

EXCESSIVE JOB PROTECTION BY LABOUR LAW IMPEDES ORGANIZATION CHANGES: TO WHAT EXTEND JOB RETRENCHMENT IS A MANAGEMENT PREROGATIVE

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Abstract

Purpose – Excessive stringent enforcement of outdated legal regulatory frameworks in employment laws of a protectionist flavour can arguably cause companies difficulty in implementing organizational changes by depriving the ability of such companies to make economically sustainable adjustments due to such regulatory frameworks in the name of job security. Organization change can take place in many forms and in the climate of such organizational changes, low-priced surplus labour dictate the redundancy and discharge from work which is becoming commonplace in the life of employees. The purpose of this paper is to address whether job protection governing labour law provisions in Malaysia is excessive in terms of the present climate of economic viability and sustainability and how it impacts adjustment to organizational changes.

Design/method/approach – Using a selection of Industrial Court cases and Malaysian Employment Act 1955 and Industrial Relations Act 1967 to observe the seeming difficulties faced by management in terms of implementation of alterations in organization.

Findings - This paper contributes to close the gap in current literature by equipping management that want to improve the atmosphere in the organization that leads to organizational changes. Furthermore, it indicates recommendations to enhance understanding in developing the association between employer, employees, trade union and job security outcomes. It enables employers to be aware of the labour law provisions and procedures they need to abide to in order to ensure effectively sustainable changes without having to be charged with court proceedings such as unfair dismissal.

Keywords: excessive, protectionism, organizational change, job security, labour law & Malaysia.

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Introduction

In the past, the companies were substantially practicing the traditional working cultures where organization required a lot of labour forces to operate the system or business manually. This evidence is especially notorious in manufacturing firms which necessitates tremendous amounts of manpower in the production line. To increase productivity, organizations would either hire more employees or increase the working hours of employees which exhaust the latter, yet the former's required outcomes were not satisfied. However, the employees often did not claim unfair treatment towards them; they were merely following the trends of the senior superiors in carrying out their own specific tasks.

Technological change and emerging technologies have pointed to the importance of the skills of a workforce as never before. The job scopes of employees are not only just emphasizing on one single aspect anymore whereas employees have to fit themselves with job rotations, work in a team basis, integration of tasks and computerized production systems. The employees have to deal with high technology working environments and different style of working cultures. Although human labour is still important in the operation systems of a company; there are more and more machineries, robotics, computer or IT software to replace human labour; with the result and objective of improved productivity, efficiency and effectiveness. Hence, organizations begin to reduce the dependency towards coarse labour in the company, especially in the production line. Since technology has brought into the company, organizational change is required drastically where job security of employees were at stake.

Job protection, better known as job security is an assurance (or the lack of it) that an employee has with regard to the continuity of a rewarding package of employment for his or her working life. The terms of contract of employment, collective bargaining agreement, or labour legislation contributes to an employee's job security because it help prevents arbitrary termination, layoffs and lockouts. Job security may also be influenced by general economic conditions. During an economic downturn, job protection become a pertinent factor because of increasing layoffs, pink slips and hiring freezes in the everyday news (Importance of Having a Job Security, 2009). A secure and stable job with commensurate remunerations, benefits and other financial incentives can offer employees a medium to long term financial security.

Organizational changes take place when an organization intends to restructure the resources to increase the ability to create value and improve efficiency and effectiveness (Hien, ?year). It is also defined as an adoption of a new idea or behavior by an organization (Daft, 2006). Organizations operate in a dynamic and changing environment and in order to survive, it must be constantly adaptive to those changes. One of the advantages is that an organization that has changed and continues to change the way they are organized and managed, can increase productivity, enhance competition and contain costs besides in meeting the changing consumer lifestyles in the light of technological breakthroughs. Organization are able to react quickly to the frequent changes in governmental regulation and deregulation policies and simultaneously meet the demand for accountability by shareholders, the opportunities and hurdles presented by new international trade agreements as well as the modes, values and norms of society. It is also able to meet the growing needs to employees and unions through change.

The objective of this study is to find out to what extent labour law provisions impede organizational changes. It attempts to discover to what degree organizational changes is a management prerogative. The findings will be able to provide employers with a clearer picture about their rights and the steps that they can take to practice their rights effectively. It will also contribute to fair labour practices in Malaysia and at the same time improve organizational flexibility in

implementing and adapting to the necessary changes in the form of retrenchment or reorganization or restructuring.

Problem statement

In this 21st century, every organization should begin adapting to changes according to the market needs in order to survive and compete with other competitors. Organizational changes might be due to some of the factors such as technology improvement, innovation, globalization, increase productivity, reorganization of works and restructuring. In order to practice all the variables for the organization, it needs to make some unfavorable decisions by downsizing most of their workmen. However, the labour law contributing great impact on adjustment to organization changes.

