RESTRUCTURING AND RETRENCHMENT

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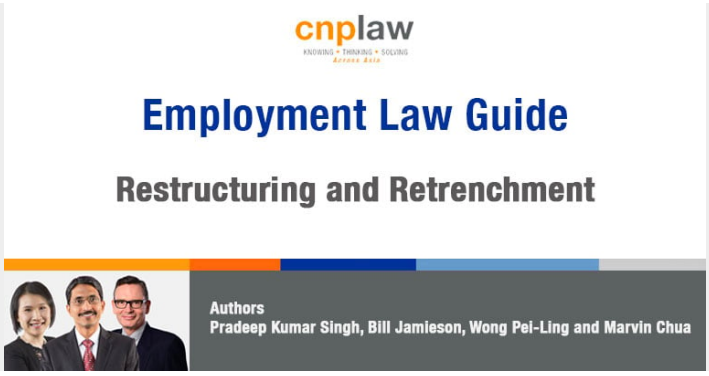

Category: Employment Law Guide

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(a) Effect on employment in event of mergers, amalgamations and sale of business

In Singapore, redundancies, business transfers and reorganisations are generally subject to contract. Under the EA, employees are statutorily protected in the event of a business transfer, including a disposition of a business as a going concern or a transfer effected by sale, amalgamation, merger, reconstruction or operation of law. Under section 18A of the EA, amongst other things, if an undertaking or part thereof is transferring from one person to another, the transfer shall not operate to terminate the contract of service of any person employed by the transferor in the undertaking or part transferred. Instead, there will be an automatic transfer the contract of service, with no break in the continuity of employment, and terms and conditions of service of the transferred employees will be the same as those enjoyed by them immediately prior to the transfer. The transferor also has an obligation to inform and consult employees and/or trade union of employees affected by the business transfer as soon as it is reasonable and before the business transfer takes place, such as through a notice to the affected employees.

(b) Retrenchment benefits

Legislation does not provide an employee with any right to retrenchment benefits on termination for redundancy or reorganisation of the employer's business. In fact, while the quantum of retrenchment benefits (if any) may be agreed upon in the employment contract or collective agreement, the EA disentitles Part IV Employees (i.e. a workman on a salary not more than S$4,500 per month or a non-workman employee other than Managers and Executives whose salary is not more than S$2,600 per month) who have worked for 2 years continuously or less from being entitled to retrenchment benefits (if any). Even where an employee has been continuously employed for 2 years or more, under Singapore case law, that employee still does not enjoy an automatic right to retrenchment benefits as an employer in Singapore has no legal obligation to provide retrenchment benefits in such cases. Irrespective of whether the EA applies, an employee has no right to retrenchment benefits unless his or her employment contract or an applicable collective agreement so provides. If the employment contract or applicable collective agreement does not so provide, the quantum is to be negotiated between the employees (or via their union) and the relevant employer. Under the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (see below), the prevailing norm is to pay a retrenchment benefit varying between 2 weeks to 1 month salary per year of service, taking into consideration the industry norm.

(c) Ex-gratia payments

In cases of termination for redundancy, an employer may make an ex-gratia payment to an employee. However, under Singapore common law an employer is not bound to make such a payment on the basis of its past practice of doing so.

(d) Length of notice of termination

Under the EA, there are no special requirements in relation to the length of notice to be provided in cases of termination for redundancy or reorganisation. The relevant notice period will apply (as discussed in 6(c) above). However, in cases of retrenchment, the MOM encourages employers as far as possible to inform affected employees of the impending retrenchment before notice of retrenchment is given.

(e) Union intervention

In cases where an employee is a trade union member, while trade unions may consult with the employer prior to the business transfer, section 18(2)(d) of the IRA prohibits trade union intervention/collective bargaining in relation to termination for redundancy or reorganisation or in relation to the criteria for such termination. Once the business transfer is completed, the new employer will also have to take over the previous employer's rights, powers, duties and liabilities which are part of any contract or agreement with the employees' trade union before the transfer.

(f) Tripartite Guidelines for Fair Employment Practices

The Tripartite Guidelines for Fair Employment Practices require (i) the selection of employees for retrenchment to be based on objective criteria, (ii) for the retrenchment exercise to be carried out responsibly in consultation with the trade union (if the employer is unionised), or with the employees affected (if the employer is not unionised), and (iii) reference to the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment for alternatives to avoid or minimise the need for retrenchments.

(g) Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (the "MEMRR Advisory")

The Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment was updated in March 2020 in light of the negative impact on the global economy the COVID-19 pandemic has had. A copy of the revised advisory may be accessed here.
The tripartite partners - the MOM, National Trades Union Congress ("**NTUC**") and Singapore National Employers Federation ("**SNEF**") have formulated the MEMRR Advisory for implementation. The MEMRR

Advisory suggests that as businesses adjust, they should consider alternative ways –to manage their excess manpower - such as upskilling and redesigning jobs
The MEMRR Advisory provides various alternatives an employer may consider before resorting to retrenching its employees. Alternatives include:

> *(i) adjustments to work arrangements without wage cuts;*
> *(ii) adjustments to work arrangements with wage cuts;*
> *(iii) direct adjustments to wages; and*
> *(iv) no-pay leave.*

These measures have been broadly categorised based on the severity of their impact to employees. The measures involving adjusting work arrangements with or without wage cuts are generally more applicable to employers who wish to scale down or suspend business operations in response to a short, temporary decline in business activities. This is particularly pertinent at the time of print, given that on 21 April 2020, the Multi-Ministry Taskforce announced that fewer businesses will be permitted to operate during Singapore's circuit breaker, to further minimise movement to curb the spread of COVID-19. Measures under the categories of directly adjusting wages and no-pay leave may be more applicable to employers suffering from extremely poor or uncertain business conditions that are likely to be long term. Consultation and consent should be sought from various stakeholders such as unions and employees before any of these measures are implemented. Employers are also advised to review and restore any adjustments made when their businesses recover.

