.

From the above it is clear in respect of an incomplete year of service, the amount payable is pro- rated, calculated to the nearest month. Subject to the provisions of these Regulations, the amount of termination or lay-off benefits payment to which an employee is entitled in any case shall not be less than :-

"(a) ten days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than two years; or

(b) fifteen days' wages for every year of employment under a continuous contract of serviced with the employer if he has been employed by that employer for two years or more but less than five years; or

(c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five year or more, and pro-rata as respect an incomplete year, calculated to the nearest month."

The payment of retrenchment benefits should be made within seven days of the termination Reg 11 i.e:-

"11.1 Any termination or lay-off benefits payment payable under these Regulations shall be paid by the employer to the employee not later than seven days after the relevant date.

(2) Any employer who fails to comply with paragraph (1) shall be guilty of an offence."

In respect of non-unionized employees who do not fall within the ambit of the EA, "the requirement to pay retrenchment benefits would primarily depend on whether there is a term in the contract of employment that mandates the payment of such benefits. The payment for such benefits may be expressed stated in the contract or exist by implication through the past practices in the contract or industry."

In *Dr HC Huang Consultancy Sdn v Lim Choon [2000]2 ILR 330*[44], "a retrenched senior engineer contended that his dismissal was unfair and complained further that he did not receive any retrenchment benefits. The Court, ruling that the claimant was not within the scope of the EA, and therefore entitled to not the termination benefits nor was there any requirement under the contract to such benefits. Therefore, the

company was not under a legal duty or obligation to pay the claimant any retrenchment benefits."

However, in the case of *Mamut Copper Mining Sd Bhd Chau Fook Kong [1997] 2 ILR 625*[45], "the question before the Industrial Court was whether an employer may proceed with the retrenchment of its surplus employees without providing reasonable compensation to its retrenches. The Industrial Court stated that the provision of retrenchment benefits 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. Further, it acknowledges a workman's security of tenure and recognises the fact that through no fault of his, such security of tenure has to give way to his employer's overriding interest of economy and efficiency."

Upon the issuance of the notice of termination and payment of retrenchment benefits, the employer is required by Reg 12 of the Employment (termination and Lay-off Benefits) Regulations 1980 to issue written particulars or statement to the employee stating the amount of the termination benefits and the manner in which such payment has been calculated. Failure to do so an offence under the EA and upon conviction, the employee may be liable to pay a fine up to RM10,000.

The acceptance of retrenchment benefit by the employee(s) does not preclude or estop the employee(s) from challenging the validity of the dismissal. In *Marlin bte Rajiman Ors v MAA Services Sdn Bhd* [1994] 2 MLJ 404[46], "the Industrial Court

allowed the preliminary objection that the employees were estopped from bringing the matter before the Industrial Court because they had already received their retrenchment payments. The Supreme Court held that the Industrial Court was wrong to have dismissed the claim purely on the ground of technicalities (i.e on estoppel) and that the Industrial Court should have proceeded to determine whether the termination was a result of a genuine retrenchment exercise or a dismissal without just cause."

4.9.2.4.3 Companies under Receivership

In situations where companies go under receivership or face bankruptcy, ie where the bank takes over, workers are not likely to be paid the retrenchment benefits. "The banks' responsibility, first and foremost, is to sell the assets and repay all debts. Any balance would then go towards the payment of statutory obligations such as income tax, EPF, SOCSO and any further balance after that would go to the payment of retrenchment benefits."

4.10 During Retrenchment

During Retrenchment phase the HR department should follow the follow guidelines:-

"a. Assist employees in job counselling and job re-placement;

b. Provide the employees the necessary advice and information on job openings within the industry;

c. Provide testimonial letters in support for job application and

d. Post employees profile to the HR networking group within the industry circle."

4.11 During the post-retrenchment phase

"During the post retrenchment phase the HR department must at least get in touch with the employees and find out if they have secured any jobs. This is to show concern and value their contributions to the seeking for them know that the company is willing is ready to give feedback their potential employers are reference check."

