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# ▶ Redundancies in Asia and the Pacific: What Employers Need to Know North Asia Session

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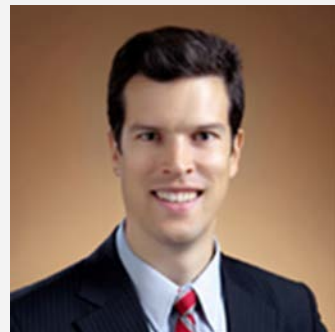
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# **The circumstances under which employers can make redundancies**



## Circumstances - Hong Kong

- An employer can make redundancy if:
  - The employer has ceased/will cease to **carry on the business** for the purpose of which the employee is employed or in the place where the employee was employed
  - The requirements of that business for employee to carry out **work of a particular kind**, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased / will cease.



## Circumstances - Hong Kong

- The above applies equally if the requirement is **reduced** rather than completely **ceased**
- Redundancy must be justified but there is no legal requirement to redeploy or make other adjustments





## Circumstances – Taiwan

- General rules
  - Business suspension or being transferred
  - Operating losses or business contractions
  - Force majeure necessitates the suspension of business for one month or more





## Circumstances – Taiwan

- Cont'd
  - Change of nature of business necessitates the reduction of workforce and the terminated employees can not be reassigned to other suitable positions
  - Worker being clearly not able to perform satisfactorily the duties required of the position held



## Circumstances – Taiwan

- Exception
  - Employee who is on maternity leave
  - Employee who is receiving medical treatment due to occupational accidents
- Obligations to exhaust alternatives before making redundancies
  - Not statutory required





## Circumstances – South Korea

- Urgent business necessity
  - Must demonstrate losses over a considerable period of time
  - E.g., business transfer or M&A (generally in the case of seller prior to closing); plant closure





## Circumstances – South Korea

- Must make every effort to avoid lay-offs
  - E.g., wage-freeze, freeze on new hires, reduction of work hours, cutting expenses, transfer of employees to other departments, education and training, ERP/ESP, VSP, temporary suspension, and voluntary resignation



## Circumstances – South Korea

- Reasonable and fair criteria
  - Based on seniority, performance evaluation, discipline records, job fitness/assessment, etc.
  - Gender discrimination is strictly prohibited





## Circumstances – China

- Redundancy
  - Individual termination cases
  - Grounds
    - “Major change in objective circumstances relied upon at the time of conclusion of the employment contract”
    - Contract must be “unperformable”
  - Certain employees protected from termination



## Circumstances – China

- Mass layoffs
  - 20 employees or 10% of total workforce
  - Grounds
    - Restructuring pursuant to Bankruptcy Law
    - “Serious difficulties in production and/or business operations”







## Circumstances – China

- Cont'd
  - Enterprise switches production, introduces technological innovation or revises its business method, and after amendment of employment contracts, still needs to reduce the workforce
  - Major change in the objective economic circumstances relied upon at the time of conclusion of the employment contracts, rendering them unperformable



## Circumstances – China

- Cont'd
  - Certain employees protected from termination
  - Certain employees with retention rights





## Circumstances – Japan

- A dismissal for any business reason (e.g., poor business results or the shrinking of business) is called an “adjustment dismissal.”
- Japanese courts determine the legal validity of an adjustment dismissal even more strictly than that of dismissal for other reasons



## Circumstances – Japan

- Case law in Japan has established four requirements for valid adjustment dismissals:
  - Necessity for personnel reductions
  - Lack of alternatives to dismissals
  - Fair selection
  - Due procedures



## Circumstances – Japan

- Necessity for personnel reductions
  - Business crisis not required
  - Even when company as a whole is profitable, the necessity for personnel reductions can be found in special cases, e.g.,:
    - Closing of an unprofitable business division
    - Transferring of business
    - Changing of business operations



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## Circumstances – Japan

- In recent years, the courts have tended to basically respect an employer's business judgment regarding the requirement for the necessity of personnel reductions





## Circumstances – Japan

- Lack of alternative to dismissals – have all measures to avoid dismissals been implemented or considered, e.g.,:
  - Suspension of overtime work, pay increases, hiring
  - Reduction of working hours, bonuses
  - Non-renewal of fixed-term employees
  - Redeployment within the company
  - Offering of voluntary early retirement



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**The process employers need  
to follow before making  
redundancies**





## Process – South Korea

- 50 days' prior notice and good faith consultation
  - 50 days' prior notice to the employee representative (or the union that represents the majority of the employees)
  - Good faith consultation as to the measures to avoid dismissals and the selection criteria for such dismissals
  - 30 days' notice to the individual employee or 30 days' ordinary wages in lieu thereof



## Process – South Korea

- Layoff report to the MOEL
  - Layoff report to the Ministry of Employment and Labor (MOEL) in case a certain threshold number of employees are laid off (generally a 10% threshold) 30 days prior to the effective date of the layoff



## Process – South Korea

- Obligations to rehire
  - If the employer decides to hire new employees, the employer must rehire previously dismissed employees within 3 years of their departure for the same positions they held previously
  - Obligation applies even if a dismissed employee has found new employment



