POST COVID-19
COST SAVING & RETENTION
后行管令，企业如何“合情、合理、合法”留才 (财)！
企业挑战
BUSINESS CHALLENGES

CASH FLOW
现金周转

EFFICIENCY
效率

?
Ecosystem
# Business Toolbox

## Revenue
- New Products or Services
- Process Acceleration
- Co-partnering
- Channel Expansion
- Renewed Focus

## Costs
- Driving Efficiency (LEAN)
- Business Automation
- Outsourcing (Resources Optimization)
- Pay for Performance
- Fixed Cost & Variable Cost Ratios

## Profits
- Merging & Acquisition
- Dividends
- Currency Exchange Hedging
- Risk Coverage
- Investments

## Cashflow
- Equity
- Loan Restructuring
- Credit Term
- Collection
- Liquidating Assets

## Funds
- Reallocation of Funds
- Resource-generating Activities
- Self-financing Activities
- Barter Trading
- Investors
BUSINESS DECISION

CLOSE
DOWN

DOWN
SIZE

IMPACT ON EMPLOYMENT
KEY PRINCIPLES
ON INDUSTRIAL RELATION

Empathy

Reason

Compliance

Communication

Justification

Contractual Obligation
SALARY REDUCTION

- Notify 1 month in advance
- Supporting Documents

PK Form

Communication
- Financial Statement & Forecast
- Action Plans

- Employee Feedback
- Consent Letter

Consent
Revenue & sales forecast drop from RM60 mil to RM20 mil in next 3 years
Outsource specific function to 3rd party

Existing Structure vs new structure

Provide professional development
Outplacement support

RESTRICTURE
RESTRUCTURE

- Gather facts and data to show genuine business need to restructure
- Emphasis on roles not people
- Meeting with employees and gather feedback

Plan & Gather Feedback

Review & Proposal

- Merging two or more existing role?
- Adding new role or Losing roles?
- Inter-department transfer?
- Selection criteria?
- Alternative measures?

Communication

- Explain new structure and how it impact current structure
- Explain roles that are being disestablished or substantially changed in the new structure
- Feedback session
RETRENCHMENT

**Communication**
- Financial Statement & Forecast
- Termination Letter

**Support**
- SOCSO EIS Benefits
- Outplacement Support

**PK Form**
- Notify 1 month in advance
- Supporting Documents

InsightH
EMPLOYMENT ACT 1955 (EA) VS INDUSTRIAL RELATION ACT 1967 (IRA)

Salary up to RM2000 OR Manual labour

Failure to provide any of the benefits is an offence for which an employer can be prosecuted in court. (e.g. annual leave with pay, sick leave with pay, maternity allowance, overtime and so on)

Any person employed under a contract of employment without being restricted to the amount of wages or the type of occupation

Cover all categories of employees irrespective of levels and titles as long as they are not Directors or Managing Directors, who have the functions that are deemed to be the directing mind of the Company.
LEGAL ISSUES ON RETRENCHMENT

• What is Retrenchment?
  It is a form of dismissal that is justified on the basis that the roles of the employees concerned have become redundant.

• When considering a retrenchment, the Court would usually consider the following two issues:
  (1) Whether there was a dismissal.
  (2) Whether the dismissal was with or without just cause or excuse.

• Who needs to prove in the Court?
  The Employer who must prove, on a balance of probabilities, that the termination was carried out with just cause or excuse.
What are the main causes for retrenchment by Employer?

There are three basic reasons that can lead to retrenchment:

i. Economic reasons
This refers to when a business is no longer in the financial position to employ all current employees any longer due to a variety of reasons that can include the minimum wage, economy, recent drought, amended legislation impacting on the cost of doing business, entry of competitors into the market, Covid-19 pandemic, etc.

ii. Technological reasons
Progress in a sector often introduces new technology that can result in making existing jobs redundant. Progress can refer to new techniques and methods of completing tasks quicker, technological inventions, new machinery and mechanisation that can have a direct impact on the number of employees needed eg. Plus Toll Touch & Go, Newspaper Utusan, etc.

iii. Structural reasons
For a business to adjust to a changing environment whether due to challenges or progress, restructuring takes place regarding changes in the workforce, which can lead to positions becoming redundant. Structural changes can also follow when a business makes strategic changes in terms of its vision and goals.
Therefore, proof of redundancy is required for the retrenchment to be valid.

Redundancy is essentially a surplus in labour.

Sistem Televisyen Malaysia Bhd. and Anor v Suzana Zakaria (2005) 1 ILR 53
The industrial court held that to prove redundancy the company must prove that there is a surplus of labour or that the requirement of the functions of the employee has ceased or greatly diminished to the extent that the job no longer exists.
Redundancy means duplicity of work

Redundancy does not mean the work does not exist anymore, but it means that the situation is such that the business requires fewer employees.

