DREW & NAPIER

Ending employment during COVID-19: A new normal?

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LEGAL UPDATE

In this Update

In these uncertain times, companies may be faced with the difficult decision of letting go of some of their workers to manage costs.

This legal update discusses the different ways the employee-employer relationship can be ended, as well as recent pronouncements by the Ministry of Manpower on the issue of retrenchment and managing manpower issues and their interaction with employment law in Singapore.

INTRODUCTION

With the recent economic downturn due to COVID-19, the spotlight has once again been cast on the employer-employee relationship. When businesses are forced to manage costs, there will inevitably be situations where employers have no choice but to let their employees go. Recognising the challenges that businesses are facing, the Ministry of Manpower ("**MOM**") has updated and/or released various guidelines and advisories to provide guidance to employers on how to save costs and, if necessary, retrench employees.

Some employers may wonder if there is a new normal for their legal obligations when terminating an employee's employment with the current pandemic, particularly in light of numerous media reports. This legal update provides an overview of the considerations (whether legal or otherwise) employers should consider when terminating their employees.

In short, the legal considerations when ending an employment relationship (whether because of resignation, termination or otherwise) remain the same. In particular, where retrenchments are concerned, the starting point continues to be the employment contract and/or collective agreement. However, when deciding on termination and retrenchment issues, employers should take the various guidelines and advisories released by the MOM into account, bearing in mind that the MOM plays a key role in regulating manpower generally, exercises oversight over both employees and employers, and contributes to the well-being of both the employer and the employee.

BACK TO BASICS

KEYPOINT

The ending of the employer-employee relationship may be driven by either the employer or the employee. It can take various forms, including resignation, termination with notice, termination without notice, and retrenchment or redundancy.

A. Resignation

An employee resigns when he/she informs their employer that he/she no longer wishes to work for the employer and gives the employer notice of this. There will typically be a contractual notice period which the employee is required to serve before the employment relationship is terminated, unless the employee pays the employer salary in lieu of notice or the employer and employee agree to waive the notice period.

One common question which arises is whether the employer, ostensibly having the benefit of the notice period, can waive it without the employee's agreement and stop paying the employee's salary immediately. The law on this is not clear. While it appears to be settled that an employer can waive the notice period, it is less clear if the obligation to pay the employee salary for that period also falls away. It is thus advisable for employers to obtain the agreement of the employee to waive the notice period and payment in lieu of notice required under an employment contract where the employee resigns to avoid disputes at a later date.

B. Termination with notice

The ending of an employment relationship at the initiative of an employer is a dismissal. In such cases, the most common option for an employer to terminate the employment relationship would be in accordance with the employment contract. The employer would thus give the employee notice (in accordance with the employment contract) of the employer's intention to terminate the employment contract, or pay salary in lieu of such notice.

In such situations, there is no legal obligation on the employer to give reasons for the termination. Accordingly, there is legally nothing wrong with simply informing an employee that he/she is being terminated in accordance with his/her employment contract. Under the Tripartite Guidelines on Wrongful Dismissal, dismissals where the right to contractually terminate the employment with notice is invoked are presumed to not be wrongful unless an employee can substantiate a wrongful reason for the dismissal. However, if an employer gives a reason for dismissal with notice but the reason given is subsequently proven false, that could provide grounds for a wrongful dismissal claim.

It is therefore typical for employers to terminate an employee without providing any reason for the termination, notwithstanding resentful protests from the employee. The usual practice is for the termination letter to state (without more) that such termination is in accordance with the terms of the employment contract, without giving due care to the actual reason for such termination. However, while the legal risk of adopting such an approach is minimised, that may not be the end of the story, particularly where the reason for terminating an employee is due to retrenchment and/or redundancy (even if this is not communicated to the employee).

Recent media articles have cast a spotlight on the practice of "forced resignations". It is usually reported that if the employee can show that his/her resignation was compelled by any conduct or omission of the employer, this would then be considered as a dismissal instead of a resignation by the employee. In such situations, an employer would then be required to pay salary in lieu of notice if the employee is forced to

resign without notice. This is a simplification of but one issue when considering termination. If the employee wants to bring a claim for constructive dismissal:

(a) The employer must have committed a repudiatory breach of the employment agreement, i.e. a breach that would entitle the employee to terminate the agreement.