Subsequent to retrenchment, the employer has a duty to ensure that work continues to be made available to its retrenched employees, if available. If positions become vacant subsequent to the retrenchment, the employer is bound to offer the positions to the retrenched employees.

"In *Kesatuan Pekerja-pekerja Perusahaan Logam v KL George Kent (M) Bhd* [1990] 2 CLJ 401[47], the evidence showed that company continued to engage operators and the temporary operators after the retrenchment of five of its supervisors and dispatch clerks. The Industrial Court held that the company should have offered the posts to the retrenched employees and that the Industrial Court's view that the retrenched employees should apply for those posts was wrong since it was the employer who had a duty to make the offer. If a retrenched employee rejects an offer of employment subsequent to retrenchment, for whatever reasons, the employer would be justified in offering the vacant position to a third party."

Although career placement services or career guidance counselling is not compulsory, it is increasingly afforded by responsible employers to their employees who are identified for retrenchment.

4.12 Conclusion

The present chapter focused on highlighting the laws and regulations that should be kept in mind while retrenching an employee. The human resource practitioners must remember that the Code of Conduct places some burden on them to provide advanced warning of any impending retrenchment and to take other measures to lessen the pain for the retrenched employee. If the Code was not observed and tha matter goes to the Industrial Court and if it is proved that the company had not been fair to the retrenched workman, the Court may order the company to reinstate the workman or pay compensation in lieu. Therefore, consultation with the employees and union on each step of the way before actual retrenchment takes places, goes to reduce the impact of retrenchment.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Introduction

Retrenchment is very difficult to cope with from both the employer's and employee's side. The employer trying to save his business viability and the employee having to lose his job and means of sustenance. It is a battle between an employer's prerogative to secure his business and an employee's right to security of tenure. Retrenchment of workers can arise due to various reasons such as closure, sale of company, shift to automated system, reorganisation and restructuring, among others.

The present chapter will focus on summarizing retrenchment, the law, process and procedure of carrying out retrenchment in the end the recommendation will be provided to improve the present situation.

5.2 Discussion

1. Retrenchment is an activity to legally terminate any employment contract with the employee when a company wants to reduce manpower or shuts down its business or close down their branches or it merges itself with two or more companies, or the company has been bought by another company.

2. Though retrenchment is a managerial prerogative and there is no legal provision that can prohibit any company from cutting their workforce but there are certain conditions that the employer should go through while retrenching its employees

for example. Section 60N of the Employment Act 1955 that has clearly stated that if a situation arises for staff reduction then the company must retrench their foreign workers first.

3. When an employee who are about to retrench falls under the purview of the Employment Act 1955, then that employee has to inform the labor department at least one month before the retrenchment date by filling in the Form PK 1/198.

The discussion revealed there are various laws and procedures that the employer has to adhered too in order to retrench the employees. Among the laws are those provisions stated in the EA, IRA, Regulation 1980. Besides those Acts and Regulations, the employer also has to follow the guidelines as being provided under the Code of Conduct of Industrial Harmony and also those guidelines by the Ministry of Human Resource. These situations, therefore would make it difficult for the employer to follow the proper procedures for retrenchment.

It is very important for the employer to follow the proper procedures in retrenching the employees in order to avoid the claim of unjustified dismissal by the employee. It is also important to note that the retrenchment also must be done in bona fide and not mala fide.

The discussion also found that, the Termination Lay off Benefits (Regulation 1980) provides that legislative protection to the employees for the involuntary termination

of employment. However, Regulations 1980 only applicable to categories of workers who fall under the definition of workers under First Schedule of the Employment Act 1955. However, for workers who do not fall under the Employment Act 1955, their rights will be protected through collective agreement between the employers or trade union or any specific provision in individual contacts of employment. In the absence of specific provision, those workers will not be entitled to any termination benefits in the event of retrenchment. Thus, it is important to address the compensation to those employees as this benefit serves as a reward for their loyalty to the company and to help them to survive in life while getting a new job.

