Redundancies in Asia and the Pacific: What Employers Need to Know
South Asia/the Pacific Session

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The circumstances under which employers can make redundancies
Circumstances – New Zealand

• When making redundancies in New Zealand an employer must:
  – Have *genuine reasons* for deciding that the person is redundant
    ▪ E.g., changes in work processes; loss of business; efficiency gains; a decision to contract out or sell the business
  – Act in a *procedurally fair* manner, e.g., consultation, redeployment
• Cont’d
  – Comply with employment agreements and/or company policy

• Employers are expected to:
  – Be proactive about redeployment opportunities/offer an alternative role
  – Show that the decision was genuine, fair, and reasonable
Circumstances - Australia

- Redundancy = dismissal where “employer no longer wishes the employee’s job to be done by anyone” (i.e., removal of position)
- Can be implemented as long as employer complies with statutory, award, agreement, and/or contractual obligations
Circumstances - Australia

• Must be necessitated by changes in operational requirements, e.g.:
  – Introduction of new technology
  – Restructure of work or positions
  – Change in financial conditions requires reduction in workforce
Circumstances - Australia

Key legal obligations of employers

• Unfair dismissal claims
  – Excluded where dismissal(s) = “genuine redundancy”

• Consultation requirements
  – Modern awards
  – Enterprise agreements
  – Fair Work Act, Part 6-4, Division 3
Duty to consider redeployment

- Necessary to explore options for redeployment to a suitable alternative role – within enterprise, or any “associated entity”
- Employee could refuse, e.g. if lower pay, conditions, status, duties or unreasonable relocation
Circumstances - Australia

• Fair and objective selection criteria
  – Must not be discriminatory
  – Must not relate to employee’s “workplace rights”; or poor performance/misconduct
  – Must comply with relevant award/agreement provisions
In India, termination of employment must be for reasonable cause. Redundancy is considered a ‘reasonable cause’ and would include terminations on grounds of economic reasons, rationalisation in industry, etc.
Circumstances – India

- Termination for redundancy is a form of retrenchment and would be covered by the Industrial Disputes Act, 1947 (ID Act).
- The ID Act applies only to ‘workmen’- which are a significant majority of the workforce.
Circumstances – India

• The circumstances in which a redundancy termination(s) would be justified are when the employer can demonstrate that:
  – The redundancy was genuine
  – The procedure for carrying out such redundancies was followed
  – The statutory and contractual severance payments were made
Obligations – India

- There are no explicit requirements to exhaust alternatives (such as redeployment or adjusting shifts).
- Recommended that employer does not hire individuals in a same/similar capacity for a reasonable period of time post-dismissals unless there is a strong and justifiable business reason for doing so.
Obligations – India

• If employer is hiring, it must invite the redundant workmen (who are citizens of India and ‘workmen’ under the ID Act) to offer themselves for re-employment first.

• If the company is unsure about being able to show clear business reasons for the termination, or unable to comply with the strict termination procedure, it may consider alternative approaches.
Circumstances – Philippines

- **Redundancy** exists where the services of an employee are in excess of what is reasonably demanded by the actual requirements of the enterprise.

- Circumstances under which employers can make redundancies:
  - Over hiring of workers
  - Decreased volume of business
Circumstances – Philippines

• Cont’d
  – Dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise
  – Changes in business direction or prospects resulting in the need for reorganization, streamlining, manpower rationalization, abolition of position, etc.
Circumstances – Philippines:

• Obligation to exhaust alternatives:
  – No express obligation to exhaust alternatives; however, prior consultation with the affected employees is required. Consultation does not mean securing the employees’ consent.
Circumstances – Philippines:

• There is an obligation to:
  – Exercise good faith (i.e., must have legitimate business reasons)
  – Use fair and reasonable criteria in selecting employees to be dismissed such as:
    ▪ Less preferred status, e.g. temporary employee;
    ▪ Knowledge or skills, performance
    ▪ Seniority
Circumstances – Indonesia

Article 164 – Employment Law No. 13 of 2003

• Two years continuous financial losses proven by audited financial statements
• Business efficiency reasons

NB: Constitutional Court decision calls into question legal basis for redundancy unless permanent total closing
Circumstances – Indonesia

Constitutional Court Decision No. 19/2011:

• Efforts should be made to avoid plant closing including:
  – Reduce wages and facilities of management
  – Reduce shifts, hours and overtime
  – Reduce work days, provide unpaid leave
  – Early retirement / attrition
Cont’d

• Query impact of this decision on redundancy?

