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Short-Changed!

Existing laws leave retrenched workers at the mercy of wily employers

By Mohana Rani Rasiah

Most workers often remain unconcerned about the trials and twists of retrenchment while they are still employed. It is often only upon being laid-off that they fully understand the bitterness of retrenchment.

Retrenchment and the Law

Retrenchment deals a cruel blow to workers who lose their jobs and thus their regular source of income. Workers find themselves displaced and, as newcomers, have difficulty entering the job market on favourable terms. The families of these workers also suffer the effects and instability of retrenchment.

Regulation 6 of the Employment (Termination and Lay-off Benefits) Regulations 1980 states the minimum benefits payable to retrenched workers. According to this law, a worker with five years of service or more is entitled to 20 days' wages per year of service.

However, unscrupulous employers can evade this provision by resorting to Section 292 (dealing with winding up) of the Companies Act. They can wind up the company and plead insolvency as the reason for not paying retrenchment benefits. The Companies Act lists in order of priority the financial obligations of an insolvent company, to its various creditors. Workers' retrenchment benefits are low priority, being classified under unsecured creditors. Almost always, retrenched workers of a company that has been wound up get not even a sen compensation. It can be a struggle to get even their unpaid salaries.

The Companies Act in this instance overrides the Employment Act, protecting the employer at the expense of the worker. The owner of an insolvent company can continue to operate his or her other business concerns and even start a new business without any restrictions.

The labour dept run-around

The retrenched worker is a wretched creature starting out with hope, as she files a suit at the labour office. Hope turns into frustration and fatigue as she attends the hearings that can drag over years. Elation sets in when she wins the case. But in many cases, due to abuse of the law, the elation is short-

lived, as the worker discovers that the employer has wound up the company and that she has won a mere paper victory.

But the circus doesn't end here. The labour department routinely assists the workers at this stage by following various procedures. Among these is the JDS (Judgment Debtor Summons), a notorious piece of paper that has to be served on the employer to personally summon him or her to court. The serving of the JDS can take years. An employer can hide behind the curtains each time the bailiff comes and send her maid to say that she is not in. Until the JDS is served, which could be well over a year, the employer is a free citizen.

Once the JDS is served, court hearings proceed and go on for some time and, predictably, the case is closed when the employer proves that there are no financial resources to pay the retrenchment benefits. Day in day out, labour department officials waste precious time and funds pursuing this exercise in futility. They act in accordance to the Employment Act, but the Companies Act can annul labour court decisions.

Our wily politicians

Each time affected workers express their frustration, invariably, some politician will make a spirited statement vowing to see justice done for the workers. At the same time, they will boldly and sternly warn the company and other companies to be responsible towards retrenched workers and not to abuse the law. In the above case, a Perak State Exco member, Junus Wahid, responded to the press coverage of the police report lodged by the workers, by coming to the defence of the workers. He suggested that the Human Resources Ministry set up a special body to track down employers who flout retrenchment clauses. It never materialised.

In connection with the closure of Pan Silver Printers, a printing firm in Silibin, Ipoh, Human Resources Minister then Lim Ah Lek issued a strong warning to errant employers who failed to pay retrenchment benefits to their workers. As expected, the errant employer in this case did not take it seriously.

Don't talk, make laws!

These empty threats and expressions of concern by politicians have achieved nothing for the workers. As Human Resources Minister, the cabinet is the place for Lim Ah Lek to champion the rights of affected workers, so that policies protecting them from exploitation are put into place. As MP, Parliament is the place for Lim to fight for better legislation for workers. The scenario can only change if laws are made to protect workers. Without that, threats by politicians have no bite

Archaic procedures such as the JDS should either be thrown out or revamped. The Employment Act should have clauses relating to the fate of workers in an insolvent company. To prevent abuse, employers whose companies are wound up should be made to bear some personal liability towards their laid-off workers.

There are too many loopholes in the law which are open to abuse by unscrupulous employers. Insolvency is a convenient excuse to escape liability and there are employers who will resort to foul means to have their companies wound up. Machinery is moved out of the company premises, in stages, ahead of the closure of a company. Files go missing at the Registrar Of Companies (ROC), and tales are told of warehouse fires that burn up company accounts.

The National Retrenchment Fund

As a measure to aid retrenched workers for whom there is insufficient legislation, one proposal put forward was the national retrenchment fund. In March 1998, retired Supreme Court Judge and former Industrial Court President Harun Hashim remarked that for the insolvent company, the liability is there but not the money. He proposed that legislation be made so that 1 per cent of each worker's salary is set aside every month in a fund managed by SOCSO to pay retrenchment benefits in cases where companies are wound up.