5.3 Recommendations

Looking at the problem of the present study the researcher suggests few recommendations such as:

i) Laws are scattered

In Malaysia, the laws of retrenchment are scattered therefore the employer finds it difficult to follow the proper procedures. Thus, the existing provisions must be gathered so that it would be easy for the employer to search for the law in order to retrench the employee in future.

ii) Retrenchment must follow proper procedures

While retrenching the workers from the employment it must follow justifiable grounds of redundancy which must be bona fide and untainted by unfair labor

practice. An employer's unilateral declaration of redundancy must be justified on the basis of genuine reasons and the decision to dismiss must be carried out with fairness.

iii) Retrenchment must follow the justifiable grounds

The selection of workers to be retrenched must be reasonably done, and must include consultation with the affected workers on any impending redundancy so that they may seek suitable alternative employment, either in the same organisation or elsewhere.

iv) Provision of termination benefits

Workers whose wages were RM 2000 or below and does not fall under the purview of the Employment Act 1955 for payment of compensation that affected workers must be paid compensation for the loss of employment by mutual consent of the other employers. The provision of retrenchment compensation will prove helpful for the employee provide the employee with the necessary means to sustain himself until he finds another suitable employment.

Furthermore, the recommendations suggests that where it is thought that a temporary reduction of normal hours of work would be likely to avert or minimize terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked.

5.4 Conclusion

The present chapter has focused on concluding all the present study and giving the suggestions to improve the situation. Moreover, while conducting the present study the researcher also highlighted the limited online studies on legal researches therefore more studies should be conducted on the legal requirement, contract terms and payment methods and be prepared for post retrenchment eventualities. Furthermore, future studies should focus on publishing their research work.

REFERENCES

Books

Amin, S. H. (1992). *Research methods in law*. Royston Publishers.

Aminuddin, M. (1999). *Malaysian industrial relations and employment law*. McGraw-Hill.

Amminuddin, M, (2003), Malaysian Industrial Relations and Employment, 4th Ed, McGraw Hill: Singapore.

Ayadurai, D, (1996), *Industrial Relations in Malaysia: Law and Practice*, Malaysian Law Journal: Kuala Lumpur.

Bhalla, S. (2016). 36_Virtual Proscription of Unilateral Lay-Offs.

Chen, V. S. (2007). *Industrial relations skills for managers*. CCH Asia Pte Ltd.

D'Cruz, MN, (1999), Current Malaysian Labour Laws, Leeds Publication: Kuala Lumpur.

Geddes, B. (2003). *Paradigms and sand castles: Theory building and research design in comparative politics*. University of Michigan Press.

Jacobstein, J. M., Mersky, R. M., & Dunn, D. J. (1994). *Fundamentals of legal research* (pp. 323-360). Foundation Press

Johnson, S., Latham, R. G., & Todd, H. J. (1866). *A dictionary of the English language* (Vol. 1, No. 2). Longmans, Green.

Kuruvilla, S., & Arudsothy, P. (1995). Economic development strategy, government labour policy and firm-level industrial relations practices in Malaysia.

Malhotra, O. P. (1973). *The law of industrial disputes*. NM Tripathi.

Marsono, H., & Kamaruzaman, J. (2008). Retrenchment in Malaysia: Employer's right. *J. Pol. & L.*, *1*, 22.

McConville, M., & Chui, W. H. E. (Eds.). (2007). *Research methods for law*. Edinburgh University Press.

Murray, M. D., & DeSanctis, C. H. (2009). *Legal research methods* (p. 49). Thomson Reuters/Foundation Press.

Parasuraman, B, (2004), Malaysian Industrial Relations: A Critical Analysis, Pearson Education: Kuala Lumpur.