According to Walsworth (2010), the statistics of Canada provide the evidence of every three employees in Canada, at least one of the employees is a member of a relevant trade union related to the said industry. This would be the one of the issues threatening the organization to make any improvements. The organization usually would be less likely to support and agree about their employees joining unions, because of a premonition that (rightfully or wrongfully, depending on which side you are on) unions are a serious barrier and counter-offensive to the objective of capital driven by market forces; the union on the other hand strives to exist with the assistance of those who are pro-Left, in the believe that justice is served to the workers as the union would provide workmen a chance by negotiating better wage premium, job securities and improved benefits in a manner dependent on existing legal regulatory framework.. Therefore, the organizations felt (justifiable or otherwise) that unions were considered to be existing and working in a way that is non-sustainable using the lens of neo-liberal capital driven economies.; thus being a spanner in the works of an company moving in the fast lane of innovation. The existence of unions could be seen to impede merit based/talent based innovation of change; nominal across- the- board benefits and increments promoted in the name of the benefit of all workers by the unions may drive away highly skilled or merit-based human capital driven by steep learning curves, whose fuel and movement are largely antagonistic towards the socialistic flavor or rationale of trade unions. Therefore, the assisting of union in terms of wage negotiation etc. in the name of the common good of all workers, being seen to be a slow and heavily laden bandwagon of sorts; frustrating amongst others, the organization's speed, innovation and process of production works; as the expenditure which was previously allocated for market driven research and development (R&D) for example, would have to be diverted to the employees paycheck. Hence, the management viewpoint being firmly rooted in the platform of market-driven profit and economies, may believe that union activity and unions in general are non- sustainable in an era where companies must innovate in order to stay sustainably fit in today's world governed by global market-driven economies.

Based on Godard and Delaney (2000) , as cited in (Doellgast, 2010), the changes in the organization can raise up issues such as conflict of interest, exposure of underlying inequalities in power and redistribution of arguably scarce resources. Instead, employees often resisted to change due to fear of work intensification and downsizing. Besides employees, managers could resist the changes because of the limits on monitoring (Batt, 2004). When resistances to changes arise, the employees or even managers will start giving unfavorable outcome for instance, collective bargaining with the organization who tried to change. As stated by Doellgast (2010), strong forms of collective voice, exercised by employee's representatives who have strong bargaining power and can access to broad participation rights can overcome obstacles to co-operation and limit

management's ability to practice unilateral strategies. Under this circumstance, a nation's industrial relations institutions could influence the resources available to worker representatives in the negotiation.

One of the examples of which the bargaining power from the union or other worker representative successfully influences management policies would be the German Telecom. The organization was actually based on consultation structures and countervailing power at multiple levels. When company facing changes in demands, the worker representative could hire their own consultants to study on the case and revise staffing recommendations upwards. Then, work councils would negotiate agreements of worker's right with the company. As mentioned by the interviewee of a team leader in March 2004, although work council can't directly take part in the decisions, but they can influence the circumstances of the decision. In shorts, the above description shows that institutional support for collective voices brings a significant influence on management decisions; being a force to be seriously reckoned with (Doellgast, 2010).

However, the labour law is protective for the employees all the time and this causes the management team or employer become frustrated because they does not have the right in theory to prevent any of their employees from joining trade unions and participate in lawful activities organized by the union. The question arises as to whether excessive job protection through labour law does really provide a large impact on organizations with the goal of changes in mind. For example, **Section 4 and Section 5** under Industrial Relations Act 1967 in Malaysia state that an employer cannot stop and interfering any employees from joining or organizing trade unions.

Besides, women are more likely to withdraw from the labour force than men during downsizing. This is because women always get more benefits from the organization such as maternity leave, flexibility of hours and day care facilities. However, in our point of view, this could be one of the disadvantages for the organization who intended to change. According to labour law, organization was not allowed to terminate a pregnant woman. In case, some female employees may take this initiative to restrict organization from terminating them, even the organization has some valid reasons to do so. These valid reasons include downsizing, computerized system and those who involved in decision making status in employment.

The world globalization means one thing to the organization, which is "change". Without adapting to relevant changes in the economic climate, an organization would find it hard to survive in a competitive environment. The first step of organization change would be cost savings. Many of the organizations would like to hire foreign employees (especially in certain industries, such as construction) which demand lower wages in comparison with the local counterparts. However, **Section 60M** of Malaysian Employment Act (1955) prohibits employers from terminating local employees for the purpose of employing foreign employees. Merely, this act anchored the organization on replacing the current employees with low-cost foreign employees.

The globalization process with a demand or hunger for cheap surplus labour resulted in many of the organizations shifting their manufacturing plant to developing countries such as China, India and Malaysia. However, under the Employment Act 1955 in Malaysia, the employer was prohibited from transfer the employees to another work place unless it was mentioned earlier in the contract of service, or giving notice earlier. The objective of organization transferring employee might be due to the shifting of plantation or production line to another place, yet the employees refuse to transfer to the said new location. During this condition, the restriction of law will become a blockage to the organization in restructuring process. Eventually, the organization might suffer losses during this period because of its inability to adapt to changing external environments.

Same as 1st According to Lee, Phan and Tan (2003), the impact of economic downturn had caused a high level of unemployment rate among Asian countries. During economic downturns, the organization tends to restructure the organization by laying off or perhaps downsizing the number of the employees in terms of cost saving preferably the low skill local employees who demand higher wages compared to the foreign workers of a similar scale of relative work skills. However, the company was not allowed to do so, as **Section 60N** of Malaysian Employment Act (1955) states that, the employer shall not terminate the services of a local employee unless he has first terminated the service of all foreign employees in a similar capacity.

