Singapore: Were you fired or retrenched? Your employer may not tell you the difference

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The COVID-19 pandemic has had an unprecedented impact on trade, supply chains and financial markets, with a particularly devastating impact on certain industry sectors such as aviation, tourism and services.

This will have an inevitable knock-on effect on employment figures, with massive global job losses on the horizon.

More than 20 million Americans lost their jobs in April 2020.

General Electric is looking at reducing 25 per cent of its aviation workforce, and American luxury department store chain Neiman Marcus has filed for bankruptcy with another US-based retailer JC Penney expected to follow suit in the coming days.

Closer to home, in April 2020, fashion e-commerce start-up Zilingo laid off 30 per cent of its staff, and Deliveroo announced a 25 per cent staff lay-off due to the COVID-19 economic downturn.

In addition, 8,663 business entities in Singapore closed shop in April 2020, double the numbers from March 2020.

With job losses in Singapore in 2020 projected to range from 45,000 to 200,000 by various analysts, the issue of disguised retrenchments will come sharply into focus as employers consider drastic cost-cutting measures to survive the circuit breaker and wider disruption inflicted by the pandemic.

This is in spite of the various support measures introduced by the government in the three budgets in 2020 to protect the jobs of Singaporeans and permanent residents.

In an initial poll by the Ministry of Manpower (MOM) in March, only 16 per cent of companies in Singapore said they will lay off employees.

The same poll in mid-April demonstrated that 23 per cent of companies anticipate reducing their workforce in the next two months, which is echoed in a separate report by Aon.

Why employers may disguise retrenchments

The uncertainty of the scope and duration of the pandemic is fuelling business concerns about the ability to maintain current headcount levels, given that manpower costs can account for a fairly large proportion of business costs, depending on how labour-intensive the industry sector is.

Unfortunately, this can lead to "disguised retrenchments" – which are designed to look like anything but what they are in substance.

A retrenchment is defined as termination of a permanent or contract employee's (minimum six-month term) contract of service due to redundancy or reorganisation of the employer's profession, business, trade or work, which would include mergers, restructuring or downsizing whether due to cash flow issues or otherwise, and judicial management.

Disguised retrenchments gained wider attention during parliamentary debates in 2016 where it was observed that employers were terminating employment without paying retrenchment benefits.

Pressure was placed on the government to introduce measures to prevent such exploitation of employees.

In response, mandatory notification requirements were introduced via the promulgation of the Employment (Retrenchment Reporting) Notification 2019.

Employers with businesses registered in Singapore with at least 10 employees are required to notify the MOM if at least five employees are notified of retrenchment – including permanent employees and contract workers – within any six-month period.

As this notification requirement compels employers to furnish information on whether retrenchment benefits were paid, employers are under pressure to ensure that retrenchment exercises comply not only with contractual obligations and agreements with unions if any, but also with the Employment Act, mandatory retrenchment notifications and the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (Tripartite Advisory).

The mandatory notification regime has imposed accountability on companies to some degree.

It has also cast a brighter spotlight on employers mischaracterising retrenchments to circumvent the reporting requirement and to avoid paying out retrenchment benefits.

What does disguised retrenchment look like?

Given the stark economic landscape, the issue of responsible retrenchment deserves attention to ensure that employees aren't disadvantaged and given the short end of the stick. Retrenchment should only be a last resort, and should be conducted fairly and without discrimination.

A genuine retrenchment typically occurs when a company undergoes major structural changes – for example through drastic cost cutting measures, downsizing, diminishment of existing roles, or if the employer is otherwise entering into mergers, liquidation or judicial management.

That said, the absence of such major change may not be conclusive of there being no retrenchment.

Cynically, some of the more common pretextual disguises for retrenchment include companies strongly suggesting to employees that they should resign, failing which the company would be compelled to dismiss them.

This has been traditionally viewed as helping the employee "save face" and to receive positive or neutral references for future job applications.

As for the company, when an employee resigns, it falls outside the purview of reporting obligations to MOM.