Parasuraman, B. (2004). *Malaysian industrial relations: A critical analysis*. Prentice Hall/Pearson.

Rajkumar, K, (1999), *Malaysian Labour Law Made Simple*, Pelanduk Publications: Kuala Lumpur.

Thavarajah, T., & Low, R. T. (2001). *Employment Termination Law & Practice: Malaysia*. CCH Asia.

Tidd, J., Bessant, J. and Pavitt, K. (2001), Managing Innovation, John Wiley and Sons Ltd, Chichester.

Ung, L. J., Brahmana, R., & Puah, C. H. (2014). Does retrenchment strategy mitigate earnings management? Evidence from Public Listed Companies in Malaysia.

Venkataramaiya's Law Lexicon Desai, vol III, 2nd edn, p 2105

Whincup, M. H. (2014). *Redundancy and the Law: A Short Guide to the Law on Dismissal with and Without Notice, and Rights Under the Redundancy Payments Act, 1965*. Elsevier.

Wu, MA, (1995), *The Industrial Relations Law of Malaysia,* Longman: Kuala Lumpur.

Articles

Abraham, S. (2006), "The market reaction to layoff announcements: a union-non-union comparison", International Journal of Manpower, Vol. 27 No. 5, pp. 452-466.

Afroz, R., Hassan, M. N., & Ibrahim, N. A. (2003). Review of air pollution and health impacts in Malaysia. *Environmental research*, *92*(2), 71-77.

Argote, L., McEvily, B. and Reagans, R. (2003), "Managing knowledge in organizations: an integrative framework and review of emerging themes", Management Science, Vol. 49 No. 4, pp. 571-582.

Ariffin, R. (1997). Changing employment structures and their effects on industrial relations in Malaysia. *The Economic and Labour Relations Review*, *8*(1), 44-56.

Armstrong-Stassen, M. and Schlosser, F. (2008), "Taking a positive approach to organizational downsizing", Canadian Journal of Administrative Sciences, Vol. 25 No. 2, pp. 93-106.

Bedeian, A. and Armenakis, A. (1998), "The cesspool syndrome: how dreck floats to the top of declining organizations", Academy of Management Executive, Vol. 12 No. 1, pp. 58-63.

Benach, J., Vives, A., Amable, M., Vanroelen, C., Tarafa, G., & Muntaner, C. (2014). Precarious employment: understanding an emerging social determinant of health. *Public Health*, *35*(1), 229.

Bidin, A., Khan, S., & Tan, O. (2012). PROTECTION OF EMPLOYEES'ENTITLEMENTS IN CASES OF EMPLOYER INSOLVENCY IN MALAYSIA. *International Journal of Business and Society*, *13*(2), 209.

Bowersox, N. (2009), "Downsizing and building organizational memory: a paradoxical relationship between 'brain drain' and 'brain gain' ", in Girard, J. (Ed.), Building Organizational Memories: Will You Know What You Knew? IGI Global, Hershey, PA, pp. 18-29.

Cascio, W. (1993), "Downsizing: What do we know? What have we learned?", Academy of Management Executive, Vol. 7 No. 1, pp. 95-104.

Datta, D., Guthrie, J., Basuil, D. and Pandey, A. (2010), "Causes and effects of employee downsizing: a review and synthesis", Journal of Management, Vol. 36 No. 1, pp. 281-348.

De Meuse, K. P., & Dai, G. (2013). Organizational Downsizing: Its Effect on Financial Performance Over Time. *Journal of Managerial Issues*, *25*(4), 324.

De Vries, M. F. K., & Balazs, K. (1997). The downside of downsizing. *Human relations*, *50*(1), 11-50.

Desai, M. C. (1983). Venkataramaiya's Law Lexicon with Legal Maxims. *Vol. II, Delhi Law House, Delhi*.

Farrell, M., & Mavondo, F. T. (2004). The effect of downsizing strategy and reorientation strategy on a learning orientation. *Personnel Review*, *33*(4), 383-402.

