LEGAL CAULDRON

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Advocates and Solicitors

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EDITOR'S NOTE

"Progress is impossible without change, and those who cannot change their minds cannot change anything."

- George Bernard Shaw

Welcome to 2016! The beginning of a new year is almost always a mark for change. We want to continue the good old-fashioned belief to "care enough and be (com)passionate about anything and everything that we do", quoting Mr Jayadeep's editor's note for our inaugural publication of the *Legal Cauldron* back in 2007. However, some things have changed for the better and it is our pleasure to introduce to you the newly appointed Cauldron Committee members, legal associates Shobana and Vijayandran, led by our newly minted Partner, Barvina. I would like to seize this opportunity to extend my sincere appreciation to the Cauldron Committee for their unfailing dedication and contribution towards the successful publication of this Issue of the *Legal Cauldron*.

2015 have seen tectonic shifts in the local corporate and commercial sphere, with the appointment of new CEOs for heavy-weight industry players such as Petronas, Malaysian Airlines, CIMB Islamic, and DRB-Hicom to name a few. Such shifts in corporate structures may have significant persuasive power over market sentiments, and would doubtlessly concern shareholders of companies ramified within this intricate economic web. Andrew's article on minority protection in Malaysia aptly provides a general but essential understanding on the rights of a minority shareholder, a worthwhile read to gain some useful insights and perhaps a sense of empowerment too.

Speaking of monumental changes, the introduction of the Goods and Services Tax (GST) back in April 2015 had industry players and individuals alike caught in a hazy state. Upon its introduction, questions and opinions on the procedures, impact and implications related to GST flooded the conventional and social media platforms. While the implementation hiccups of this broad-based consumption tax is gradually being ironed out, we thought it may be helpful to shed some light on the impact of GST specifically on property and real estate transactions alongside other related issues in the featured article written by Manisah since the impact of the GST on property and real estate transactions were the most common queries we have come across to date. As the Royal Customs of Malaysia steadily rolls out guidelines addressing the impact of GST on targeted industries, we look forward to being better apprised on the implementation progression and to be more equipped with a breadth of perspective and acuity of judgment on the topic.

Deviating from the corporate and commercial realm, in instances where corporate or personal disputes take a turn for the worse and become litigious, a subpoena may be issued by the Court to aid the dispute resolution process. The article by Jesrin illustrates the purpose and types of subpoena available as well as the processes to be accorded should one encounter the unlikely event of having a subpoena issued upon. Expanding on litigious matters, topics on redundancy and retrenchment is more pertinent of late considering the tender employment situation. Andy in his article on redundancy and retrenchment shares on what an employee can do when faced with the devastation of retrenchment.

This Issue of the *Legal Cauldron* also features parcels of memories from our trip to Krabi, the annual Christmas Kringle celebration in office, and other activities and events participated by the JHJ family.

As always, we hope that you enjoy the read as much as we took pleasure in sharing it with you. We also welcome feedbacks or queries which you may have on any of the topics or columns contained in our *Legal Cauldron*. Please send your comments, suggestions or queries to kd@jhj.com.my and we look forward to hearing from you!

Sincerely,

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Minority Protection in Malaysia

Understanding your rights as a Minority Shareholder

Do you own some shares in a company? Did you buy the said shares because you thought the company has a great future profit potential? That sounds like a great decision. But how many shares did you buy? Less than 51% of the issued shares? If so, then you are a "minority shareholder".

Shares allow voting rights but if you are not a majority or substantial shareholder, then there is every chance that you maybe outvoted on a matter that may be crucial to you. What if you feel what the directors/majority shareholders are doing is wrong? Can you take action?

The general answer is no. There is a rule called the "***Foss v Harbottle"*** rule which states that "the proper plaintiff in respect of wrong committed against a company, is the company; not the shareholder". In such a scenario, if you feel that the directors/majority shareholders are doing something wrong, they are committing that wrong against the company, not against you personally. Therefore, the entity which has the right to take any action, is the company and not you.

Therefore, that leads to a conundrum. How can action be taken by the company if the wrongdoers (being majority shareholders) are already in control of the company? Surely they would never cause the company to take action against themselves. What then can you (as a minority shareholder) do?