• But no corresponding legal requirement and no *stare decisis*
Circumstances – Singapore

• Not expressly stipulated
• In general, when cost-cutting measures have been implemented, but restructuring and retrenchment are still needed to keep the business viable
Circumstances – Singapore

• No express obligation for companies to explore alternatives before making redundancies

• “Tripartite Guidelines on Managing Excess Manpower” (which do not have force of law) recommend various alternatives to redundancies
Before employees can be considered redundant, employers must prove that there is a need to retrench. The accepted justifications for retrenchment are:

- Business loss – Malaysia Industrial Court requires cogent proof to justify retrenchment on the grounds of loss of business.
Circumstances – Malaysia

– Reduced turnover – A declining trend of business normally indicates a reduction of the company’s profits that would justify a reduction in the output and workforce; must be significant decline

– Contracting out – Malaysia Industrial Court has recognized that an employer may hive off or contract out part of its business to a third party to maintain efficacy of its undertakings.
Circumstances – Malaysia

• In these situations, employees can be considered redundant on the following ground:
  – Where job no longer exists or was abolished, or where the job and duties underlining the position had diminished greatly
  – Where the job still exists but the business requires fewer employees to do the same nature of job
The process employers need to follow before making redundancies
Process – Indonesia

- Written notice of proposed redundancy
- Mandatory mediation by Ministry of Labor
- Labor Court application, trial and decision
Process – Indonesia

Compensation

- If two years’ continuous financial losses:
  - Basic severance pay
  - Basic service pay
  - Compensation
    - health + housing allowance (15% of severance + service pay)
    - relocation allowance, if applicable
    - untaken leave
Cont’d

- If for reasons of business efficiency:
  - Same as above except basic severance becomes double severance
Process – Singapore

- Notify Ministry of Manpower
- Inform workers of impending retrenchment as early as possible
- Provide notice of retrenchment
Process – Singapore

- Pay retrenchment benefits/ex-gratia payments if the company is obliged under the employment contract, or chooses, to do so
  - Non-unionised employees: norm is 2 weeks – 1 month’s salary per year of service
  - Unionised employees: norm is 1 month’s salary per year or service
Process – Singapore

• Payment of benefits – non-union employees
  - Non-union employees covered under the Employment Act and who have been continuously employed for 3* years or more **may** receive (but are **not entitled to**) retrenchment benefits

*the Act was recently amended to 2 years effective 4/1/15
Process – Singapore

• Cont’d
  – If no retrenchment benefit clause in employment agreement, little difference between termination due to redundancy or by notice
  – Employees still entitled to notice period / pay in lieu
Process – Singapore

• Payment of benefits – unionised employees
  – Court may order retrenchment benefits if employees are part of a union, even if the employment agreement does not stipulate retrenchment benefits
  – Where employees are represented by a trade union, the dispute may be referred to arbitration under the Industrial Arbitration Court
Process – Malaysia

• Item 20 of the Malaysian Code of Conduct of Industrial Harmony: where redundancy is likely, employers should take positive steps to minimise reductions of workforce:
  – Limiting recruiting
  – Restricting overtime; working on day of rest
  – Reducing number of hours/shifts/days worked in a week
  – Re-training and/or transferring to other department/work
• Item 21 of the Malaysian Code of Conduct of Industrial Harmony states:

“Before any decision on reduction is taken, there should be consultation with the workers or their trade union representatives.”
Section 60N of the Malaysia Employment Act 1955 provides that:

“Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.”
Process – Malaysia

• Notice to employees/compensation
• Employees not covered under the Malaysia Employment Act 1950
• In absence of any express contractual clause, the employee should be given reasonable notice
• Employer should observe provisions of the Collective Agreement
• Employer required to inform the nearest Labour Department
A New Zealand employer must follow a procedurally fair process for redundancies, which includes:

- Consultation (prior to the decision being made)
- Access to relevant information (and an opportunity to comment)
Process – New Zealand

• Cont’d
  – Considering alternatives to dismissal (e.g., retraining, transfer or redeployment)
  – Statutory ‘good faith’ duties apply
• Notice and redundancy compensation are not mandatory: based on contract or policy
Process – Australia

• Notice of termination
  – Minimum notice periods in *Fair Work Act*, based on length of service

• Redundancy pay
  – Minimum severance payments in *Fair Work Act*, also based on length of service
  – Union agreements often provide for more
Process – Australia

• Outplacement assistance
  – No legal obligation to provide
  – Common practice for larger employers

• Mediation/court involvement
  – No legal obligation to provide
  – Could arise from employee/union
    initiation of legal proceedings, where
    employer breaches any of the above
    requirements
Process – India

• The procedure to be followed for redundancy terminations and the payments to be made vary, depending on:
  – Place of employment
  – Position and role of the individual within the organization
  – Length of service
OBLIGATIONS OF THE EMPLOYER

- Employee is a workman
- Has completed 1 year of continuous service

1 Month Notice or pay in lieu
- Retrenchment Compensation
- Notify the Government

Commercial Establishment

3 Month Notice or pay in lieu
- Retrenchment Compensation
- Approval of the Government

Factory/Plantation/Mine (>100 employees)
Process – India

• Last in-first out
  – When retrenching an Indian citizen in a particular category of workmen, employer must retrench the last person to be employed in that category
  – LIFO rule is meant to ensure that employees are treated equitably
  – If employer retrenches a more senior workman, the reasons must be recorded in writing and made known to the workmen
Process – Philippines

• Procedural due process
  – Announcement/Consultation
  – Service of written notice to the affected employees and the Department of Labor and Employment (“DOLE”)
  – Payment of separation pay (or: execution of a quitclaim document simultaneous to the release of the separation pay)
  – If employer is a unionized establishment, the provisions of the CBA will govern
Process – Philippines