Gandolfi, F. (2005). How do organizations implement downsizing?–An Australian and New Zealand study. *Contemporary Management Research,1*(1), 57-68.

Gandolfi, F. (2013). Workforce downsizing: Strategies, archetypes, approaches and tactics. *Journal of Management Research*, *13*(2), 67.

Guthrie, J. P., & Datta, D. K. (2008). Dumb and dumber: The impact of downsizing on firm performance as moderated by industry conditions. *Organization Science*, *19*(1), 108-123.

Hergenrather, K. C., Zeglin, R. J., McGuire-Kuletz, M., & Rhodes, S. D. (2015). Employment as a Social Determinant of Health: A Review of Longitudinal Studies Exploring the Relationship Between Employment Status and Mental Health. *Rehabilitation Research, Policy, and Education*, *29*(3), 261-290.

Hew, SK, (2002), Dismissal: Salient Points to Ponder Before Industrial Court Proceedings in Malaysia, Leeds Publication: Kuala Lumpur.

Hitt, M., Bierman, L., Shimizu, K. and Kochhar, R. (2001), "Direct and moderating effects of human capital on strategy and performance in professional service firms: a resource-based perspective", Academy of Management Journal, Vol. 44 No. 1, pp. 13-28. http://www.hrinasia.com/general/20000-lost-their-jobs-in-2015-worse-in-2016-says-employers-group/

Kuminoff, N. V., Schoellman, T., & Timmins, C. (2015). Environmental regulations and the welfare effects of job layoffs in the United States: A spatial approach. *Review of Environmental Economics and Policy*, *9*(2), 198-218.

Lim, D. S., Celly, N., Morse, E. A., & Rowe, W. G. (2013). Rethinking the effectiveness of asset and cost retrenchment: The contingency effects of a firm's rent creation mechanism. *Strategic Management Journal*, *34*(1), 42-61.

Macdonald, J. J. (2006). Shifting paradigms: a social-determinants approach to solving problems in men's health policy and practice. *Medical Journal of Australia*, *185*(8), 456.

Marques, T., Galende, J., Cruz, P., & Portugal Ferreira, M. (2014). Surviving downsizing and innovative behaviors: a matter of organizational commitment. *International Journal of Manpower*, *35*(7), 930-955.

Marshall, A., McColgan, P., & McLeish, S. (2012). Why do stock prices decline in response to employee layoffs? UK evidence from the 2008 global financial crisis. *Journal of Financial Research*, *35*(3), 375-396.

Maslach, C., Schaufeli, W. B., & Leiter, M. P. (2001). Job burnout. *Annual review of psychology*, *52*(1), 397-422.

Massingham, P. (2008), "Measuring the impact of knowledge loss: more than ripples on a pond?", Management Learning, Vol. 39 No. 5, pp. 541-560.

Mazumdar, D. (1991). *Malaysian labor markets under structural adjustment* (Vol. 573). World Bank Publications.

Mellahi, K., & Wilkinson, A. (2004). Organizational failure: a critique of recent research and a proposed integrative framework. *International Journal of Management Reviews*, *5*(1), 21-41.

Mishra, K. (1996), "Organizational responses to crises in trusting organizations", in Kramer, R. and Tyler, T. (Eds), Trust in Organizations, Frontiers of Theory and Research, Sage Publications, New York, NY.

Mohamed, A. A. A., & Baig, F. B. S. (2012). Security of Tenure vs Management Prerogative to Discharge Surplus Labour. *International Journal of Business and Social Science*, *3*(7).

Muniapan, B**,** (2006), *Work and Employee Relations: An Overview of Constructive Dismissal in Malaysian Employment Relations,* 3rd National Human Resource Management Conference: Emerging Challenges of the Century, organised by Universiti Utara Malaysia, City Bayview Hotel Langkawi, Kedah, 26–28 November 2006.