Nevertheless, majority of the organizations will normally choose to either lay off their employees or reduce their salary otherwise retrench them during recession and economy downturn. This action will definitely cause some unfavorable outcomes affecting their employees. The employees will most likely to call up for a picketing to confront the management in a tussle to claim what they feel was rightfully theirs but had been taken away. Even though organizations were forced to take certain actions such as layoffs apart of the workforce in order to make sure their business survive during recessions, however this circumstance normally met, understandably with great resistance from the employees. Thus, there are evidences of picketing and strikes which had happened. According to **Section 40** of Malaysian Industrial Relations Act (1967), employees were allowed to organize picketing as long as it did not involve any illegal action. The act stated that, “employees can attend at or near their workplace when they have a trade dispute for the purpose of peacefully giving information to the public and other employees and to persuade other employees and not to work if a strike has already been declared”. Once picketing happened, it might be affected the company’s reputation and even caused some unavoidable losses to the company.

During a business restructuring exercise, employers may terminate employees by putting their contract of employment to an end. Retrenchment does not only happen during economic recession but also when the economic climate is good. For instance, when an inevitable organizational change takes place, the organization may decide to retrench its workers due to factors such as the introduction of new technology, business relocation, merger and acquisition, a business is sold or restructuring of a company. Additionally, with the rapid advancement of automation, employees’ services may become redundant and thus, can be terminated. In Malaysia, retrenchment is permitted by law for operational reasons when there is redundancy. Redundancy means there is surplus of workers. The main legislation governing retrenchment is the Malaysian Industrial Relations Act 1967. **Section 13(3)** of Industrial Relations Act 1967 recognizes management’s rights to employ workers or terminate them with proper cause or reason. Employers have the right to decide the number of employees to be employed or retain by considering the viability and profitability of the business. If they feel that the number of employees is too many, employers can discharge the excess employees. The Malaysian Employment Act 1955 is another law that governs redundancy. **Section 12(3)** of the act governs when an employee may be terminated from service. (Hamidah Marsono, Hj. Kamaruzaman Jusoff, 2005)

Research Objectives

Walsworth (2010) emphasized that innovation is the fundamental component for the success of an organization. This paper has investigated that there are three problems that union might restrict innovation take place in organization. Firstly, the information sharing between unionized

employees is limited when the working environment separates worker and management interest. It is a fundamental barrier for product innovation to take place. Secondly, unionized employees, as well as managers, have different perceptions and goals. This may pose a limit toward an incentive to innovate. Lastly, unions may achieve their goals through appropriate control towards management, hence they might restrict other unilateral management decisions, which including design, speed and process of production. Therefore when a union try to prevent the implementation of policy designed to encourage collaboration from employees, it tends to increase the heat of conflict between the management team and the said union.

Literature review

According to Rizwana Iqbal (2011), one of the things in the world will be static even the world itself also will change (Rescher, 1996). Therefore, adjustment in the organization is important for continuous improvement and in order to gain competitive position in market. According to Michael Crandall (2006), the definition of organization change is “*an alteration of an organization’s environment, structure, culture, technology, or people*”. The uncertainty in the environment makes the organization changes hard to implement especially those who have more hierarchy, formal rules and regulation, centralized decision making (Henderson & Clark, 1990). Change is a challenging task for the organization because of the technology and economic implications involved. However, employees’ commitment is an essential factor that facilitates organizational change. Any uncertainty about the employee’s future creates stress that reduces the said employee’s performance.

Malaysia is a developing country with tremendous economic development and thus, not spared from the impact of globalization. Naturally, the economic development requires a large pool of employees and whenever there is economic downturn all employees are affected. These cases pertaining to dismissal of employees by the reason of redundancy would be heard by the Malaysian Industrial Court (Ali & Hassan, 2011).

According to the Employment Law, employers are permitted to re-organize their businesses by retrenching or terminating their employees, however with limited conditions. Redundancy or worker surplus may be due to financial difficulties and also the increasing use of technology causing retrenchment. *Article 20 of the Code of Conduct for Industrial Harmony 1975* states that employers should take measures to avoid reductions of workforce when redundancy situation is likely to exist. These measures include limitation on recruitment, restriction of overtime work, giving early warnings, assisting the employees to find other work and many more even though the decision about size of the workforce is a management prerogative (Ali & Hassan, 2011).