Fret not! There is **Section 181 of the Companies Act 1965**: Remedy in cases of oppression. But it should firstly be borne from the outset that this is not a remedy to be used "willy-nilly". A person who joins a company (as a member/shareholder) must bear in mind that he/she does so on the understanding that he/she may be outvoted. This is called the "majority rule" – which simply means the will of the majority should prevail, just like democracy. You therefore may not challenge a decision of the majority just because you do not like it. There must be "oppression".

What amounts to "oppression" (for the purposes of our Companies Act)? Lord Wilberforce in ***Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227*** states:

> *"The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked; there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made up… their Lordships would place emphasis on 'visible'… Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at some identifiable point in time, can be held to have crossed the line."*

The above case merely makes a statement of principle. But it is not a very useful practical guide because it is vague. However, over the years there have been a few guidelines:

1. Domination and Control: It must be shown that the wrongdoer is holding "dominant power" in the company. If he/she is a majority shareholder, then clearly such a person has dominant power. But one does not need to be the majority to be dominant as this term is meant to be interpreted in a way which makes sense. An example of that would be where a person (who does not own majority shares) may be deemed to be dominant if the articles of the company provide him with very wide ranging powers.

2. Mismanagement is not actionable: If the complaint pertains merely to mismanagements then it is not actionable or not "oppressive". Mere disagreements about how the company should be run are not considered "oppression". But on the other hand, if the directors are completely indifferent to the commercial interests of the company and allow the business to deteriorate to the point of inactivity, then that may amount to "oppression" (***Ng Chee Keong v Ng Teong Kiat Highlands Plantations Ltd [1980] 1 MLJ 45***).

3. The oppression must affect you as a member/shareholder: What this means is that the oppressive act must have had a detrimental effect on your interests as a shareholder. This means that it must have some connection with the affairs of the company. For example, if you are not paid for your consulting services by the directors, then you cannot seek remedy under this provision. This is because it has affected you in your capacity as a contractor or service provider to the company and not as a shareholder. It does not matter even if you may own shares in the company or if the only reason you were asked to provide such services were because you were a member of the company.

'A person who joins a company (as a member/shareholder) must bear in mind that he/she does so on the understanding that he/she may be outvoted.'

If you fulfil the requirements above, then you may be entitled to an appropriate remedy. But bear in mind, the burden of proof is on you as the "complainant"; i.e. he who alleges must prove. It is not for the wrongdoer to prove their innocence. Getting a remedy in this respect may not be easy, but there are many deserving cases which have been successful. A good example is the case of ***Re Coliseum Stand Car Service Ltd [1972] 1 MLJ 109***.

In ***Re Coliseum***, the respondent (wrongdoer) was a majority shareholder in the company and more or less ran the business himself in his own way. This in itself is not wrong, but the respondent proceeded to do the following:

- Failed to declare dividends even though the company was profitable;
- Continued to receive a salary from the company although he was absent from the country for three and a half years;
- Made loans to himself and his son; and
- Kept certain details secret regarding the terms of the renting out of the company's premises.

This is a good illustration of a case that is deserving of remedy under **Section 181**. Clearly, the majority shareholder in this case sought to abuse the power that came with his majority shares (and hence his majority voting rights) and all the elements justifying a remedy against oppression were in place:

A. There was domination by the respondent;

B. It was not merely mismanagement; and

C. The acts adversely affected the petitioner (minority shareholder) in his capacity as a shareholder.

Taken collectively, there was clearly "a line that was crossed" and a "visible departure from the standards of fair play which a shareholder is entitled to expect" as explained by Lord Wilberforce (above). Surely a shareholder can fairly have an expectation, for example that dividends would be declared if the company has been doing well.

The Court is given wide-powers under **Section 181** to grant any remedy "as it thinks fit" which the Court usually exercises in the way that is probably most fair in the circumstances. In ***Re Coliseum***, the Court ordered the wrongdoer to transfer such amount of shares to the other shareholders such that the company would be henceforth managed jointly.