(b) The employee must have accepted this breach.

(c) The repudiatory breach must have caused the employee to leave his/her employment.

The upshot of this is that not every act by the employer would be sufficient for an employee to claim that he or she has been constructively dismissed. Instead, this breach must be one that (as provided for by law or by the employment contract) entitles the employee to terminate the contract, such as non-payment of salary, or one that goes to the heart of the employment contract.

C. Termination without notice

If an employer wishes to terminate an employee without notice, it must have just or sufficient cause to do so. Otherwise, an employee may have a basis to bring a wrongful dismissal claim against an employer, and make a claim for either reinstatement or compensation.

Under the Employment Act, an employer may terminate an employment contract without notice if the employee has wilfully breached a condition of the employment contract (such as being absent for more than 2 days without reasonable excuse).

An employer may also (after due inquiry) dismiss an employee on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of the employee's service. The Tripartite Guidelines on Wrongful Dismissal provides examples of what constitutes misconduct, which includes but is not limited to:

(a) Theft.

(b) Dishonesty.

(c) Disorderly conduct at work.

(d) Insubordination.

(e) Bringing the organisation into disrepute.

If an employer wishes to terminate an employee without notice on the grounds of misconduct, the obligation is on the employer to conduct a due inquiry into the employee's conduct before concluding that there has been misconduct. Employers should also take note that an employer may only suspend the employee for a maximum of 1 week while the employer conducts the inquiry unless otherwise determined by the Employment Commissioner, and must pay the employee at least half of the employee's salary during the period of suspension.

D. Retrenchment and redundancy

Where does retrenchment come into the picture? Legally, a retrenchment is no different from a situation where the employer has decided to terminate an employee with notice. The Employment Act only provides that no employee who has been in continuous service with an employer for less than two years shall be entitled to any retrenchment benefit.

This provision is often misconstrued to mean that an employer is thus obliged to pay retrenchment benefits if the employee has worked for the employer for more than two years. However, this is likely incorrect. The provision is phrased in the negative, disentitling an employee who has been in continuous service for less than two years to retrenchment benefits. It does not confer a right for an employee who has been in service for more than two years to receive retrenchment benefits. Instead, such employees would only be legally entitled to retrenchment benefits if the same is provided for in their employment contract/collective agreement.

However, there is also a human element to retrenchments and terminations of employees in general. If employment issues were all in black and white, the employer, as master to his servant, would almost always be in a stronger position. The human element helps to level the playing field, and is often the cornerstone for policy decisions (as it should be, particularly in a pandemic). The MOM, together with the tripartite partners, has provided guidance to employers on how to manage retrenchments, chiefly through the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment ("**Tripartite Advisory**"). The Tripartite Advisory was recently updated in March 2020 in light of the COVID-19 situation to include:

(a) Guidelines for employers to implement a flexible work schedule to optimise the use of manpower.

(b) Guidelines for employers to focus on training and upskilling employees.

(c) Mandatory reporting to the MOM on cost-saving measures.

The MOM has also released an advisory on retrenchment benefits payable ("**20 May Advisory**"). The salient points of the 20 May Advisory are as follows:

(a) Employers should tap on the support measures provided by the Singapore Government, such as wage support payments as well as training grants, for assistance where there are manpower surpluses.

(b) Where there is no choice but to retrench an employee, employers should provide retrenchment benefits to their employees based on the employer's financial position:

    i. Where the employer is in a sound financial position, they should continue to pay retrenchment benefits based on the existing contracts, collective agreements, memoranda of understanding, or prevailing norms for retrenchment benefits (such as between 2 weeks to 1 months' salary per year of service as stated in the Tripartite Advisory).

    ii. Where the employer has been adversely affected by the COVID-19 situation, the employer should work with the union if their employees are unionised or directly with the employees to renegotiate a fair retrenchment benefit linked to the employee.

    iii. Where the employer is in severe financial difficulties notwithstanding the various support schemes, the employer should negotiate with their unions (where there is one) for a mutually acceptable retrenchment benefit, or provide a lump sum retrenchment benefit (not linked to the employee's years of service) of between one and three months of salary.