Muniapan, B. (2015). Business Sustainability from the Perspective and Management of Malaysian Retrenchment Laws. *Technological Solutions for Sustainable Business Practice in Asia*, 273.

Ramayah, T., Jantan, M., & Chandramohan, K. (2004). Retrenchment Strategy in Human Resource Management: The Case of Voluntary Separation Scheme (VSS). *Asian Academy of Management Journal*, *9*(2), 35-62.

Reisel, W. and Banai, M. (2002), "Job insecurity revisited: reformulating with affect", Journal of Behavioural and Applied Management, Vol. 4 No. 1, pp. 87-90.

Reynolds-Fisher, S. and White, M. (2000), "Downsizing in a learning organization: are there hidden costs?", Academy of Management Review, Vol. 25 No. 1, pp. 244-251.

Sahdev, K. (2003), "Survivor's reactions to downsizing: the importance of contextual factors", Human Resource Management Journal, Vol. 13 No. 4, pp. 56-74.

Schmitt, A., Borzillo, S. and Probst, G. (2011), "Don't let knowledge walk away: knowledge retention during employee downsizing", Management Learning, Vol. 43 No. 1, pp. 53-74.

Schuler, R. S., Budhwar, P. S., & Florkowski, G. W. (2002). International human resource management: review and critique. *International Journal of Management Reviews*, *4*(1), 41-70.

Schweizer, L., & Bilsdorfer, P. T. (2016). Stock Price Reactions to Corporate Layoff Announcements: A Resource and Systems Theory-Based Analysis of Socially Accepted Layoff Procedures. *Corporate Responsibility: Social Action, Institutions and Governance*, 95.

Shah, P. (2000), "Network destruction: the structural implications of downsizing", Academy of Management Journal, Vol. 43 No. 1, pp. 101-112.

Todd, P., & Peetz, D. (2001). Malaysian industrial relations at century's turn: Vision 2020 or a spectre of the past?. *International Journal of Human Resource Management*, *12*(8), 1365-1382.

Trahms, C. A., Ndofor, H. A., & Sirmon, D. G. (2013). Organizational decline and turnaround a review and agenda for future research. *Journal of Management*, *39*(5), 1277-1307.

Tsao, C. W., Newman, A., Chen, S. J., & Wang, M. J. (2016). HRM retrenchment practices and firm performance in times of economic downturn: exploring the moderating effects of family involvement in management. *The International Journal of Human Resource Management*, *27*(9), 954-973.

Cases

1.Harris Solid State (M) Sdn Bh d& Ors v Bruno Gentil Pereira and Ors [1996] 4 CLJ 747

2.Gabungan Persahaan Minyak Lengkap Sdn V Heng Mee Oo (1990) 2ILR 33

3.Wha Hay Mooi v Acterna Malaysia sdn Bhd 2010 LNS 0002.

4.Pipraich Sugar Mills LTD v Pipraich Sugar Mills Mazdoor Union [1957] AIR 121.

5.Koperatif Perumahan Angkatan Tentera Berhad v Meor Othman Lofti bin Abdul Latiph [1994] 2 ILR 1213.

6.Amos and others Max-Are Ltd, [1973] IRLR 285.

7.Qdos Microcircuits Sdn Bhd v Gurmeet Kaur Kaka Singh & ORS (2001) 1ILR 786

8.Great Wall Shopping Sdn Bhd and Gan Shang Eng (1988).

9.*Federal Hotels International Sdn Bhd and KC Fong& CT Mak* (Award 113 of 1989).

10. *Khoo Heng Choon & Co and Geeta Devi* (Award 345 of 1992).

11.*Mamut Copper Mining Sdn Bhd v Chau Fook Kong* [1997] 2 ILR 625.

12.Federal Hotels International Sdn Bhd and KC Fong& CT Mak (1989)

13.Bayer (M) Sdn. Bhd. v. Ng Hong Pau [1999] 4 MLJ 361

14.Mamut Copper Mining Sdn Bhd v Chau Fook Kong [1997] 2 ILR 625.