Thus, all hope is not lost should you find yourself in an unfair situation vis a vis as a minority shareholder of a company. Do not assume that just because you do not have enough voting rights to change any wrongdoing that nothing can be done. If the conduct of the company's affairs have "crossed a line", you may just be able to bring an action against the wrongdoer.

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I've been served a subpoena!

What you need to know if you have been served a subpoena to appear in Court.

Imagine the following scenario - you are a HR Manager and you have been served with a subpoena to appear in Court to produce documents and to give evidence in relation to a former employee. Now what? Must you abide by the subpoena? Do you really have to go to Court? The answer is yes, unless there are sufficient grounds to support otherwise, which will be discussed below.

Introduction

A subpoena is a summons issued by the Court based on the request of a party whereby the person named in the subpoena would be required to produce relevant documents and/or to give evidence in Court. The purpose of a subpoena is clearly explained in the case of ***Lucas Industries Limited v Hewitt & Ors (1978) 18 ALR 555, FC*** at 570 as follows:

> *"The purpose of the process of the subpoena is to facilitate the proper administration of justice between parties. For that purpose it is the policy of the law that strangers who have documents may be put to certain trouble in searching for and gathering together relevant documents and bringing them to Court. It is according to the same principle that persons who have knowledge of facts are put to the inconvenience of being brought to Court and required to give evidence."*

Types of Subpoena

With the recent amendments to the Rules of Court 2012, the names of the Writ of Subpoenas are known as a Subpoena to Testify, a Subpoena to Produce Document and a Subpoena to Testify and Produce Document and this is seen under **Order 38 Rule 14 of the Rules of Court 2012**.

A Subpoena to Testify may contain the names of two or more persons, however a Subpoena to Produce Document, can only contain the name of one person. Two persons can be called to give evidence under one Subpoena but two persons cannot be called to produce documents under one Subpoena for otherwise, each would leave it to the other to comply and in the end the documents might not be produced. Under a Subpoena to Produce Documents, the person may not even have to attend Court but is permitted merely to cause the documents to be produced in Court.

"The purpose of the process of the subpoena is to facilitate the proper administration of justice between parties."

Service of Subpoena

Each and every Writ of Subpoena must be served personally on the recipient within 12 weeks of it being issued. Once a subpoena is properly served, the subpoena has full effect until the conclusion of the trial, at which, the witness' attendance is required unless the witness is released sooner.

Do you have to accept a subpoena?

The answer is certainly yes. If a subpoena is properly addressed to you and you are the person named in the said subpoena, then you have to accept the said subpoena. It is important for you to check the name on the subpoena in order for you to confirm that you have been correctly named in the subpoena. In the event you had accepted the subpoena without ensuring that you are the person named and only realised the mistake subsequently, you should immediately hand the subpoena to the correct person or

inform the relevant authority that you are not the person named in the subpoena.

What do you do upon receiving a subpoena?

At first, you need to identify the type of subpoena served on you; i.e. to produce documents or to give evidence in Court or both. If it is for you to produce documents, then you should make copies of the said documents and produce it in Court on the day of the trial. This would mean that you would need to have proper document retention whereby the entire document must be produced in full. If you try to selectively produce only certain documents, then it might look like you are trying to hide certain evidence from the Court.

'It is essential to note that if you do not attend Court after being served with a subpoena, the Court may issue a warrant of arrest against you.

For those who have never given evidence in Court, it is important to bear in mind that you can take your time in answering the questions and when you do, speak slowly and clearly. If you do not understand or cannot hear the question, then ask for the question to be repeated. If you are not sure of the answer, you are permitted to say so because it is important that you do not mislead the Court with false statements or answers.

Next, you will need to determine the date and time in order to comply with the subpoena. This is to ensure that you have enough time to produce the required documents and/or attend Court on the trial date. Alternatively, do contact the relevant lawyer upon receipt of the subpoena in order for you to seek more time to comply with the subpoena or fix another time for you to attend Court.

Finally, you should confirm with the relevant lawyer on the cost or payment that you are entitled to receive for complying with the subpoena. It would be to your benefit if such confirmation is produced in writing. If you are attending Court as a witness of fact as opposed to an expert witness, you are not entitled to claim loss of time in attending the trial as a witness.