Closure of specific department

*Court of Appeal in Bayer (M) Sdn. Bhd. v Ng Hong Pau (1999)*

Merely showing reorganization or drop in sales is not sufficient. Employer must show that the retrenched employees’ functions were reduced to an extent where it is considered redundant.
AS EMPLOYERS DEEM FIT?


Industrial Court held that the employer has the right to organize its business in the manner it considers best. However, in doing so the employer must act **bona-fide** and not **capriciously** or with the motive of victimisation an unfair labour practice.
Code of Conduct for Industrial Harmony 1975

- **Aim**: to lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony.

- Although not legally binding, the Code has been given its legal “teeth” by virtue of sec 30(5A) of the Industrial Relations Act 1967

- Clause 22 (a) of the code provides; if retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:
  
  (i) Giving 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
Code of Conduct for Industrial Harmony 1975

Clause 22 (a) of the code provides (cont.)

(iii) Retiring workers who are beyond their normal retiring age

(iv) Assisting, in co-operation with the Ministry of Human Resources, the workers to find work outside the Undertaking

(v) Spreading termination of employment over a longer period

(vi) Ensuring that no such announcement is made before the workers and their representatives or trade union has been informed.
The Code

Need for the efficient operation of the company

Ability, experience, skill and occupational qualifications

Length of service (Last in, First Out "LIFO" principle) and status (non-citizens, casual, temporary, permanent)

Age

Family situation

Other criteria as may be formulated in the context of national policies

The Code also states that the selection for retrenchment should be based on the following

[Diagram with bullet points as described in the text]
WAYS TO MINIMIZE REDUNDANCY

For example, in circumstances where redundancy is likely, an employer should take positive steps to avert or minimize reductions of the workforce by adopting measures such as:-

(a) Limitation on recruitment

(b) Restriction of overtime work

(c) Restriction of work on the weekly day of rest

(d) Reduction in number of shifts or days worked a week

(e) Reduction in the number of hours of work

(f) Re-training and/or transfer to other department/work.
LENGTH OF NOTICE TO EMPLOYEES

The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than:

(a) **four weeks’ notice** if the employee has been so employed for less than two years on the date on which the notice is given;

(b) **six weeks’ notice** if he has been so employed for two years or more but less than five years on such date;

(c) **eight weeks’ notice** if he has been so employed for five years or more on such date:
RETRENCHMENT BENEFITS

Employment Act 1955

- Salary below RM2000 per month
- Worked for more than 12 months

Calculations

Mr. ABC worked for 20 years, salary for the previous 12 months is RM24,000 (RM2000 per month),

\[
\frac{\text{last 12 months salary}}{365 \text{ days}} \times \text{No. of days} \times \text{No. of years}
\]

\[
\frac{RM \, 24,000}{365 \text{ days}} \times 20 \text{ days} \times 20 \text{ years} = RM26,301
\]
If the court finds that the retrenchment is not just and without cause, it would amount to unfair dismissal, which the court may allow:

1. **Reinstate** the employee and **backwages**. Eg. pay the arrears in salary from date of dismissal to the last date of court hearing OR

2. **Pay compensation** in lieu of reinstatement and **backwages**:
   - Compensation is usually 1 month salary \times years of service. Eg. RM 3000 per month \times 15 years of service = **RM 45,000**
   - Backwages is capped at maximum 24 months backwages from the date of dismissal. Eg. 9 months from dismissal to court’s decision X RM 3000 (salary per month) = **RM27,000**
Case 1: Mohd Azhan bin Arifin v Ranhill Berhad

- Took measures to avoid retrenchment.
- The Employer was facing serious cash flow constraints due to a high interest rate payment for a USD220.0 million loan which exposed the Employer to a yearly interest payment of USD27.5 million.
- The Employee stated that the Employer continued to employ expatriates and ran trainings for its employees after his retrenchment, and that the senior management and directors continued to enjoy benefits such as company cars and drivers.
- HELD: Although the Employer presented evidence to show that it was facing financial difficulties, it was revealed that the Employer was still making profits and had declared dividends to its shareholders that year. The Employer was not running at a loss.
Case 1: Mohd Azhan bin Arifin v Ranhill Berhad (cont.)

- Although the Employer presented evidence to show that it was facing financial difficulties, it was revealed that the Employer was still making profits and had declared dividends to its shareholders that year.

- The court concluded that, on a balance of probabilities, the Employer’s plea that it was facing financial constraints which made the Employee’s employment unsustainable is “unconvincing and unjustified” and that the Employer had “failed to discharge its burden of proof to establish actual financial difficulties”.