While the law recognizes that retrenchment due to economic or other justifiable reasons lies on the part of employer, employees too have the rights over their retrenchment and such rights derive from the excuse and reason used by employers. In conclusion, employers’ prerogative to retrench employees is not without limit. The employee can still challenge the retrenchment on the ground that it was done in bad faith, non-compliance with the rules, laws or collective agreement and non-observance of the Code. The law in Malaysia is considered adequate in protecting the rights and interests of employees in times of retrenchment

The focus is on the attitude of union activists because they are the ones that ultimately influence workforce reaction towards the change. If the activists are favorable of the change then the process will flow smoothly and inexpensively, adverse activists however, will demand for compensation

and pose negative influence to retard the change. Activists are suggested to be more opposing than ordinary union members because of 'voice mechanism' which refers to voicing out discontents, or their large stake in union rents that are bound to decrease after the change (Cappellari, Lucifora, & Piccirilli, 2004). The labour law gives employees the right to join trade unions thus union activists possess great influence that will determine the success or failure of organizational changes. The research scrutinizes the reaction of active union members towards organizational changes thus providing the basis for a better understanding on how it is likely to respond to those changes. The results reveal that employees who became union activists have higher tendency to complain than members (Cappellari, Lucifora, & Piccirilli, 2004).

The Industrial Court is a tribunal established by The Industrial Relations Act, 1967 to arbitrate trade disputes between union and employers and hear cases surrounding unfair dismissals without just cause or excuse. The Court plays a major role in laying down guidelines on fair employment practice. With recent organizational changes such as downsizing and retrenchment taking place, there are many cases whereby employees claim they are unfairly dismissed. The employers will be required to pay a compensation package or reinstate the employee if the Court finds that the employee was dismissed without just cause or excuse whether on the grounds of redundancy, misconduct or poor performance (Aminuddin, 2009).

Although the Court has no objections with employers who need to reduce their workforce when they have surplus labor, there are guidelines to be followed before it could be considered a fair dismissal. The employer will have to prove to the satisfaction of the Court that the employee was redundant and that the employer had followed all the procedures laid down in the Code of Conduct for Industrial Harmony, which require employers to downsize based on 'Last-in-first-out' criteria (Aminuddin, 2009). These studies proves that even though organizational changes such as downsizing, restructuring and retrenchment which require the dismissal of employees is a management prerogative, it is very limited whereby there are still many procedures that employers need to follow before it is considered a fair dismissal.

Technology change

Friedberg (2003) explained that the computerization working conditions and technological changes will affect the working trends, especially the retirement plans of older employees. The older employees will respond differently based on consideration whether to improve their skills. While there is technology changing rapidly nowadays, it is important to understand the causes and effects of the baby boomers on their retirement plans. Specifically, a shift towards skill-biased technological change contributes to increase in earnings inequality in the US. According to Juhn (as cited in Friedberg, 2003), the enhancing in dispersion of earnings leads to lowly educated employees to retire earlier, as compared to employees with higher paper qualifications. Computerization and technological changes have brought the effect of automated routine tasks, which usually involved in clerical and assembly-line jobs. Thus, the unskilled and semi-skilled employees are being replaced. In addition, computers replace less skilled functions by complement those technical and management jobs, this raise the productivity levels. Furthermore, computers are easier to be used over time, so the employers and employees both contribute resources to the computer training. Employees who possess computer skills often seem to demand a higher pay and

promotion. However, older employees fail to keep pace with the recent changes in computer use. They have less time for training as they are nearing or close the age of retirement. Besides, older employees are less likely to have computer skills in the first place. Nevertheless, the older employees having lower average education levels; becomes a barrier for them to attend computer-based skills training; which would necessarily require a new adaptation to their learning curve which the said generation would see as arbitrary to their interests in terms of welfare. They more prefer the routine jobs which have been automated. As a result, lack of technology requiring new skills made work less attractive and inconvenient. Those employees who lack such new skills might be running the risk from terminating prematurely while others that possess such skills may be retained in employment.

Job security

According to Flecker (2009), the impact of external restructuring which including outsourcing, relocation and fragmentation of activities along value chains on work and employment, for examples employment levels, job security, work organization and the quality of work life. It is prove that for most sectors, the more enhancing on outsourcing opinions will reduce the bargaining power of employees. Cost cutting and use of employees who demand less protection especially in the realm of safety and health (whether due to the lack of protective measures initiated by the government of the day where the employees are from or situated or otherwise) are usually the main reasons of outsourcing and relocation. Due to the fact most companies aim to gain benefits from introducing different wage levels and employment conditions via outsourcing, some risks of externalization and flexibility demands will occur. These risks may worsen the downstream in the value chain. The research also argues that outsourcing accelerates tendencies towards decentralized bargaining and deregulation will weaken the employees and destabilizes the industrial relations institutions. In addition, internationalization, relocation of work and reorganization will put pressure on making concessions on the employment conditions of those core employees. Meanwhile, according to Huws (as cited in Flecker, 2009), the growing of restructuring in value chain will lead to enhance in insecurity for most of the workforce. Besides, Dorre (as cited in Flecker, 2009) also argues that the increase in companies' peripheral employment also puts pressure on standard employment relationships of permanent employees and increase in levels of insecurity.

Storm and Naastepad (2008), make an important statement with regard to the impact of labour market deregulation on employee's job security issue in the Organization for Economic Cooperation and Development (OECD). Their research argues that the lower demand growth in the market will directly lead to lesser export growth and labour productivity growth. This circumstance will then decline the need for employees, and thus raise the long-term unemployment rates in the OECD. On the other hand, the productivity improvements depend a lot on the employees' ideas, suggestions and co-operation; however this trend will become a con if the employees feel not confidence with the tasks and their jobs are at risk. Meanwhile, the low bargaining power of wages by employees in OECD is also another factor that contributes to high unemployment rate. Employees feel they lack of authority in negotiate their demanding wages, thus their job satisfaction will be decreased.