It is essential to note that if you do not attend Court after being served with a subpoena, the Court may issue a warrant of arrest against you. Before the issuance of a warrant of arrest, the Court will have to be satisfied that the person has been served with the subpoena and that a reasonable sum has been extended to cover the cost of complying with the subpoena.

Can you set aside a subpoena?

A subpoena may be issued against anyone including a minister. However, the Court will prevent the use of its practices and processes which includes subpoena if it is misconceived or not for purposes of justice. In the case of **Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 2 AMR 3351; [1993] 3 MLJ 679, sc,** the Respondents being the former solicitors for the Appellants were sued for professional negligence. At the hearing of the suit, the First Respondent issued a subpoena against the counsel acting for the Appellants to give evidence for the defence and to produce documents. The Appellants applied to set aside the subpoena which was dismissed. On appeal to the Supreme Court, it was held that the onus is on the party issuing the subpoena to show the materiality of the witness on a balance of probabilities, in that it outweighs any oppression that may be caused to the objecting party. If indeed it can be established that no useful result would be obtained by the attendance of a witness in Court, the subpoena can be set aside.

Conclusion

In conclusion, fret not when you are served with a subpoena. It is part of a legal procedure. Pay attention to the details of the subpoena, take it seriously, but do not stress yourself out over it.

Thus, regardless the reason for the subpoena being issued, remember that your duty is to provide the Court with truthful evidence free from prejudice and embellishment and/or produce complete documents in Court.

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GST OH GST!

The impact of the Goods & Services Tax on property transactions and other related issues.

Of late, there had been a lot of uproar regarding the Goods & Service Tax ("GST"). This 'new' set of tax was actually mooted way back in 2011 and was finally implemented under the Budget 2014 regime which took effect on 1st April 2015 at a fixed rate of 6%. An entity has to register for GST if the annual taxable turnover is more than RM500,000.00 a year.

For the purpose of this article, I shall focus on the impact of GST on property transactions and its related issues which include the purchase of a commercial or residential property from the developer, a sub-sale of property as well as tenancy for a property.

Let me first brief you on the definition of GST and other related terms.

What is 'GST'?

Goods and Services Tax (GST) is a multi-stage tax on domestic consumption. GST is charged on all taxable supplies of goods and services in Malaysia except those specifically exempted.

It is important to understand that not all types of property is subject to GST. A taxable supply can be either standard-rated or zero-rated.

Standard-rated supply means a taxable supply of goods or services subject to tax; for example, the sale or rent of commercial properties. When a supplier who is a GST registered person supplies standard rated goods or services, he is allowed to charge GST on the supply.

Zero-rated supply is a taxable supply which is subject to a rate of zero percent (0%) such as basic food items, education, healthcare and medical services.

On the other hand, Exempt-rated supply is a supply which is not subject to GST, i.e. no GST is chargeable on such supply. Residential property, agricultural and general use of land (e.g. burial grounds, playgrounds and government buildings) falls under this category.

Now that we have understood the different types of supply, let us move on to the impact of GST on property transactions.

Buying Property from Developer

A. Residential Property

Since residential properties fall under the Exempt-rated supply, they are technically not subject to GST. But you may ask: "Would the prices of residential properties be affected if they are exempted from tax?"

It is my opinion that one of the possible reasons for GST to affect the prices of residential properties would be because developers will have to incur the costs of the construction materials inclusive of tax since construction materials do not fall under Exempt-rated supply, but they cannot get a refund for the same as such costs do not fall under the Zero-rated supply. As a result, developers would be forced to accept a lower profit margin. To avoid this, they may opt to raise property prices. In the end, we as buyers would be the ones who have to bear the cost of the end product while the developers secure their profits.

As a chain effect, the increased price will most likely affect property prices if it involves sub-sale properties. So, even though residential properties are not subjected to GST, the buyers may still feel the pinch due to the increasing cost of construction indirectly.

B. Commercial & Industrial Property

Unlike residential properties, the sale of commercial properties is a clear cut case which falls under the Standard-rated supply and is taxable under the GST. Instead of beating around the bush, there is a clear

pricing scheme for properties of these kind where there is a segregation between the actual sale price and the post-GST price.

