LHAG Insights

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Adequate Paper Trail Key to Defending *Bona Fide* Retrenchment Exercise

Nur Fatin Liyana Mohamed Nor & Ors v Menteri Sumber Manusia & Johawaki Holdings Sdn Bhd; *Noor Hasyimah Kauzi & Ors v Menteri Sumber Manusia & Johawaki Trading & Machineries*
(Kuala Lumpur High Court Applications for Judicial Review Nos WA-25-580-12/2019 & WA-25-582-12/2019)

Following a cost rationalisation exercise, the Johawaki Group found there was a surplus of employees. After determining that there were no other suitable roles for them within the Group, the employees were subsequently retrenched.

The exercise was put to the test when several of the affected employees challenged whether it was genuine and filed representations for unfair dismissal under **s 20** of the Industrial Relations Act 1967 (**Representations**). Last Tuesday (2 February 2021), the High Court affirmed the decision of the Minister of Human Resources (**Minister**) not to refer the Representations of four retrenched employees to the Industrial Court. In dismissing the employees' judicial review applications challenging the Minister's decision, the High Court judge rightly found that there were no serious issues to be tried pertaining to the employees' retrenchment.

A crucial point from these cases is that the Minister had made his decision after taking into consideration the detailed supporting documents presented by the companies to show that the reorganisation exercise and subsequent retrenchment of the employees were done in good faith. Such documents included invitations to town hall sessions together with an employee attendance list for those sessions, the talking points of a senior member of the management on the reasoning behind the rationalisation exercise, proof of cost-cutting measures, selection process, efforts to redeploy employees and payment of retrenchment benefits.

However, with the recent amendments to the Industrial Relations Act 1967, it would appear that cases that are not resolved through conciliation at the Industrial Relations Department will now be referred directly to the Industrial Court without the filtering mechanism of the Minister. While this may expedite the process and reduce the number of judicial review challenges made against the Minister, such as in this instance, it raises the concern that the Industrial Court may be swarmed with frivolous complaints by aggrieved employees.

Employers should therefore bear in mind that in conducting any rationalisation exercise, a proper and adequate paper trail must be kept in order to prove before the Industrial Court that their decision to retrench employees was done in good faith.

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