Preuss and Lautsch (2002) investigated the effect of employee involvement and job insecurity on employee satisfaction and commitment. In the research, employees perceived that job security come with a combination of clear management effort and a high level of employee involvement. However, the continued downsizing in organization will increase the job insecurity, hence will bring the negative effect on employee satisfaction and commitment in the organization. It will also

cause decline to the value of employee involvement in the workplace. Employees with low satisfaction levels will not desire to effectively involve themselves within the organization's activities. Furthermore, in order to reduce worker belief in managements' efforts to secure jobs, past downsizing may reduce employee's commitment towards the organization.

Moreno-Galbis (2007) argues that there is a difference of employees' job stability level between a tayloristic job (which is the traditional firm that mainly emphasizes on employees by tasks) and a holistic job (which is modern and more flexible firm that emphasizes on job rotation, work teams and computerized production systems). In order to transform from a tayloristic to holistic firm, the reorganization process of a firm must involves heavy restructuring cost. Specifically, this cost will lead to wage inequalities among the employees and thus enhanced in large employees' job instability level. Besides, according to Bauer and Bender (as cited in Moreno-Galbis, 2007), the skill-biases of organizational changes will lead to more job destruction among low skilled employees. On the other hand, job creation which raises the numbers of vacancies makes the employees become easier to switch to a new job during reorganization of the firms. Thus, the rise in job creation and job destruction will lead to high turnover intention among the employees.

Lee, Phan and Tan (2003), examines that there are many firms in Asia are forced to massive layoffs to reduce their cost due to the Asian economic crisis. The impact of economic downturn had made a high level of unemployment rate among Asian countries. This causes many younger worker felt job insecurity in their working life. Besides, the research stated that IMF and World Bank have helped Asian countries by providing funds in order to solve the problem of financial crisis. Under the condition for such international borrowings, these countries have to agree to liberalize its economics and improve corporate governance. Unfortunately, those countries no longer restrict the entrant of international companies. Restructuring organization would be implemented by foreign firm through upgrading human capital and exploiting new technology. This circumstance has increases competiton among local firms, the firms are forced to upgrade their operation or shutdown if they fail to compete. Besides, employees are facing the great difficulties in finding job without the new skill of the technology applied and continual knowledge.

According to Friedman and Lee (2010), due to the rapid changes in the economic climate, the form of casualization have increased the percentage of employment opportunities in private sector of China. However, this tendency has reduce the level of labour standards and slightly increased the informal nature of employment. This is because China employees are often subjected to long working hours, low pay, summary dismissals and the non-existence of insurance claims. In addition, the large numbers of temporary China employees in state-owned manufacturing sectors and heavy industries are situated in an incredibly uncertain position. This has implied a loss of job security and benefits among China employees in the planned economy.

Most established countries, such as the United States, outside Europe (although the latter seems to be quickly following suit) have adopted neo-liberal economics. Under this economic condition, the legislation for those countries has expanded the right for employees, which involves collective bargaining rights albeit within an ever increasingly tight web of legal regulatory frameworks, or what we commonly call 'red-tape'. In United States for example, over the years, research shows that unionization and collective bargaining have replaced other fundamental employee rights. There are various of reasons for eroding the employee rights, which included changes in employer preferences, globalization, and changing political philosophies. In addition, the public policy in

those countries has failed to adapt the changes in employment relationship that would be benefit for employees. Nevertheless, the organizational restructuring, enhanced use of flexible employees and wide-scale layoffs are weakening the employment conditions for peripheral employees. Thus their trust levels in the organization become lesser. (Van Buren, Greenwood and Sheehan, 2011)

According to Muhammad Naveed, Muhammad Naeem Hanif & Shahid Ali. (2011). In recent years, the State Bank of Pakistan restructures the banking sector by encouraging M&A in order to sustain their strong performance. Due to the large volume of M&A, this study examines how the process of Merger & Acquisition impact employees' job security, motivation and satisfaction in the banking sector of Pakistan. The majority of the employees in banking sector view M&A as a threat for their jobs. For instance, Hellenic Bank has terminated 3627 jobs from the period of 1998-2003 because their shareholders always require limited number of workers. Hence it results to job insecurity and dissatisfaction in employees. From the results of this study, employees who worked at both pre and post-mergers & acquisitions strongly feel that this M & A process pose a strong threat to their job security and also dampen their motivation level.

Job retrenchment; the extent to which management prerogatives plays a role

According to the Ministry of Human Resource Malaysia (2011) the main reasons for employee retrenchment in Malaysia is due to high production costs. Employers are unable to bear the high cost and in order to continue operations; they have no choice but to discharge workers. The second reason is due to deterioration in demand for products and the third reason is the organization's shift towards automated systems. Due to the advancement of automation and technology, organizations may introduce new equipment, computer packages, electronic systems and machines that would reduce the need for manual labour. The fourth reason according to the Ministry is due to part of operations have shifted to another place, followed by reduction in production of product, sale of company, closure, drop in product market, recruitment difficulties, no demand for product or service, and lastly outsourcing part of the business (*Refer Table 1: Reasons for Retrenchment By Region, December 2011*). All of these are changes that can take place in the organization that may lead to surplus of workers and ultimately, results in retrenchment.