C. Property where usage differs from the type of land

However, there are circumstances where usage of a property does not reflect the type of land. In this case, the Director General of Customs and Excise will look at the usage of the property. For instance, even though Shop XYZ is built on a condominium lot, Shop XYZ will always be treated as a commercial unit; hence it is subjected to GST.

'It is important to understand that not all types of property is subject to GST. A taxable supply can be either standard-rated or zero-rated.'

Property under construction / progressive billing

A developer is entitled to impose GST on the progressive payment for Standard-rated property that is under construction as at 1st April 2015. However, if you have already signed the Sale and Purchase Agreement ("SPA") with the developer prior to the implementation of GST, the developer will only be allowed to charge GST on the progressive billing if any clause in the agreement specifically provides so.

The selling price of a property displayed by the developer in an advertisement after the implementation of GST will be the purchase price inclusive of GST, unless the developer has obtained prior approval for exemption to comply from the Director General of Customs and Excise.

Sub-sale Market

In sub-sale transactions of commercial properties involving individuals, is the vendor required to collect or impose GST from the buyer? By right, the answer is no. But in instances where a person repeatedly buys and sells commercial properties, the Director General of Customs and Excise may consider those transactions performed by that individual to be an act of an enterprise and so GST will be imposed.

The other instance where a vendor can collect or impose GST will be if the vendor can satisfy the four elements stated under **Item 5** of the **GENERAL GUIDE FOR GOODS AND SERVICES TAX** as at 16th March 2015 which are as follows:

1. Is it a taxable supply? [The answer would be yes if it is a commercial property]
2. Is it a taxable supply? [The answer would be yes if it is a commercial property]
3. Is it a taxable supply? [The answer would be yes if it is a commercial property]
4. Is it a supply in the course and furtherance of any business?

   [The answer would be no if the property is held as an investment to derive income. The owner does not deal in the property and this transaction is a one-off deal.]

   [The answer would be yes if trading and dealing in properties is the business in nature i.e. the carrying on of an enterprise.]

As a buyer, you can verify whether the vendor is a GST registered person by visiting the Customs' website at www.gst.customs.gov.my.

Tenancies, Leases, Easements & License and the Exemptions

Any tenancy, lease, easement, license to occupy of a commercial property is a supply of services, therefore GST applies. To illustrate, a simple analogy would be as follows:-

a) Shop ABC was sold to XYZ Sdn Bhd for RM2 million and will be subject to GST of RM120,000.00. The GST will be borne by XYZ Sdn Bhd.

b) If the same property is leased out to Ahmad, GST will be imposed on him. For instance, the monthly rental of RM20,000.00 is subject to an additional RM1,200.00 being the GST sum.

Given the situation, landlords are advised to review their leasing agreement to ensure it includes the relevant GST clauses.

However, if it is a residential property and was rented out for residential purposes, it will be exempted from GST.

Property Utilities & Outgoings

Any supply which was charged by Government related bodies for purposes such as quit rent, assessments, premium, registration of titles, stamp duty and other payments fall outside the scope of GST. However, other outgoings may be subjected to GST.

As for electricity supply, the first 300kWh of electricity supplied to domestic consumers has been gazetted by the Government as Zero-rated supply. For any usage above, it will be considered as Standard-rated supply. For non-domestic consumers, the supply of electricity is still subject to GST.

Generally the supply of treated water by State authority and private company is subjected to GST at the standard rate. For example, in service apartments or condominiums, the supply or treated water by the provider to Joint Management Corporation (JMC) or Joint Management Body (JMB) is treated as business to business supply; therefore the water provider must collect or impose GST for the supply. However, under the **GST (Zero-rated Supply) Order 2014,** supply of treated water for domestic consumption is Zero-rated.

Currently, only GST-registered businesses can claim back GST. Unfortunately, GST is not claimable by a domestic consumer.