15.Adam Abdullah v. Malaysian Oxygen Bhd. [2012] MELR 357

16.Chay Kian Sin v. Measat Broadcast Network System Sdn. Bhd (2012).

17.William Jack & Co. (M) Sdn. Bhd. v. S. Balasingam [1997] 3 CLJ 235

18.Harris Solid State(M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira Ors [1996] 3 MLJ 489.

19.Pengkalen Holdings Bhd v James Lim Hee Meng [2000] 2 ILR 252.

20.Radio & General Trading Sdn Bhd v Pui Cheng Teck, Gan Sek Teng, Foo Say Tuan & Goh Tok Eng [1990] 2 ILR 242

21.Sharikat Eastern Smelting Bhd v Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Logam Sa Malaya (1968).

22.Firex Sdn Bhd v Cik Ng Shoo Waa [1990] 1 ILR 226.

*23.*Association Pan Malayisa Cement Sdn Bhd v Keatuan Pakerja-pekerja Perusahaan Simen (M) Perak [1986] 2 ILR 1612.

24.Indian Cable Co Ltd v Its Workmen 1962 (1) LLJ 409.

25.Guoman Port Dickson v Ahmad Akmal Mohd Yunos [2001]1 ILR 875.

26.Dr HC *Huang Consultancy Engineers Sdn Bhd v Lim Choon Ntia* [2000] 2 ILR 330.

27.Behn Meyer & Co (M) Sdn Bhd v Puan Jariah bte Baharum & Anor [1994] 1 ILR 165.

28.Associated Pan Malaysia Cements Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Simen(M) Perak [1986] 2 ILR 1612

29.Tulsidas Khimji v F Jeejeebhoy [1961] I LLJ 42

30.Koperasi Jayadiri (M) Sdn Bhd v Lai Chui Yin [1993] 1ILR 74

31.Malaysia Shipyard & Engineering Sdn Bhd D Mukhtiar Singh & 16 Ors [1991] 1 ILR 626

32.Swadesamitran Ltd v Their Workmen AIR 1960 SC 762.

33.Supreme Corporation Bhd v Pn Doreen Daniel [1987] 2ILR 522

34.Industrial Court in Supreme Corporation Bhd v Doreen Daniel G Ong Kheng Liat [1987] 2 ILR 522

35.Associated Pan Malaysia Cements Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Simen (M) Perak [1986] 2 ILR 1612

36.Jupiter Securities Sdn Bhd v Edmund Chang (2009).

37.Richard v Koefod [1969] 3 All ER 1264

38.Quek Chen Yen v Majlis Daerah Kulai [1986]2 MLJ

39.D'Cruz v Seafield Amalgamated Rubber Co Ltd (1963) MLJ 154

40.Payzu v Hannaford (1918) 2 KB 348

41.Gabungan Perusahaan Minyak Langkap Sdn Bhd Heng Mee Oo [1990] 2 ILR 33

42.Web Printers Sdn Bhd v Nandah Kumar s/o P K Menon (1992) 124

43.Dunlop Industries Employees union v Dunlop Malaysian Industries Bhd & Anor (1987) 2 MLJ 81

44.Dr HC Huang Consultancy Sdn v Lim Choon [2000]2 ILR 330

45.Mamut Copper Mining Sd Bhd Chau Fook Kong [1997] 2 ILR 625

46.Marlin bte Rajiman Ors v MAA Services Sdn Bhd [1994] 2 MLJ 404

47.Kesatuan Pekerja-pekerja Perusahaan Logam v KL George Kent (M) Bhd [1990] 2 CLJ 401

Statutes

Employment Act 1955 (Act 265)

Industrial Relations Act 1967

The Code of Conduct for Industrial Harmony 1975

Employment (Termination and Lay-off Benefits) Regulation 1980

Appendix A

Sample Appendix (Replace Accordingly)

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