Table 1

MALAYSIA: SEBAB-SEBAB PEMBERHENTIAN PEKERJA MENGIKUT WILAYAH, DISEMBER 2011
MALAYSIA: REASONS FOR RETRENCHMENT BY REGION, DECEMBER 2011

SEBAB REASON	BIL. MAJIKAN/NO. OF EMPLOYERS			JUMLAH/TOTAL
	SEM. MALAYSIA/PSULAR MALAYSIA	SABAH	SARAWAK	
Kos Pengeluaran Meningkat/ High Production Cost	6	0	0	6
Kemerosotan Permintaan/ Deterioration in Demand for Product	5	0	0	5
Bertukar ke Sistem Automasi/ Shift to Automated System	1	0	0	1
Sebahagian Operasi Pindah ke Tempat Lain/ Part of Operation Has Shifted to Another Place	1	0	0	1
Pengurangan Pengeluaran/ Reduction in Production of Product	1	0	0	1
Penjualan Syarikat/ Sale of Company	2	0	0	2
Penggulungan Syarikat/ Closure	1	0	0	1
Kejatuhan Pasaran Produk/ Drop in Product Market	6	0	0	6
Sukar Mendapat Pekerja/ Recruitment Difficulties	1	0	0	1
Tiada Permintaan Produk/Perkhidmatan/ No Demand For Product/Service	3	0	0	3
Outsource/ Outsource	2	0	0	2
Lain-lain/ Others	4	0	0	4
Tiada Alasan/ No Reason	0	0	0	0
JUMLAH/TOTAL	33	0	0	33

Sumber: JobsMalaysia, Kementerian Sumber Manusia
Source: JobsMalaysia, Ministry of Human Resources

Nota/Note:

Bilangan Majikan adalah berdasar kepada bilangan sebab yang dinyatakan.
The number of employers is based on the number of reasons which is stated.

However, to what extent does the organization has the right to retrench those employees? **Section 13(3) of Malaysian Industrial Relations Act 1967** states that management has the rights or prerogatives to employ or terminate workers with proper reasons and excuse. Management has the right to determine the number of workforce if should have. The court will not interfere with the *bona fide* exercise of the management's power; however, it is important that employers provide proper reason and excuse before terminating the employees.

To exercise management prerogatives for retrenchment of employees, the employer must be able to prove that there really is redundancy in the organization. If there are several reasons that lead to the retrenchment, the employer must establish the principal reason for the decision. The court will then determine whether the termination or dismissal was fair or otherwise. Employer who intends to terminate employees due to redundancy must also consult the employee's trade union. The termination must also conform to the Code of Conduct for Industrial Harmony 1975 and signed by the Trade Unions and Employer's Organizations. **Section 63A of Malaysian Employment Act 1955** also states that it is the duty of employer to notify Director of Labour before any retrenchment can take place within 90 days strictly.

In retrenchment, if the employee feels that his termination of service is unfair without just cause or excuse, he has the right to bring the matter to Industrial Court. Should the court agree that the dismissal was done without just cause or excuse, the Court can order reinstatement of the employee together with back-wages from the date of dismissal to the date of the Court's award. An example of wrongful dismissal whereby termination is on *mala fide* is when retrenchment is carried out to victimize employees for their legal involvement in trade union activities.

In a nutshell, management prerogative is recognized in Malaysian Law and employers have the right to organize and restructure his business to what he feels *bona fide* for the interest of the business, including retrenching employees. Management should however conduct retrenchment exercise only as a last resort after taking into consideration other steps such as reducing operational cost and cutting other unnecessary perks and benefits such as travelling expenses and entertainment allowances.

Retrenchment procedure

Retrenchment exercise requires some governing procedures to be considered with just cause or excuse. The Industrial Court in *Rocon Equipment Sdn Bhd & Anor vs. Zainuddin Muhamad Salleh & Yang Lain* (2005) emphasized that if redundancy did exist, a further issue to be considered is whether the retrenchment is done in accordance with the acknowledged standards of procedure.

Clause 22(a) of Malaysian Code of Conduct for Industrial Harmony 1975 (the Code) provides the subsequent procedures to be taken by the employer:

- (i) To give as early a warning as practicable to the workers concerned;
- (ii) Introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;
- (iii) Retiring workers who are beyond their normal retiring age;
- (iv) Co-operating with the Ministry of Labour and Manpower to help the workers to find work outside the undertaking; spreading termination of employment over a longer period;
- (v) Ensuring that no such announcement is made before the workers and their representatives or trade union have been informed.

The employers should inform and consult with the workers or their trade union representatives immediately before any decision on retrenchment is taken. Retrenchment must be conducted fairly and not tainted by any unfair legal practice (Thavarajah, 2009). Thus, when employers carry out the selection of the employees for retrenchment, they must be according to the Last in First Out (LIFO) principle (especially when retrenchment involves local employees) and also get the approval of the workers and their union representatives (Teoh, 2007).