The court calculated the financial award as follows:

- **Backwages** based on the maximum of 24 months. \[ RM16,480 \times 24 = RM395,520 \]

- No evidence of post-dismissal earnings was produced, and therefore the only deduction from the backwages would be the retrenchment benefit previously paid. \[ RM59,143.85 \]

- **Compensation in lieu of reinstatement** calculated at one month per year of completed service. \[ RM16,480 \times 2 \text{ months} = RM32,960 \]

**TOTAL AWARD = RM369,336.15** \[ RM395,520 + RM32,690 - RM59,143.85 \]
Case 2: Rasyidah Rosli v Ally Azran Holding Sdn Bhd

- Company showed declining revenues for 3 years but was still profitable.
- Termination notices given to the 3 employees did not provide the reasons for the terminations, although later in court proceedings the company stated that retrenchment was due to redundancy.
- HELD that the dismissal was unfair because the company failed to prove that the employees’ position were redundant.

AWARD:

- Backwages of 14 months \(\text{RM}6,763.00 \times 14 \text{ months} = \text{RM}94,682.00\)
- No evidence of post-dismissal earnings was produced. In the circumstances, the court imposes a deduction of 10\% = \text{RM}9,468.20
- Compensation in lieu of reinstatement (one month’s salary per year of service) \(\text{RM}6,763.00 \times 15 \text{ months} = \text{RM}101,445.00\)

TOTAL AWARD = \text{RM}186,658.80 [\text{RM}94,682 + \text{RM}101,445 – \text{RM}9,468.20]
Case 3: Mohd Zakir Yusoff v Telarix (M) Sdn Bhd

- Company failed to show the **basis on which the employee was selected** and **how the decision was made to restructure**
- HELD: failed to prove redundancy because the employee’s services, job functions, duties and responsibilities **existed at the time of his dismissal**.

**AWARD:**

- Backwages of 15 months: \( RM30,916.67 \times 15 \text{ months} = RM463,750.00 \)
- Compensation in lieu of reinstatement (one month’s salary per year of service): \( RM30,916.67 \times 2 \text{ months} = RM61,833.34 \)

**TOTAL AWARD = RM525,583.39** \([RM463,750.05 + RM61,833.34]\)
Case 4: Nik Sabri Bin Nik Ismail v Central Sugars Refinery Sdn Bhd

• The company exercised ‘Right Sizing’ which outsourced a large part of its security section, causing the jobs of 17 security guards to be redundant.

• By outsourcing the security section of the Company, the Company managed to achieve savings of RM413,899.00 from September 2018 to April 2019.

• The Claimants argued that the Company is still making profits and the retrenchment is merely an excuse to remove them from the Company claiming their jobs were redundant.

• HELD: No evidence to show that the Company’s exercise to reorganize its business were tainted with mala fide motives intended to victimize the Claimants.

• The Court is of the view that the Company has the prerogative to reorganize its business operations in any manner for the purpose of its economic viability and in the manner, the Company think best.
Case 4: Nik Sabri Bin Nik Ismail v Central Sugars Refinery Sdn Bhd (cont.)

- The Company has arranged the claimants for interview with the outsourced company but none of the claimants attended the said interview.

- The Company avers that it retained the 4 security guards and retrenched the claimants based on the Company’s “Performance Management System” (“PMS”) and disciplinary record where the 4 security guards retained were always amongst the top performers based on the PMS with good disciplinary records.

- All the performance data of all employees in the Security Section of the Company extracted from the PMS was available and serve on the Claimants before the trial.

- The Court is satisfied that the Company’s selection based on the Company’s PMS and disciplinary record was a justifiable way of selecting the retention of employees during a retrenchment exercise.
BEGIN WITH THE END IN MIND
LET’S DO A POLL
The post-pandemic organization will take shape along three dimensions.

- Who we are
- How we operate
- How we grow

New Normal

Source: McKinsey & Company
ORGANIZATIONAL DEVELOPMENT ROADMAP

- Technology
- Organization Structure
- Employee Competency
- Rewards & Recognition
- Leadership
- Value & Culture

Current Revenue

Work Processes & SOP

Management System

Technology

Target Revenue

InsightH mindheart Connections
Performance & Efficiency Driven

- Remote Working Arrangement
- Reskilling & Upskilling
- Redeployment & Rehiring

KPI / PMS
Mentorship & Coaching
Job-Person Match
Agile Leaders

VISIONARY
Set direction, culture and team goals

DEMOCRATIC
Facilitate decision for team to take ownership

COACHING
Help team to learn faster to adapt

AFFILIATIVE
Build engaging team
"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change."

Charles Darwin (1809 – 1882)
Thank You

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“Talent wins games, but teamwork and intelligence win championships.”
Michael Jordan
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