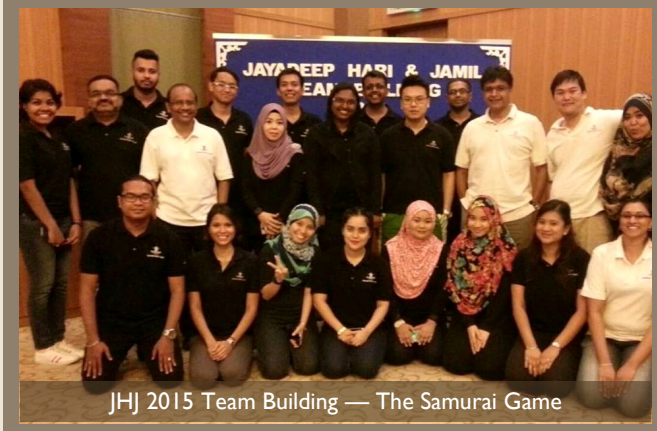
Conclusion

It is relevant to know the impact of GST as we are all involved directly or indirectly.

If you wish to buy a new property, determine first the category that it falls under i.e. Standard-rated, Zero-rated or Exempt-rated. Only then, you will have a clear picture on the costs which revolves around it.

I hope that this article will provide you new insights and general knowledge on the topic.

JHJ 2015 IN A FLASH

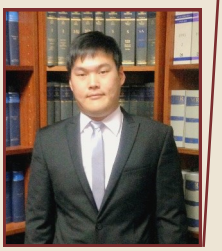


JHJ 2015 Team Building — The Samurai Game

JHJ trip to Krabi, Thailand 2015


Annual Christmas Kringle celebration with the JHJ family


JHJ with the boys and girls of Rumah Bakti Dato' Harun at Aquaria KLCC



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Redundancy or Retrenchment: Is it the End?

An insight into what an employee can do when faced with retrenchment.

In the modern business world, it is common for companies to take over or merge with other companies or undergo internal restructuring exercises. These exercises may very well impact the employees of the business. When these exercises take place, more often than not it creates a situation of redundancy which in turn will give rise to the retrenchment of employees. The question now is what can an employee do when they are faced with such situation? Well, this article will shed some light as to what an employee can do.

'...the employees' security of tenure in employment is akin to a property right under the Federal Constitution...'

Before we dwell into what an employee can do, firstly we need to understand the rights of the employers and the employees as well. This is so because what the employee can do is very dependent on whether these rights have been breached. The Courts in **TWI Training and Certification (SE Asia) Sdn Bhd v Jose A Sebastian [1998] 2 ILR 879** had recognized the company's or organization's rights to undergo restructuring or mergers and acquisitions as it is within its managerial prerogative to decide what would be in the best interest of its business arrangements; to identify its own areas of weaknesses and then decide whether to proceed with discharging its own surplus.

On the other hand, the Courts have also recognized the rights of employees to a security of tenure in their employment. In fact, the Court in the case of **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor [1996] 1 MLJ 481** observed that the employees' security of tenure in employment is akin to a property right under the Federal Constitution which may be forfeited, save and except for just cause and excuse. However, the Court when faced with such cases would, more often than not, need to balance out the rights of both the employer and the employee.

Now that we have understood some of the competing rights of both the employees and the employers, let us proceed to discuss what employees can do or have the right to when they are being retrenched. If the employee falls within the definition of a worker under the **Employment Act 1955**, i.e. persons who had entered into a contract of service with an employer for a monthly salary of not more than RM2,000.00, they will have a right to retrenchment benefits under the **Employment (Termination and Lay-Off Benefits) Regulations 1980**.

Retrenchment benefits are generally benefits fashioned in a monetary form, given to the employees who are retrenched. The purpose of retrenchment benefits as observed by the Chairman of the Industrial Court in **Pengkalen Holdings Bhd v James Lim Hee Meng [2000] 2 ILR 252** is to serve as a 'cushion against the hardships faced by an employee who has to content with the loss of his employment and the consequential loss of his immediate means to earn an income'. It is also to help the employee who is retrenched to overcome the hardships for the period between which the employee is retrenched until the retrenched employee finds a new employment.