Job retrenchment: The courts role – to what extent?

The two relevant questions considered and determined by the Court are as follows:

- (1) Whether the Claimant's redundancy situation leading to retrenchment as alleged by the Company is *bona fide*? (William Jacks – *supra*)
- (2) Whether the proven redundancy constitutes just cause or excuse for the retrenchment? (Goon Kwee Phoy – *supra*).

In the **Industrial Court Award No. 759 of 2011** between Thor Meng Tatt and Informatics Training Technology Sdn. Bhd., the Court was not satisfied that the Company had reasonably exercised its managerial power reasonably in consonance with **Section 20, 21, 22 and 23 of Malaysian Code of Conduct for Industrial Harmony**. This is because the Claimant was not consulted by the Company on the impending merger, only gave the Claimant a two hour notice before termination, departed from the LIFO principle and did not offer him alternative position. In conclusion, the court referred to **Kesatuan Pekerja-Pekerja Perusahaan Logam v. KL George Kent (M) Bhd. [1990] 2 CLJ (Rep) 214** and acted in accordance to equity, good conscience and the substantial merit of this case without regard to technicalities [s. 30 (5) Industrial Relations Act 1967 (Act 177)] this Court finds that the dismissal was without just cause or excuse.

In the case between Malayan Law Journal Sdn. Bhd. and Pook Li Ping, **Industrial Court Award No. 312 of 2010**, the court referred to the term “redundancy” that has been defined by Dunston Ayudurai in Industrial Relations in Malaysia, Law & Practice 3rd Edition at pages 255 and 256 in the following terms:

“Redundancy refers to a surplus of labour and is normally the result of a reorganization of the business of an employer, and its usual consequence is retrenchment, i.e. the termination by the employer of those employees found to be surplus to his requirements after the reorganization. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.”

The Industrial Court recognised that the Company is entitled to organize its business in the manner that it considers best, whereby the reorganization of the affairs of the Company in relation to the Claimant's position as Commercial Director in the Company, hence the post of the Claimant had become redundant. The Respondent has proved on a balance of probabilities, the existence of a redundancy situation justifying the Claimant's dismissal. The Court applied **Section 30(5) of Malaysian Industrial Relations Act 1967** to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form and award that the dismissal of the Claimant was for a just cause or excuse.

In Malaysia, the management has the right to retrench their workmen when they perceive a need to do so and this issue is not questionable since it is a management prerogative. However, employees who were retrenched may bring this matter to the Industrial Court resulting to a trade dispute with their employers. These employees can file a complaint under **Section 20 of Malaysian Industrial Relations Act 1967** that he has been unfairly dismissed (Aminuddin, 2007).

The following labour law sections prove that excessive labour protection in Malaysia if implemented without substantive legal premonition and wisdom may impede organizational change. **Section 20 of Malaysian Industrial Relations Act 1967** stated that the employer have to re-employ the employee or pay compensation for the loss of job to the workmen if they satisfactorily prove that they are being terminate without just cause or excuse. The management must have a good justification of the retrenchment exercise to the court in order have the authority to retrench the workmen according to **Industrial Court Award No. 348 of 1986**. The court expects the employer to provide reasonable causes or excuse when termination take placed. Two questions will be asked when the unfairly retrenchment in **Industrial Court Award No. 243 of 1990** (Aminuddin, 2007). First, whether the retrenchment caused by the redundancy situation. Second, if

there are a redundancy situation happened in the company, was the retrenchment done in conformity with well-established procedure. In **Section 12 (2) of Malaysian Employment Act 1955**, the statutory stated that the employers must give a notice depend on the length of working period before exercise retrenchment actions. If the employer fail to do so, then the organization will be liable for prosecution under **Section 99 of Malaysian Employment Act 1955** which shall be fined RM 10.000 (Jusoff & Marsono, 2008).

The employers must ensure there is a proper selection on the group of workmen being retrenched is required under Malaysian Code of Conduct for Industrial Harmony 1975. The labour department will apply **Section 69 of Malaysian Employment Act 1955** and inquire into and confirm and set aside any decision of an employer to dismiss the employee without just cause or excuse but it does not have power to reinstate the workmen who has been dismissed (Aminuddin, 2007). The court can only order the company to pay termination benefit and wages in lieu of notice to the workmen. There is also no enforcement to pay the benefit to the workmen within the scope of Employment Act. Once the employees within the scope of this Act have been terminated, they are entitled for the benefits provided by the employer depend upon their employment period.