• Notice
  – Individual written notice of termination must be served to each affected employee
  – Written notice must be submitted to the DOLE—Regional Office where the employer’s business is located, together with a completed Employment Establishment Report
Process – Philippines

• Cont’d
  – Both notices must be served at least 30 days before the intended date of termination. (Payment in lieu of notice is prohibited)
  – Employer may opt to not require the employees to report to work
Process – Philippines

• Separation pay
  – Separation pay shall be equivalent to at least one month’s salary, or one month’s salary for every year of service, whichever is higher
  – Where the employer has a more favorable company policy or practice, the benefits provided thereunder will apply
Remedies available to employees if the employer breaches its obligations
Available Remedies to Employees – India

An employee may bring a legal claim of wrongful termination against the company. If the company is unable to demonstrate that: (i) there is a genuine business rationale for the redundancy terminations; (ii) the appropriate termination procedure has been followed; and (iii) the employees have been paid their entitled dues on termination, the following remedies may exist.
Available Remedies to Employees – India

– The courts may order the employer to reinstate the employee

– The courts may order the employer to pay compensation to the employee

– The courts may order the employer to reinstate the employee along with payment of back wages and/or compensation
Available Remedies to Employees – India

• Statutory period of limitation for wrongful dismissals is three years under the ID Act, but courts regularly condone delays and accept claims beyond three years
Available Remedies to Employees – Philippines

Violation of Substantive Due Process

• The employee may file a complaint for illegal dismissal with the National Labor Relations Commission (NLRC)

• Where dismissal is declared unlawful or illegal, the employee shall be entitled to:
  – Reinstatement without loss of seniority rights or separation pay
Available Remedies to Employees – Philippines

• Cont’d
  – Full back wages (to be computed from the time of dismissal up to the time of reinstatement)
  – Damages, where dismissal is done in bad faith
  – Attorney’s fees (usually 10% of the total monetary award)
Available Remedies to Employees – Philippines

Violation of Procedural Due Process

• The employee may file a complaint for damages with the NLRC

• Where there is a violation of procedural due process the employee shall be entitled to PhP50,000.00 as nominal damages
Available Remedies to Employees – Indonesia

• No unilateral termination by employer
• Redundancy can only be implemented with:
  – Employee written consent, or
  – Labor Court approval
• Otherwise employee remains on payroll and, if not, may seek reinstatement order
Available Remedies to Employees – Singapore

• Civil action for retrenchment benefits: damages
  – For non-union employees, not easy unless retrenchment benefits are provided for in employment agreement
  – For union employees, may be able to argue successfully based on factors considered by the courts
Available Remedies to Employees – Singapore

• Representation to Minister of Manpower [Employment Act Section 14(2)]
  – Where there has been dismissal without “just cause or excuse” [even if employee is terminated with notice!]
Available Remedies to Employees – Singapore

• Cont’d
  – Redundancy situation may amount to just cause or excuse but employer may need to prove the same
  – Minister can order compensation or reinstatement of employee
Available Remedies to Employees – Singapore

Does the employee have a clause in his employment agreement providing for retrenchment benefits in the event of redundancy?

Yes

Retrenchment benefits are to be determined in accordance with the clause

No

Is he part of a union?

Yes

Retrenchment benefits to be agreed upon; if no agreement, the matter can be referred to the Industrial Arbitration Court

No

No obligation to pay retrenchment benefits. However, if the employee goes to the Ministry of Manpower, the Ministry may try to convince the employer to provide some retrenchment benefits
Available Remedies to Employees – Malaysia

• Employees terminated on the ground of redundancy may file a written complaint to the Industrial Relations Department.

• In the event the employer is not able to prove the redundancy, the termination of the employee is found to be without just cause or excuse.
Available Remedies to Employees – Malaysia

- If the Industrial Court finds that reinstatement is not a suitable remedy, it will order the employer to pay compensation in lieu of reinstatement.
Available Remedies to Employees – New Zealand

• Personal grievance claim: ‘unjustified dismissal’ - Employment Relations Act 2000

• Test: whether employer’s actions were what a ‘fair and reasonable’ person could have done in all circumstances:
  – Genuineness of the redundancy
  – Whether the employer followed a procedurally fair process.
Available Remedies to Employees – New Zealand

- Remedies include:
  - Reinstatement
  - Reimbursement of lost wages
  - Compensation for distress/loss of benefits
  - Costs
Available Remedies to Employees – Australia

• Dismissal not a “genuine redundancy” and found to be harsh, unjust and unreasonable → reinstatement, compensation

• Failure to consult over redundancies in breach of award/agreement → injunction (redundancies on hold), penalties up to A$55,000 for a corporation
Available Remedies to Employees – Australia

• Failure to provide statutory notice or redundancy pay → compensation, penalties up to A$55,000 for a corporation

• Failure to meet statutory consultation requirements (15+ redundancies) → “appropriate” orders, but not reinstatement, compensation, severance pay, etc.
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