Employers must however note that this may give rise to constructive dismissal claims, with employees arguing that the company's conduct compelled a forced resignation.

Mischaracterising a retrenchment as a sacking is another common strategy.

Employees who have had neutral to positive performance reviews are informed of poor performance out of the blue, or without discernible basis. The onus of establishing poor performance falls on the employer, and the employer should be able to demonstrate justification for the same if challenged.

In 2017, Surbana Jurong purported to dismiss 54 employees for poor performance, insisting that no one had been retrenched.

Surbana Jurong came under the MOM's scrutiny, and the Surbana Sackings Saga was labelled as "unacceptable" in Parliament. With union involvement, a settlement agreement was eventually reached with the employees.

Employees may also be accused of misconduct out of the blue, without any due inquiry being conducted.

Misconduct is the only legitimate ground for employers to avoid having to provide notice or pay salary in lieu of notice, quite apart from not paying retrenchment benefits.

Disguised retrenchment rearing its ugly head

Many law firms, such as ours, may already be seeing an uptick in legal queries from both employers and employees about lay-offs and retrenchments, with employers seeking to reduce their cost exposure to the maximum extent, and employees fighting tooth and nail to get the most equitable separation packages possible.

In the past two months, we have encountered several cases of employees being abruptly terminated, without being offered retrenchment benefits by their employers.

In one particularly egregious example, a senior executive in a technology company was let go a week after she notified them of her pregnancy in March.

This termination came on the heels of a pay raise offered to her just a month prior. She was informed that she was being let go on the basis of downturn in economic conditions, but that she would not be paid retrenchment benefits.

In another example, a senior employee at a hotel was informed that her employment was being terminated contractually, with salary in lieu of notice. When she requested for retrenchment benefits to be paid, she was informed that her role was not being made redundant.

As an employee who would soon be out of the organisation, she has no means of independently verifying if this is a retrenchment, such as if her role is being phased out or if the hotel has complied with the mandatory retrenchment reporting obligations.

We have seen cases of expatriate senior executives lose their jobs on account of them drawing some of the highest salaries in an organisation, without attracting wage support offered by the government.

We are also seeing companies retrench low-wage manpower that they believe can be easily replaced, whether by automation or rehiring at a later stage.

Recourse for disguised retrenchment

The Employment Act provides that employees with two years' service or more are eligible to retrenchment benefits, without specifying the quantum of such benefits.

If the employment contract or collective agreement provides for the quantum of retrenchment benefit, the company would be bound by it. For collective agreements, this is typically pegged at one month of retrenchment benefits per year of service.

In the absence of such provision, the employer and employee are to negotiate the quantum. Those with less than two years' service should be granted a retrenchment payment out of the employer's goodwill

The Tripartite Advisory urges companies to pay employees retrenchment benefits benchmarked at two weeks to one month per year of service, though this can be varied depending on a company's financial position and industry practice.

We anticipate that given the current economic headwinds, companies will be relying on these caveats to downplay their ability to pay out retrenchment benefits.

Failure to comply with the Tripartite Advisory can lead to penalties including the curtailment of the offending company's work pass privileges.

Employees who have been wrongfully retrenched under the guise of a pretext should in the first instance attempt negotiations with employers, failing which they can file a claim at the Tripartite Alliance for Dispute Management (TADM), followed by the Employment Claims Tribunal, for wrongful dismissal.

In our experience, the TADM is closely scrutinising COVID-19-related unfair employment practices and wrongful termination claims.

The option of a civil suit is also available. There are also avenues that offer assistance to retrenched workers, such as Workforce Singapore's career support programme.

Most importantly, employers should be transparent with their employees about the reason for termination, and should conduct the retrenchment in a non-discriminatory manner.

A key element of this involves employers acting in good faith and being fair to employees in terms of retrenchment pay-outs.

This reduces confusion and dissatisfaction, which is important in ensuring continuing employee engagement and averting reputational damage to the company's brand in a crisis.

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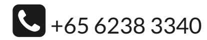
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