The MTUC welcomed this suggestion, but pointed out rightly that the 1 per cent contribution should be made not by workers but by employers as it was their liability. The Human Resources Minister took up these suggestions, revealing that in the year 1997, retrenchment benefits totalling 12.7 million ringgit were not paid out to workers on the grounds of insolvency. This is a significant amount, representing one-fifth of all retrenchment benefits due to workers in that year.

The proposal for a national retrenchment fund was, however, rejected by the cabinet in June 1999. This is the cabinet which okayed the use of EPF money to buy 500 million worth ringgit of shares to shore up the value of UEM shares in late 1997. Also the very same cabinet that endorsed the bailout in August 1997 of Konsortium Perkapalan Nasional Bhd, in which Mirzan Mahathir holds a 51 per cent share. The 12.7 million ringgit in retrenchment benefits due to workers is an insignificant sum in comparison to these huge bailouts, but the cabinet failed to be generous with laid-off workers.

The government has to recognise that workers are partners in the economic development of the country and as such it must make and implement laws to protect them. In an environment where there are employers who are exploitative and mean, it is the government that workers will ultimately turn to for protection and justice. Given the existing set of laws, that justice must now come in the form of a scheme to pay retrenched workers what is due to them.

Justice Denied

The case story of a retrenched worker

Mary Daniel, a spry old woman in her mid-sixties, walks up and down the courts, hoping against all odds that her former employer will pay up the 2,500 ringgit due to her as retrenchment benefits prescribed by the Employment Act.

On 23 April 1997, the Ipoh Labour Court handed down a judgment instructing a private firm to pay Mary and seven other co-workers retrenchment benefits totalling RM17, 888. After more than two years, the judgment has not yet been honoured. But this is no crime, going by the law, and indeed the principles of natural justice seem to have little to do with the way the law works when it comes to retrenched workers.

Just consider the sequence of events in this particular case:

- o Retrenchment without notice

On 30 September 1995, the owner of the firm, Chin Yuen Sdn. Bhd, a juice packing company in Jelapang, Ipoh terminated the workers with immediate effect, citing a drop in business to justify the

closure of the company. Retrenchment benefits were not discussed, but re-employment was offered in a similar company in Pahang.

- o Workers file suit at Labour Office: "Settle!" urge the officers

In November 1995, Mary and her co-workers approached labour officials regarding retrenchment benefits. Even though Regulation 6 of the Employment (Termination and Lay-off Benefits) Regulations 1980 clearly specifies the formula for minimum retrenchment benefits, labour officials advised the workers to accept the 300 ringgit as out-of-court settlement that was being offered by the employer. (The average claim was 2,200 ringgit).

- o The labour case and the employer's defence

Throughout the course of the case, the employer, represented by counsel, adamantly pursued the line that the workers had left of their own accord to seek greener pastures.

- o Judgment and notice to appeal

On 23 April 1997, the labour court handed down an ex-parte judgment in favour of the workers, allowing a 14-day appeal period. The employer failed to appeal and ignored the judgment.

- o Issuance of the Judgment Debtor Summons (JDS)

The labour department issued a summons that had to be hand-delivered to the employer to appear in the sessions court for failing to honour the judgment. For more than a year, the labour office was unable to deliver the JDS, causing the court case to be postponed three times.

- o Workers catch the employer in her house

Frustrated by the delay, Mary and the other workers, after lodging a police report, managed to catch the employer in her house. They handed over a letter asking her to present herself in court and if she found the judgment unfair, to tell the court so. And so in July 1998, one year three months after the judgment, the JDS hearings started.

- o Sorry, the company has been wound up!

After having all along maintained that the workers had left of their own accord, the employer stunned the workers by saying that the company could not pay as it had been wound up. Further research showed that the winding up proceedings had started as early as 1995 and thus, throughout the labour case, the employer had put up a farce to keep everyone off her tracks.

- o Sorry, the accounts got burnt!

Upon being questioned by the workers regarding the company accounts, the employer maintained that the accounts for the three years before the closure were burnt in a warehouse fire.

The provisions for a wound up company as contained in the Companies Act will stand the employer in good stead and she need not worry about parting with her money. She can continue to live in her palatial mansion, drive her many cars and operate her other business concerns and set up new ones.

Thanks to the law, she can hold her head high in respected society despite having trampled on the rice bowls of her former workers.

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