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EMPLOYMENT & INDUSTRIAL RELATIONS

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5 FEBRUARY 2025

JUSTIFYING DEVIATIONS FROM THE CODE OF CONDUCT FOR INDUSTRIAL HARMONY

by Shariffullah Majeed & Arissa Ahrom

It is well established that the Code of Conduct for Industrial Harmony ("**the Code**") cannot be enforced as a binding statute. Therefore, a failure to comply with the Code *per se* cannot be fatal in a proper retrenchment exercise. While the Code may not have the force of law, it is still the gold standard by which a company's actions may be measured to determine whether the whole retrenchment exercise had been carried out *bona fide* and whether every attempt had been made to explore alternatives before terminating employment on the grounds of retrenchment. The courts have consistently recognised that the Code has legal sanction, being a document that the Industrial Court should have regard to when making its award pursuant to **Section 30 (5A)** of the Industrial Relations Act 1967.

In this case, it was undisputed that the Company had consistently been operating at substantial losses since 2016. This was further aggravated by the Malaysian government's imposition of lockdowns during the

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COVID-19 pandemic, which significantly impacted the Company financially. Therefore, the Company had no choice but to streamline its business operations by transitioning from manufacturing and research & development ("**R&D**")to supply chain management. This transition involved the elimination of its manufacturing and R&D operations, as well as the complete abolishment of the relevant departments and divisions carrying out the said functions, leading to the retrenchment of 61 employees, including the Claimants.

However, the Claimants contended that the Company's restructuring exercise was not genuine as the Company had failed to comply with the Code pursuant to its failure to among others, consult with or give early warning to the Claimants of their retrenchment. In justifying the Company's deviation from the Code, the Company's witness explained that the Company could not give early notice to the Claimants of their impending retrenchment due to a series of anonymous emails threatening the lives of its Managing Director and his family. These emails appeared to have been sent by the Company's employees.

The severity and perilous nature of the threats against its Managing Director was clearly demonstrated by the said emails which were produced in court during the trial, justifying why early notice could not be given to any of the retrenched employees, including the Claimants. In deciding that there was a genuine need for the Company to carry out a restructuring exercise and that the Claimants' retrenchment was carried out *bona fide*, the Industrial Court found, among others, the following:

(a) The Claimants' positions in the Company became redundant as the Company's operations were streamlined and its business model was restructured, involving among others, the elimination of its manufacturing operations;

(b) Despite preparing for a new project prior to the pandemic, the Company's business direction was altered as a result of the pandemic, whereby its business model was changed to supply chain management, in view of the adverse impact of the COVID-19 pandemic on its business;

(c) Therefore, there was a genuine need for a reorganisation exercise by the Company, and a genuine redundancy situation had arisen, which led to the retrenchment of the Claimants;

(d) The Last-In-First-Out ("**LIFO**") principle did not apply, as the whole department carrying out the Claimants' functions had been abolished, and all the employees within that department were retrenched; and

(e) The Company had sufficiently justified the reason for the presence of additional security personnel at the townhall prior to the Claimants being handed their retrenchment notices, i.e., the series of threats against its Managing Director.

CONCLUSION

The Company had rightfully reorganised its business for economic purposes and to maximise operational efficiency when it undertook the business transition. Under these circumstances, the Claimants' positions, along with 61 other employees (out of a total 74 employees), were excess to the requirements of the Company, and therefore, the Company was entitled to discharge such excess. Thus, the Company had been justified in retrenching the Claimants.

In this case, the court had affirmed that the Code cannot be applied in a technical or mechanical manner. Instead, it should be taken as mere guidance in a properly conducted retrenchment exercise, as in the instant case. Failure to adhere strictly to the requirements under the Code *per se* cannot vitiate a genuine retrenchment.

The Industrial Court Award can be accessed here.

The Company was represented in the Industrial Court by Partners Shariffullah Majeed, and Arissa Ahrom, of Lee Hishammuddin Allen & Gledhill.

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