Restructuring and Voluntary Separation Scheme in View of the Movement Control Order

by Nurul Aisyah Hassan

On 16 March 2020, the government announced a movement control order (MCO) would take effect from 18 to 31 March 2020 to curb the spread of COVID-19. Among other things, the MCO imposed a travel ban, as well as requiring government and private business premises to close (except those deemed to be essential services).

On 25 March 2020, as a move deemed necessary to tackle the escalating pandemic, the government extended the MCO to 14 April 2020. Since then, the MCO has been extended several times. The country is now under a Recovery MCO until 31 December 2020. Economic activities put to a halt due to travel restrictions and social distancing measures have driven a sharp fall in consumer and business spending. The inevitable result of this, among others, is that businesses lose revenue and require a re-evaluation of their manpower requirements.

Companies may find that restructuring of their organisations would be necessary in order to tackle their financial losses as a result of business closures during the enforcement of the MCO. Upon an evaluation of their manpower requirements, companies may opt to offer a voluntary separation scheme or undertake a retrenchment exercise in order to terminate the service of an individual employee or a group of employees who are no longer needed.

Restructuring and retrenchment

Security of tenure is recognised in Malaysian employment law, whereby an employee's services cannot be terminated without just cause or excuse. However, where a restructuring of the business is required as a means to mitigate an economic downturn, companies may find it necessary to retrench a number of its employees who are found to be surplus to their business requirements. The law recognises a company's prerogative to organise its business in the manner it considers best as long as it is exercised *bona fide*.

In fact, the Ministry of Human Resources, through its third Frequently Asked Questions (FAQ) published on 4 April 2020,[1] also takes the position that the decision to retrench employees is the prerogative of employers, bearing in mind the following:

- there must be a genuine financial impact on the business arising from the COVID-19 pandemic;
- employers must exhaust all other means first before opting to retrench employees, such as reducing working hours, reducing or freezing the hiring of new employees, reducing or limiting overtime, limiting employees from working on weekends or on public holidays, reducing employees' wages or laying off their employees temporarily; and
- in the event that retrenchment of employees cannot be avoided, employers should terminate the services of foreign workers first before considering local employees. If retrenchment of local employees is being considered, employers

1 See http://jtksm.mohr.gov.my/images/novel_coronavirus/soalan_lazim/FAQ%20KSM%20Bil%203%20English%20version.pdfat Question & Answer 5.

are encouraged to comply with the "Last In, First Out" rule. However, employers may depart from these principles if they have strong justifications to do so.

Companies must also be prepared to collate documentary evidence on the retrenchment exercise by compiling, among others, organisational charts (pre- and post-reorganisation), evidence of losses or declining profits/sales (e.g. annual reports), e-mail communication with employees during the reorganisation stage, company-wide announcement regarding reorganisation and evidence of any other cost-cutting measures.

Voluntary separation scheme

Companies also have the option of offering a voluntary separation scheme (**VSS**) in order to avoid retrenchment on a wider scale, since employees who agree to leave voluntarily may result in a reduction of manpower to the level that is optimum for business operations such that a restructuring would no longer be required. Any eligible employee may make an offer to the company to be considered for the scheme.

If the company accepts the offer, both parties will enter into a mutual agreement to terminate the contract of employment pursuant to the scheme. Although a company would have more flexibility in terms of selection of offers, the terms offered must be generous enough to induce the employee to leave the company voluntarily. It is important that the communication of the terms of the VSS be made carefully, using the right terminology to ensure that there is a correct understanding of the offer.

Conclusion

As businesses now face unchartered waters in dealing with the COVID-19 pandemic, and with a global recession almost inevitable, employers would naturally consider downsizing as a measure to cushion the financial impact on their businesses.

It may be prudent for companies to first explore any other cost-cutting measures after the MCO is lifted before making the decision to immediately retrench any employees. Nevertheless, a company may still choose to retrench where there are compelling financial reasons and it cannot afford the luxury of offering a VSS.

In any case, whether a company opts to offer VSS or to retrench its employees, it should arrive at a decision which best suits its interest in the long run, and to ensure that it observes the relevant laws and good industrial relations practices.

LH-AG

About the author

Nurul Aisyah Hassan (nah@lh-ag.com) is an associate with the Employment & Industrial Relations Practice and is part of a team headed by **Shariffullah Majeed** (sha@lh-ag.com).

Shariffullah Majeed (sha@lh-ag.com), a partner with the Employment & Industrial Relations Practice, works closely with several government-linked companies and regularly advises them on employment-related issues. He has also played a critical and encompassing role in aiding companies in fruitful mediations.