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CCS Insights: Retrenchment 39 – Last in first out basis need not necessarily be followed but as far as possible to be practised

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In the case of Weeluk Corporation (Sarawak) Sdn. Bhd. vs. Wee Siok Luan [Award No: 8/4-185/98 of 1998], the court held that:-

Where the just cause or excuse advanced by the company is redundancy, it has to prove firstly, that the claimant was supernumerary and that her position was redundant and secondly, that her termination was in accordance with accepted industrial relation standards, practices and procedures.

However, LIFO (Last in First Out) basis need not necessarily be followed but as far as possible to be practised

Such departure from the LIFO is also confirmed in the First Allied Corporations Bhd vs. Lum Siak Kee (1996) where the Industrial Court ruled that the principle of the Code is not inflexible and extraordinary situations may justify variations.

In industrial law, the burden of proof is on the employer to show the factors he has relied on in selecting an employee for retrenchment and such an employer must act reasonably in his determination of this issue.

In the case of Malaysia Shipyard & Engineering Sdn. Bhd. v. Mukhtiar Singh & 16 ORS. [Award No: 4/4-62/88 of 1987], the court held that:-

- In an industry such as the shipbuilding industry, it is not unreasonable to place more emphasis on physical fitness and endurance; as such the company's assessment of the age factor was not wholly improper or unfair.

- The 3 year period over which the performance of an employee was based was not so unreasonable that no employer placed in circumstances such as the company was placed in, would have adopted it - it is not a patently unreasonable assessment and there is no evidence to indicate or suggest that any of the claimants had been recently transferred from one section or division to another.

- The assessment based on the medical records was neither unreasonable nor unfair as it reflected the company's desire for physical fitness in the performance of an employee's duties.

- The assessment based on the disciplinary records of the employees over 5 years was also not unreasonable or improper as the company was of the view that a disciplined workforce was essential to industrial safety and high productivity.

- There was evidence to show that the contract workers who were employed by the company were engaged on a temporary basis in order to cut costs and these employees were not performing the duties of the retrenched claimants.

- There is no legal obligation on the part of the company to consult or warn its employees before retrenchment and in this case, there was also no contractual obligation for the company to do so. Furthermore, there was sufficient evidence to indicate that the claimants knew or must be deemed to know, from the circumstances of the company and the actions taken by it, including the union meetings, that the possibility of their retrenchments was real and imminent and therefore quite foreseeable.

- On the facts of this case, the selection criteria were reasonable and the company had adduced sufficiently sound and valid reasons for departing from compliance with the LIFO principle. Dismissals justified.

By referring to this case, in selecting employees for retrenchment, employees with skills or those who occupy a specialized position may be retained and a poor performer may be eliminated.

Thus, the employer must show in detail the selection procedure and must show how they picked those unlucky one.

The Industrial Court in National Union of Cinema & Places of Amusement vs. Shaw Computer & Management Services Sdn Bhd (1975) held that the court will usually require the employer to show how, by whom, and on what basis the selection for redundancy was made.

Finally, we got a conclusion; the employer may adopt his own objective criteria in making selection. These objective criteria may include the employee's ability and expertise, experience, qualification and the business needs.

在 Weeluk Corporation (Sarawak) Sdn. Bhd. vs. Wee Siok Luan [Award No: 8/4-185/98 of 1998] 这个案件，工业法庭裁决:-

如果公司对于解雇所提出来的正当理由是因为裁员，那么首先必须要去证明涉及的员工在公司是冗余的，也就是说其职位变成多余的；然后还要去证明有关的解雇是根据公认的劳资关系标准、惯例和程序进行。

至于 “后进先出”[LIFO] 的原则，要尽可能地实践，但是不是强制性一定要遵循。

这种背离“后进先出”的原则是可以被接受的，而在 First Allied Corporations Bhd vs. Lum Siak Kee (1996) 这个案例获得证实。在这个案件，工业法庭裁定《工业和谐行为准则》的原则不是不能变通的，在特殊情况下，是可以根据具体情况作出修改。

在工业关系法令下，举证责任在用人单位 [也就是雇主] 身上，他需要陈述他在选择裁员时所依据的因素；同时上述的考量是合理的。

在 Malaysia Shipyard & Engineering Sdn. Bhd. v. Mukhtiar Singh & 16 ORS. [Award No: 4/4-62/88 of 1987] 这个案件，工业法庭如此裁定：

- 在诸如造船业之类的行业中，公司比较注重员工的身体健康和耐力并非没有道理的；因此，公司以年龄因素作为评估，并非完全不正确或不公平。
- 参考员工过去三年的绩效，也并非不合理
- 以员工的医疗记录作为评估，既合理也公平，因为它反映了公司在员工履行职责时身体健康的重要性。
- 以公司过去 5 年的员工纪律记录作为评估，也不是不合理或不适当的，因为公司认为有纪律的员工，对于工业安全和高生产效率至关重要。

- 有证据表明，公司雇用的合约员工 [Contract Worker] 是为了降低成本而临时雇用的，同时这些合约员工并没有履行被裁撤的员工的职责。

- 公司在裁员之前，是没有法律义务咨询或提醒员工。在这种情况下，公司也没有合同上的义务 [Contractual Obligation]。此外，有充分的证据表明，从公司的情况及其所采取的行动（包括工会会议）来看，涉及员工是知道或被认为知道，因此可预见，他们会被裁员的可能性是真实的，而且迫在眉睫。

- 根据本案例的事实，公司所作出的选择标准 [没有遵循“后进先出”的原则] 是合理的，并且公司已经提出了充分合理的理由解释为什么会偏离“后进先出”的原则。因此，解雇是合理的。

这个案件显示，在选择谁被裁员时，可以保留具有技能或担任专门职位的员工，同时可以淘汰业绩不佳的员工。

因此，雇主必须详细陈述遴选的程序，并且需要解释他们如何挑选那些不幸被裁员的员工。

在 National Union of Cinema & Places of Amusement vs. Shaw Computer & Management Services Sdn Bhd (1975) 这个案件，工业法庭在做出裁决说解释说，法庭通常会要求雇主表明公司是如何、还有由谁以及是在什么基础或准则上进行裁员。

最后，我们得到一个结论，那就是雇主在选择时可以采用自己的客观标准。这些客观标准可能包括员工的能力和专业知识、经验、资格和业务的需求。

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