

RESPONSIBLE MANAGEMENT OF EXCESS MANPOWER: RETRENCHMENT CONSIDERATIONS AND ALTERNATIVES

Introduction

The Covid-19 pandemic has significantly affected business globally and its effects are likely to persist through this year and the next. To survive amidst this challenging period, many businesses have resorted to various measures to reduce operating costs, including negotiations for rental reductions, re-evaluating their manpower needs, or increasing the adoption of technology and outsourcing solutions.

In this article, we explore the updated legal framework in Singapore with respect to the responsible management of excess manpower by employers. In particular, we look at the advisory on retrenchment benefit payable to retrenched employees as a result of business difficulties due to COVID-19 issued by the Ministry of Manpower (“**MOM**”) on 20 May 2020, the National Wage Council's 2020/2021 Guidelines, the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment updated in March 2020 (“**Tripartite Advisory**”) and the Tripartite Guidelines on Fair Employment Practices (“**Tripartite Guidelines**”).

Cost-Saving Measures as Alternatives to Retrenchment

The Tripartite Advisory encourages employers to consider all alternatives to retrenchment before effecting retrenchment as a last resort. Suggested alternatives include:

- (a) Adjustments to Work Arrangements without Wage Cuts;
 - (b) Adjustments to Work Arrangements with Wage Cuts;
 - (c) Direct Adjustments to Wages; and
 - (d) No-pay Leave
- (collectively referred to as the “**Cost-Saving Measures**” in this article).

We have been requested by various businesses to consider the suitability and applicability of the above Cost-Saving Measures in light of their respective commitments and circumstances. In implementing these measures, employers should consult and seek the consent of unions (if applicable) and employees as early as possible, and communicate the impact of the measures on the employees in a clear and empathetic manner. For example, we have encountered queries from employees arising from such communications, and assisted in establishing FAQ platforms and/or with designated contact persons to address various operational queries. Employers should regularly review and restore any adjustments made when their businesses recover.

As the Cost-Saving Measures constitute a variation of the employment contract, the employee's consent to the (temporary) changes to the terms of employment should be duly recorded to minimise potential disputes and claims down the road.

Mandatory Notifications on Cost-Saving Measures

Employers who implement Cost-Saving Measures from 7 April 2020 onwards must notify MOM, within 1 week after implementing Cost-Saving Measures, if your business:

- (a) is registered in Singapore and have at least 10 employees; and
- (b) implements Cost-Saving Measures that result in:
 - (i) More than 25% reduction in gross monthly salary for local employees; or
 - (ii) More than 25% reduction in basic monthly salary for foreign employees.

Retrenchment

Employers should conduct a retrenchment exercise only after having considered and/or implemented all applicable Cost-Saving Measures. Employers should also be aware that where any local employees are placed on mandatory no pay leave or retrenchment, the company will not be eligible for the Jobs Support Scheme (JSS) payments in respect of such local employees (i.e. Singapore Citizens and Permanent Residents).

Employers should also be mindful of the following when conducting any retrenchment exercise:

(a) Retrenchment benefits

Employees who have served the company for at least 2 years are eligible for retrenchment benefits. Those with less than 2 years' service could be granted an ex-gratia payment, out of goodwill.

The amount of retrenchment benefit to be paid out depends on what is provided for in the employment contract or collective agreement (for unionised companies). If there is no provision, this would be subject to negotiations between the employees (or their union) and the employer.

With reference to the Tripartite Guidelines, the prevailing norm is to pay a retrenchment benefit of between 2 weeks to 1 month's last drawn salary per year of service, depending on various factors including the company's financial position, whether the company is unionised, and industry norms.

Further, it should be noted that pursuant to Section 84A of the Singapore Employment Act (Cap. 91) ("EA"), entitlements to maternity benefits are unaffected by retrenchment.

(b) Conducting the retrenchment exercise

Please ensure that any decision to retrench an employee is conducted fairly and based on objective criteria (e.g. ability to contribute to future business needs); does not discriminate against any particular group on grounds of age, race, gender, religion, marital status and family responsibility, or disability; and complies with the Tripartite Guidelines.

MOM will investigate complaints of discriminatory employment practices and may impose significant enforcement actions for substantiated complaints, such as curtailing work pass privileges of the employer.

While the EA does not require the employer to disclose selection criteria for retrenchment, proper records (in relation to processes/policies, management meetings and communications regarding retrenchment) should be kept in this regard.

It is mandatory for employers with at least 10 employees who have retrenched 5 or more employees within any 6-month period to notify MOM of the retrenchment exercise.

Where an employee is retrenched or dismissed on the grounds of redundancy, and (a) has reasonable grounds to establish there is no redundancy situation and that the employer is merely using that as a pretext for terminating the contract without just cause; or (b) feels that although there is a redundancy situation, he/she has been unfairly selected for retrenchment, such employee may file a claim for wrongful dismissal, seeking reinstatement and/or compensation under the EA. Whilst the onus would be on the employee to show that his dismissal is wrongful, employers are reminded to always be mindful to conduct any retrenchment exercise with due caution and process, to defend against potential claims.

Termination Scenarios Other than Retrenchment

Where the employment relationship is: (a) terminated by resignation by the employee, or (b) terminated for cause, a retrenchment is not deemed to have taken place and retrenchment benefits are not payable. Termination requirements are generally governed by the employment contract or collective agreement (for unionised companies) and should be assessed carefully to mitigate against potential wrongful dismissal claims.

Employers should note that actions compelling its employees to resign (e.g. transferring them to a different role, with a substantial pay cut) may lead to constructive dismissal claims, with employees arguing that the company's conduct compelled a forced resignation. The burden of proof for establishing such claims will fall on the employee.

Where the employment relationship is terminated for cause (e.g. due to consistently poor performance), and the employee disputes the grounds of dismissal, the onus would be on the employer to substantiate poor performance, if required. Therefore, it is important for employers to maintain proper records evidencing poor performance and the conducting of due inquiry processes.

Dispute Resolution Process

If employees are not paid the retrenchment benefits stated in their employment contracts (i.e. salary related claim), or have a wrongful dismissal claim (for reinstatement and/or compensation under the EA), they can submit a request for mediation at the Tripartite Alliance for Dispute Management (TADM). Depending on whether the TADM deems the claim as substantiated, and on the outcome of the mediation at the TADM (where applicable), the parties may then seek resolution at the Employment Claims Tribunal (ECT).

Conclusion

Despite the challenges presented by the ongoing Covid-19 pandemic, employers are reminded to consider all viable alternatives to retrenchment, to treat their employees with empathy and consideration, and to conduct any retrenchment exercise as a last resort and in full compliance with the EA and relevant guidelines published by MOM, TADM and other applicable agencies.



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