However, for the employee to be entitled for retrenchment benefits under the Regulation, the employee will need to fulfill a number of criteria. Under **Regulation 3**, the employee must have been employed under a contract of service for a period no less than 12 months and the employer had not provided work for the employee for a certain number of days and period where the employee was not entitled to any remuneration for these works that were not provided. Once these criteria are fulfilled, thus the employee would be entitled for retrenchment benefits. However,

the Regulations also provide a certain number of categories where employee are not entitled to retrenchment benefits. Amongst those categories are where the contract of service is terminated upon the employee attaining the age of retirement and where the employee is terminated on the grounds of misconduct. Also, where the employee had been re-engaged by the company or organization, or where the contract of service has been renewed, the employee will similarly not be entitled to claim for retrenchment benefits.

Apart from the above, there are situations and circumstances whereby the employee had accepted the retrenchment benefits but thereafter allege the occurrence of dismissal without just cause and excuse. The question now is can the employee do that? From the face of it, this might not look fair to the companies, especially so when they have offered retrenchment benefits to the retrenched employees but subsequently sued for the said, supposedly compensated, retrenchment. However, the answer to the above question is yes. The employee can claim dismissal without just cause or excuse against the company even after they have received the retrenchment benefits.

In the case of **Nadarajah & Anor v Golf Resorts (M) Sdn Bhd [1991] 1 ILR 704**, it was held that the acceptance of retrenchment benefit under protest will not estop a worker from questioning the validity of the dismissal. The rationale behind this was addressed by the Court in **Nasaruddin bin Haji Abu Bakar v Perwira Ericson Sdn Bhd & Anor [1994] 1 LNS 96** where the Court observed the following:-

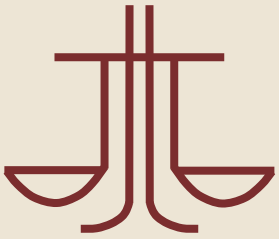
> *"it cannot be denied that when it comes to a retrenchment exercise, an employee is not in equal position as the employer. If the employer wants to retrench the employee and offers the employee a lump sum payment, the employee has no choice but to take the payment. If he does not take the payment, he would nevertheless have to go but without taking the money. Under such circumstances, an employee has only once choice, and that is to take the money and complain later, as had happened in this case."*

The Court was of the view that pursuant to **S 30(5) of the Industrial Relations Act 1967**, the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities. As such, the legal form and technical issues such as estoppel will not be considered by the Industrial Courts.

There may also be situations where employees are retrenched as a result of redundancy but they would be able to claim dismissal without just cause or excuse if they are able to prove that the dismissal was in the disguise of retrenchment. It was also held in the case of **East Asiatic Company (M) Bhd v Valen Noel Yap [1987] ILR 363** that the right of the employer to reorganize is only to the extent that the employer's act must be *bona fide* or in good faith. In relation to this, the Court in **Radio General Trading Sdn Bhd v Pui Cheng Teck & Ors (Award no. 243 of 1990)** had considered 2 questions, i.e. (a) was there a situation of redundancy which gave rise to retrenchment of employees; and (b) if there was a situation of redundancy, whether the retrenchment of employees were carried out pursuant to the accepted standards of practice. If the answers are in the negative to the questions above, the Court will find the dismissal of the employee to be without just cause and reason.

On the other hand, employees who do not fall within the purview of the **Employment Act 1955** will also have their respective contract of employment to fall back on. For example, if such an employee has been retrenched, companies or organisations would usually offer an option to voluntarily leave their employment with a compensatory amount. Such schemes are known as the voluntary separation scheme, which is somewhat similar to the termination and lay-off benefits as described above for employees governed under the **Employment Act 1955**. Nevertheless, if the company does not offer anything to the employee prior to the retrenchment, the company would then need to prove that they have acted *bona fide* in carrying out the retrenchment exercise. Otherwise, the employee would have the legal recourse of bringing an action against the employer for unfair dismissal.

In conclusion, retrenchment is not the end for the employees, whether they fall within the definition of an employee under the **Employment Act 1955** or not, if the proper procedures are followed. This is so because at the end of the day, the employees who are retrenched will not be leaving empty handed. It is just a matter of whether the employees will be able to obtain a voluntary compensation by the employer or to claim their dues from the employer through the Courts. It is undeniable that considering the current state of economy in Malaysia, there is a heightened chance for situations of redundancy to arise, leading to the retrenchment of employees in any given industry.



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