(c) In the case of lower wage employees, who in absolute terms would otherwise receive a lower sum of benefits on retrenchment, employers are urged to be more generous, for instance by providing more weeks of retrenchment benefit pay-out per year of service.

(d) Where there has been no choice but to retrench an employee, employers should support retrenched employees in seeking new employment through:

    i. tapping on the employer's business contacts and networks; and/or

    ii. referring these employees to the various governmental initiatives such as Workforce Singapore, which can provide employment facilitation.

Thus, even though there is no strict legal obligation for employers to pay retrenchment benefits, employers are strongly advised to conduct retrenchments in a fair and responsible manner. In this regard, the MOM has also recently clarified (in response to a Straits Times article dated 20 May 2020 titled *"Employers must offer fair retrenchment package, be more generous with low-wage workers amid Covid-19: MOM"*) that only retrenched employees with retrenchment benefits stated in their employment contracts can lodge claims at the Tripartite Alliance for Dispute Management ("**TADM**"), but that those without contractual retrenchment benefits can still approach TADM for advice and mediation.

While the Tripartite Advisory and 20 May Advisory are not provided for in the Employment Act to have legal force, the fact that they are jointly issued by the MOM and the other tripartite partners means that employers would be well advised to take careful note of the advice set out therein.

The question which employers may then face is: "What constitutes a retrenchment?" This term has not been defined in the Employment Act. In the Tripartite Guidelines on Mandatory Retrenchment Notifications as well as the Employment (Retrenchment Reporting) Notification 2019, the term "*retrenchment*" has only been defined as dismissal of an employee because *"of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work"*. A leading text on employment law in Singapore provides slightly clearer guidance, defining "retrenchment" or "redundancy" as *"a portion of the staff or the labour force being discharged due to surplusage"*. The general position thus appeared to be that a retrenchment occurred where an individual was terminated due to there being excess manpower in the organisation.

It is therefore noteworthy that in the 20 May Advisory, the MOM stated that *"[a]n employer who terminates an employment contract with no plan to fill the vacancy any time soon is presumed to have retrenched the employee and this advisory will then apply"*. In doing so, the MOM has provided (arguably) the first ever express benchmark of what it will consider a retrenchment. This is in contrast to the legal position, where there is no provision for such a presumption.

CONSIDERATIONS MOVING FORWARD

Legally, resignations and dismissals (with or without notice and including retrenchments) continue to generally be governed by the terms of the employment contract and the Employment Act. The legal exposure to the employer where terminations are concerned remains a claim by the employee for wrongful dismissal.

This is also the case in situations of retrenchments. Apart from the obligations as set out in the employment contract and any collective

agreement, there remains no strict legal obligation for an employer to pay a minimum retrenchment benefit.

The 20 May Advisory does not change the status quo, but still serves as a timely reminder for employers to consider not only the legal position, but also the human element and the regulatory position to be considered when determining what retrenchment benefits to be paid, if any, when retrenching employees. However, as noted above, the 20 May Advisory appears to have introduced some new (albeit brief) guidance from MOM on what it considers a retrenchment which employers would be well advised to take heed of.

Employers should take note of this clarification of the MOM's views, as it could have a material bearing on whether termination of their employees constitutes a retrenchment, which would then require the employer to adhere to the MOM's Mandatory Retrenchment Notification regime and to take into account the Tripartite Advisory. In particular, employers should be prepared to explain to the MOM why it did not consider any termination a retrenchment. If it is unable to do so and the MOM deems that the employer is in breach of its retrenchment obligations, consequences may follow.

For questions or comments, please contact:

Rakesh Kirpalani
Director, Dispute Resolution &
Information Technology
Chief Technology Officer
T: +65 6531 2521
E: rakesh.kirpalani@drewnapier.com

Timothy Oen
Associate, Dispute Resolution &
Information Technology
T: +65 6531 2598
E: timothy.oen@drewnapier.com

Drew & Napier LLC

10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
E : mail@drewnapier.com

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