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CCS Insights: Retrenchment 36 – How employees are selected for retrenchment?

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Section 12(3) of the Employment Act 1955 [section 11(3) of the Labour Ordinance 1950 Sabah, section 12(3) of the Labour Ordinance 1952 Sarawak] provides that the employees may be terminated from service when such termination is attributable wholly or mainly to the fact that:

(a) the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed;

(b) the employer has ceased, or intends to cease, to carry on the business in the place at which the employee was contracted to work;

(c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;

(d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish.

Involuntary termination from employment may affect the employee's personal well-being and the stabilities of his families. Thus, the effected employee is entitled to a minimum written notice (* *Please refer to our previous article*) from his employer, regardless of anything contrary contained in the contract of service between the parties.

Failure to give the appropriate notice will make the employer liable for prosecution under section 99 of the Employment Act 1955 [section 130(M) of the SLO].

In the event, retrenchment of employees cannot be avoided; in companies with foreign workers employed in a similar capacity as local employees, section 60N of the Employment Act 1955 (EA) mandates that the services of foreign workers are to be terminated first (i.e. Foreign Worker First Out) [*section 118D of the Labour Ordinance 1950 Sabah mandates that the services of non-resident employees are to be terminated first whereas section 119D of the Labour Ordinance 1952 Sarawak mandates that the services of non-resident employees are to be terminated first*].

If retrenchment of local employees is being considered, a commonly applied principle - "Last in, First Out" - means the most junior employee (in terms of length of service) would be retrenched first, compared to those who have served for a longer duration.

Employers are encouraged to comply with “Last in First Out”, however the LIFO principle is not an absolute mandatory rule and the employer can depart from the rule in retrenching staff. However, the employer must have sound and valid reasons for departure from the LIFO principle before he can be allowed to do so.

The departure from the LIFO principle was adopted by our Industrial Court. In the case of Supreme Corporation Bhd versus Puan Dorean Daniel a/p Victor Daniel and Ong Kheng Liat [Award No: 349 of 1987], the court held that:-

Held:

(1) The principle of "last in, first out" (LIFO) is not an absolutely mandatory rule which cannot be departed from by an employer when retrenching staff, if, in the light of other objective criteria and special circumstances, the employer has sound and valid reasons for the departure, all authorities agree that he should be allowed to do so.

1955 年劳工法令第 12 (3) 条文 [1950 年沙巴州劳动法第 11 (3) 条文， 1952 年砂拉越劳动法第 12 (3) 条文] 规定，在以下的情况下，雇主是可以终止雇员的服务，当这种终止完全或主要基于以下的实况：

a) 雇主已终止或打算终止 - 雇员被录用的业务；

b) 雇主已停止或打算停止 - 雇员被录用的业务地点；

c) 对雇员从事某种特定工作要求的业务，已经结束营业或逐渐减少，或预期将结束营业或逐渐减少；

d) 对雇员从事某种特定工作要求的业务地点，已经结束营业或逐渐减少，或预期结束营业或逐渐减少。

非自愿终止雇佣合约，可能会影响员工的个人福祉及其家庭收入的稳定性。因此，即使当事双方之间在雇佣合约中有何不一致的条款，受影响的雇员都有权从其雇主那里获得最低限度的书面通知（* 请参阅我们之前所发布过的文章）。

如果不给予适当的通知，雇主将在 1955 年劳工法令第 99 条文 [沙、砂劳工法第 130（M）条文]下被控。

如果真的无法避免裁员；对于那些有雇用外籍工人从事与本地雇员一样工作的公司，请注意，1955 年劳工法令第 60N 条文规定，这一类型的雇主首先应该终止外籍工人的雇佣合约（也就是我们经常看到的“Foreign Worker First Out 外籍工人先出”）[*1950 年沙巴劳动法第 118D 条文以及 1952 年砂拉越劳动法第 119D 条文，则指示首先必须要终止非居民雇员的雇佣合约*]。

如果要裁员本地员工的话，通常采用的原则是“后进先出”，这意味着与服务时间长的员工相比，工龄（就服务年限而言）最短的员工将首先被裁员。

我们鼓励雇主遵守“后进先出”的原则，但是“后进先出”原则不是绝对强制性的规定，雇主在做出裁员本地员工时，是可以背离此规则的。但是，大前提是，要有合法的依据，才能够这么做。

偏离“后进先出”的原则，工业法庭也曾采纳。在 Supreme Corporation Bhd 与 Puan Dorean Daniel a/p Victor Daniel and Ong Kheng Liat [Award No: 349 of 1987] 这个案件, 工业法庭是这样做出裁决的:-

> “后进先出”（LIFO）的原则并不是绝对强制性的法则，如果根据其他客观标准和在特殊的情况下，用人单位具有更健全和更有效的选择标准，而在裁员时不得不背弃“后进先出”此法则，这种原因，所有有关当局都应该同意并允许雇主这么做。

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