(i) Adjustments to work arrangements without wage cuts

Employers are encouraged to train and upgrade the skills of their existing employees. Employers can receive absentee payroll subsidies for such employees undergoing training. In turn, this could help support employers as it could lead to an increase in productivity as employees are better equipped with relevant skills and knowledge.
Employers can also consider rotating or redeploying employees to alternative areas of work within the company or its related corporations ("Group") in order to meet any structural changes in the Group.
Employers may implement flexible work schedules and arrangements, which will allow companies to optimise the use of manpower resources when they go through cyclical troughs and peaks in manpower demands and this assure employees of a stable monthly income during this period. Employers considering a flexible work schedule will require the support of unions and employees and thereafter shall apply to the Commissioner for Labour. Other than overtime exemption, the employer may apply to be exempted from the EA provisions on pay for work on rest days and public holidays, provided that certain conditions including the safety and health of employees, are met.

(ii) Adjustments to work arrangements with wage cuts

Employers may consider other work arrangements such as part-time work and sharing of jobs. These measures can help to re-distribute the workload amongst employees and employees can be remunerated accordingly. Employers can also consider a shorter workweek, which directly translates into the reduction of work hours. Examples include requesting employees to take up to 50% of their earned annual leave, implementing a reduction in workweek such that it does not exceed 3 days a week and does not last for more than 3 months at any one instance, (which may be subject to review), and to pay affected employees not less than 50% of their wage during the period when the shorter workweek is implemented.
Employers may also consider a temporary layoff, where a worksite is closed for a designated period while some administrative functions are still performed or applied broadly across the whole company. Employers may request employees to take up to 50% of their earned annual leave, implement the layoff period such that it does not exceed one month at any one instance, subject to review, and to pay the affected employees not less than 50% of their wage during the layoff period.

(iii) Direct adjustments to wages

Companies with a flexible wage system in place may consider adjusting various applicable wage components to further reduce manpower costs, including annual wage increment, variable bonus payment, annual wage supplement, monthly variable component and other allowances.
It is recognised that these are more severe cost-saving measures that may have to be implemented by companies suffering from extremely poor or uncertain business conditions that are likely to be long term. These measures are likely to be in place over an extended period of time and severely impact the livelihood of employees. It is imperative that employers engage and seek the consultation and consent of unions and employees before implementing the above measures.

(iv) No-pay leave

Companies may consider, as a last resort, putting employees on no-pay leave. This is a drastic measure and should only be implemented if it will help the company survive, save jobs and retain employees for the long haul, when the economy improves. However, in implementing no-pay leave, companies should have considered or implemented other measures and consulted their unions and employees, and recognised the impact on rank-and-file employees in determining the extent and duration of the measure. Senior management should also lead by example, by accepting earlier and/or deeper cuts as a cost-saving measure, and if business conditions warrant it, companies could apply no-pay leave in conjunction with other cost-saving measures.
The MEMRR Advisory highlights that in the event any of these measures have to be implemented, employers should always exercise care and fairness when doing so, and pay special attention to the impact of any measures on low-wage employees.

However, if the above measures do not suffice and retrenchment is inevitable, companies should do so in a responsible and sensitive manner. To achieve responsible retrenchment, key areas that the MEMRR Advisory has identified include using objective criteria when evaluating employees for retrenchment, giving early notice to affected employees, provision of retrenchment benefits and re-employment facilitation. The MEMRR Advisory states that companies should notify the MOM of impending retrenchments as soon as possible if a decision to this effect has been made and that as far as possible employing companies should inform affected workers of their impending retrenchment before notices of retrenchment are given.
Note that the MEMRR Advisory is not mandatory but amounts to strong recommendations to employers. Employers are encouraged to follow the MEMRR Advisory set out in the relevant paragraphs to the extent it is practical to do so taking account of the requirements of their business. In order to maintain a strong Singaporean core, the MOM has indicated that it may cut the work pass privileges of employers who unfairly retrench Singaporeans.

(h) Mandatory retrenchment notifications

Since 1 April 2019, employers with 10 or more employees (at the time when a notice of retrenchment is given) are required to notify MOM if 5 or more employees are retrenched within any 6 month period. The notification must be submitted online and be in the form provided at the MOM website within 5 working days after the employee is notified of his/her retrenchment.
In this context, retrenchment means to terminate the employee's contract of service at the initiative of the employer because of redundancy or any reorganisation of the employer's profession, business, trade or work. This applies to permanent employees, as well as contract workers with full contract terms of at least 6 months. Failure to notify within the required timeline is considered a civil contravention under the EA and errant employers may be issued a contravention notice to pay an administrative penalty.

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Please note that this section of the Employment Law Guide is a summary provided for general information purposes, aimed at aiding understanding of Singapore's employment law as at the date of writing. It is not exhaustive or comprehensive and reading this memorandum is not a substitute for reading the text of the various statutes to fully understand the extent of the obligations owed. This guide should also not be relied upon as legal advice.