Recommendation

In order to resolve the conflicts between organization and unions, the best way was for the organization is to understand the benefit of industrial democracy, namely a smart partnership between the employer and the union by way of co-operation and common good; and here the Government plays an important role as a mediator and in a supervisory role in its tripartite capacity as a go between. The institution of industrial democracy is a pertinent one; it is an arrangement through which mutual trust and confidence can and should be built. In order to achieve a sustainable smart partnership, the organization must have the willingness and ability to deal the problems with unions in an independent but responsible manner. Besides the organization, the union should stand in a more rational angle when looking at the problem. We live in times where capital and organized labour should strive to build mutuality and no longer be strange bedfellows. The labour union should make serious efforts to negate or at least reduce substantially a biased and unpractical though puritan Marxist approach on their side ; ignoring the long term implications of nihilistic anarchy on the nation's economy if such an activist approach is promulgated, merely for a quick hand-out or to gain short term benefits. Under some extreme conditions such as economic downturn and the effect brought by globalization(though extreme, seem to happen quite frequently these days), the labour union should give more consideration toward the organization's condition; by adopting more moderate and sustainable efforts instead of 'taking to the streets' so to speak . In other words, union must respect managerial or employer's prerogatives; keeping in mind the fact that both the employer and the union have to play an equal role as tripartite partners in industrial democracy ; with the Government being a mediator and regulator in these matters.

In the organizational and managerial point of view, the organization should always ensure better working conditions and reasonable wages for the employees. The organization should develop a proper communication system between management and employees. Industrial democracy could be one of the ways of good communication. Industrial democracy is the application of democracy in the workplace via voting system, democratic structuring, adversarial process, system of appeal and so on. The purpose of such a system is to get the employees involvement in making managerial decisions and this could increase the satisfactory level of employees because they becoming a part of the decisions. This smart partnership in the workplace, provides a sustainable platform for the

workers to voice out how the business or service is run, enables(in the long term) the organization to function more competitively and efficiently by means of such co-operation.

On the other hand, employees should not run from their responsibility as well. The employees should adapt themselves for the technological, social and economic changes. The world is changing very rapidly due to globalization, and resistance to change surely cannot be a sustainable behavior to be retained on the part of employee/s. A radical change of outlook and attitude is extremely necessary to adapt to a steep learning curve being imposed by the strong waves of globalization, which is putting a great downward pressure on labour costs; to avoid them being left behind in the wake of this rapid change. The organization plays an important role in helping the employees to adapt to the changes by providing them training in computerized systems and technical skills. Through improving of employee's skills, aids the organization to develop and at the same time increase the employee's job security.

For effective change in the workplace it is necessary to communicate to employees about the reasons and need for change. This not only fulfils the requirement of **Section 12 (2) of the Malaysian Employment Act 1955** but also involves employees and providing them with a sense of belongingness to the organization and removes them from a state of anxiety and brings them to a platform of certainty. With this, it sends them a message that the organization is trying their best to ensure that they are still provided with a job however they too must play their role in the change process. Thus, it reduces resentment and dissatisfactions, instead cultivate mutual understanding.

It is fundamental to ensure that the Human Resource Manager is well informed and trained about the labour laws and procedures especially surrounding retrenchment so that they will not be involved in costly charges that affect their financial position as well as company image. It is advisable for the HR Manager to work closely with Organizational Development Practitioners when planning future change.

Conclusion

It is submitted here that the labour law provisions on the whole with regard especially to job protection are precautionary in nature rather than excessive. In accordance with rule of law and the doctrine of separation of powers the Courts plays a fair role by ensuring that the retrenchment is made *bona fide* and not *mala fide*. However, such labour provisions may be a double-edged sword, in the sense that although the intention of the Government was noble in creating such laws to protect and enhance the right of the workers, when trade unions abuse or forget the original purpose for which it was formed, and instead run riot with undue activist undertakings, at the expense of the long terms aim of the Government to achieve competitive and sustainable economic growth, then there is a serious problem of the cause difficulties when organizations need to adapt to the changes. This research shows that the above problem is coupled with the fact of the law placing the burden of proving that the dismissal of employees is done with just cause or excuse on the employers thus requiring fundamentally onerous obligations. Of course, this puts the employers on check, as they cannot do at their whim and fancy with the workers; however there is a high fiscal cost to bear when there is mass litigation or collective industrial action brought by umbrella unions against the employer or employers in the Industrial Court. The Court here play an important role in noting their role in the realm of separation of powers; judicial activism should not be unbridled, judges are law

interpreters who should carry out their function using as a norm (except perhaps in hard cases); a strict dictionary interpretation of the statutes which were drafted by the makers of the law, namely Parliament; keeping in mind the sensitive public policy notions of enabling as opposed to crippling sustainable economies in the long run. Having said this, the saving grace of the written laws are such that it enables employers to be aware of the labour law provisions and procedures they need to abide to in order to ensure effective change without having to be charged with unfair dismissal.

It is undeniable that the labour unions, if and when they misuse their privileges as an equal tripartite partner in the context of industrial democracy, by taking undue advantage of the protections afforded by labour laws, in actuality become the biggest threat and constraint for the organization to change or make decision towards innovation. The existing of labour unions should always remain loyal to its ideals in a platform of good faith by representing for worker's right and resolve the conflicts between employee and employer through a systematic procedure. However, the globalization process had created frustrated situation to both the organization and employee. The authority and influence especially in terms of sentimental or charismatic appeal, being a base of raw and perhaps at times, unbridled power, creates an impression of the labour union unintentionally being and becoming the blockage of organizations to move forward. The Government here has, still and should always plays the crucial role here in closely monitoring, controlling and if necessary to quell arbitrary activist outbursts of unions using the cloak of industrial justice but in truth to wrest control of state power.

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