## Process – China

- Redundancy
  - Employer required to negotiate with employee on amending contract
  - 30 days' written notice or pay in lieu
  - Payment of severance



## Practice – China

- Redundancy
  - Difficult to prove grounds
  - Employees usually terminated by agreement
  - Redundancy procedure may used to pressure employee to reach agreement
  - Payment of 1-2 extra months of severance is common



## Process – China

- Mass layoffs
  - Notice to union or all employees
  - Submission of termination plan to labor bureau
  - Payment of severance
  - Rehiring preference for terminated employees



## Practice – China

- Mass layoffs
  - Government does not encourage unilateral termination of groups of employees
  - Labor bureau reporting may actually be approval procedure



## Practice – China

- Usual practice
  - Develop severance package, usually 1-2 extra months for severance and additional amounts for pregnant and ill/injured employees
  - Develop strategy for employees who may refuse to accept package
  - Possibly consult with union regarding proposed package





## Practice – China

- Cont'd
  - Notify labor bureau regarding proposed package
  - Announcement to all employees
  - Sign termination agreements with every employee
  - Implement strategy for employees who refuse to sign



## Process – Japan

- Overall process
  - 30 days' notice is a minimum, but not necessarily sufficient, condition; for a legally valid dismissal
  - Process for an adjustment dismissal is not provided in any statutes
  - Employers have to design and implement the process at their own discretion and risk



## Process – Japan

- Fair selection – reasonable criteria and fair application to select the employees subject to dismissal
  - The criteria must not be illegally discriminatory (e.g., based on gender or labor union membership) and should be objective to rule out arbitrary selection
  - Criteria based on age or work performance/contribution not prohibited



## Process – Japan

- Due procedures – explanations and discussion with affected employees and, if applicable, the union
  - Selection criteria required to be disclosed
  - Where there is a collective agreement to negotiate with the labor union before dismissing any member, dismissal without negotiation is likely to be invalid



## Process – Japan

- Cont'd
  - Labor unions in Japan whose memberships are limited to a specific employer typically adopt harmonious labor relations
  - Outside unions, even those that have only one member in the company, have the right to collectively bargain with the employer



## Process – Hong Kong

- Redundancy is a form of **termination** of employment by the employer.
- Employer must:
  - Be able to **justify** the redundancy (with documentary proof)
  - Fairly **select** people for redundancy purposes



## Process – Hong Kong

- Ensure the termination is not on **unlawful** grounds
- Give requisite **notice** or pay in lieu
- Make appropriate **termination payments** (including a statutory severance pay for those who have worked 24 months+)
- There is however no requirement for consultation in advance



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## Process – Taiwan

- Notice and severance payment
- Act of mass redundancies
  - Redundancy plan
  - Negotiation
  - Dispute resolution







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# Remedies available to employees for unlawful termination



## Remedies for Unlawful Termination – China

- Reinstatement
  - Back wages plus penalty for late payment
  - Payment of social insurance/housing fund contributions
  - Employment until end of current contractual term



## Remedies for Unlawful Termination – China

- Double statutory severance
- Remedy may be limited to double statutory severance if reinstatement is “impossible”



## Remedies for Unlawful Termination – Japan

- Formal lawsuits, preliminary dispositions, and labor tribunals
- Illegal dismissals can result in court-ordered reinstatement and back pay
- There is no system whereby a court order to an employer to pay a certain amount would result in the dissolution of an illegally dismissed employee's employment contract



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## Remedies for Unlawful Termination – Japan

- In most cases, employers carry out personnel reductions by mutual agreement and the offering of a reasonable separation package without resorting to dismissal



## Remedies for Unlawful Termination – Hong Kong

- No further remedies generally
  - Do not have concept of unfair dismissal
  - Provided the employer gives notice/pay in lieu and makes all termination payments (including the severance pay), no further remedies are available to the employee even though the ground of termination is found not to be redundancy



## Remedies for Unlawful Termination – Hong Kong

- Discrimination/unlawful termination
  - However, employee may challenge that the selection process/reason of termination is discriminatory
    - Can complain to Equal Opportunities Commission and seek damages in court



## Remedies for Unlawful Termination – Hong Kong

- Discrimination/unlawful termination
  - Also cannot make redundant an employee who is pregnant, on maternity leave, on sick pay or injured at work
    - To do so is a criminal offence and, on conviction, will be subject to penalty





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## Available Remedies to Employees – Taiwan

- Effects of illegal termination
- Dispute resolution
  - Mediation
  - Arbitration
  - Court



## Available Remedies to Employees – South Korea

- Civil complaint with the Regional Labor Relations Commission
  - Most common remedy is reinstatement and back pay; employee may choose lump sum compensation in some cases
  - Refusal to comply with reinstatement order and back pay can result in administrative fine of up to KRW 20 million 2 times a year, up to 4 times total



## Available Remedies to Employees – South Korea

- Civil suit in court
  - Plaintiff may file a wrongful termination claim
  - Plaintiff may also file damage claim for emotional distress
  - No punitive damages recognized
- Criminal complaint for unfair labor practice



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