L&P

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Unfair Dismissal: financial loss, restructuring, and ceasing of business

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I. Introduction

It is undeniable that when running a business, the business owners always aim for highest profits. Organization restructuring is a common measure to extract the most efficiency out of a company's human resources, according to economic principles. Moreover, an operational adjustment may be required to suit the competitive business circumstances to maintain the business and most importantly to maximise profits.

In order to maintain competitive, sometimes it means that employers have to restructure their organizations by laying off employees to decrease costs and production expenses, and on the other hand to increase work efficiency. Sometimes, the corporation even needs to carve out the business units that do not generate profit for its group, which leads to ceasing of such business unit and termination of employments.

Even though the restructuring and cease of business is reasonable and common in economic sense, such actions could bring about legal complications and massive legal disputes, if not handled properly.

II. Relevant laws

1. Section 49 of the Establishment of the Labour Court and Labour Procedure Act

"… *if the Labour Court considers the dismissal unfair, it shall order the employer to reinstate the employee ... However, if the Labour Court finds that such employee and employer can no longer work together, it shall order an amount of compensation … which the court shall take into consideration the age of the employee, working period, the employee's hardship when dismissed, the cause of dismissal and the compensation the employee is entitled to receive.*"

2. Section 583 of the Civil and Commercial Code

"*If the employee deliberately disobeys or habitually neglects the lawful commands …, absents himself from service, is guilty of severe misconduct, or … incompatible with … faithful discharge of his duty, he may be dismissed by the employer without notice or compensation.*"

3. Section 17 of the Labour Protection Act

"… *When the period is not specified in the contract of employment, an employer or an employee may terminate the contract by giving advance notice in writing … at or before any due date of wage payment in order to take effect on the following due date of wage payment …*"

The advance notice under this section shall not apply to the termination of employment under Section 119 of this act and section 583 of the civil and commercial code."

4. Section 118 of the Labour Protection Act

An employer shall pay severance pay to an employee who is terminated as follows:

Employment period	*Severance pay*
120 days < 1 year	*30 days (1 month)*
1 year < 3 years	*90 days (3 months)*
3 years < 6 years	*180 days (6 months)*
6 years < 10 years	*240 days (8 months)*
10 years < 20 years	*300 days (10 months)*
≥ 20 years	*400 days (13.3 months)*

"Termination of employment … means any act where the employer refuses to allow an employee to work without paying wages … or any other causes and includes where the employee does not work and receives no wages on the ground that the employer is unable to continue the undertaking …"

5. Section 119 of the Labour Protection Act:

"*An employer may not pay severance pay to an employee when employment is terminated upon any of the following conditions:*

(1) Performing his/her duty dishonestly or intentionally committing a criminal offence against the employer;

(2) Deliberately causing damage to the employer;

(3) Committing negligent acts causing serious damage to the employer;

(4) Violating work rule, regulation or order of the employer …;

(5) Absenting himself/herself from duty without justifiable reason for three consecutive working days …;

(6) Being sentenced to imprisonment by a final court judgment …"

III. Unfair dismissal and unfair dismissal damages

Besides the payments under the Labour Protection Act ("**LPA**"), such as severance pay and payment in lieu of advance notice (which will be discussed in Section VII-VIII of this document), termination of employment may entitle the employee to claim for damages or reinstatement under Section 49 of the Establishment of the Labour Court and Labour Procedure Act ("**ELC**") for the dismissal that the court determines as unfair.

The law does not specifically define the term "unfair dismissal". However, it grants a broad discretion power to the court to determine the fairness of the dismissal. The court will look at the specific facts of the case to determine the fairness on a case-by-case basis, such as business necessities, severity of employee's misconduct or whether there is the same treatment applied to other employees. In a general sense, the unfair dismissal refers to unnecessary, inappropriate, and unjustifiable dismissal or termination of employment without cause.

In the case of unfair dismissal, the court may order the employer to reinstate the employee at the same rate of wage as of the time of dismissal. However, if the court finds that the employer and the employee can no longer work together, it shall order an amount of compensation to be paid to the employee, so-called "unfair dismissal damages".

For example, dismissal without any reason, dismissal with unjustifiable reasons, and dismissal to target or harass any specific employee can be considered unfair dismissal. In such event, the employees commonly claim for the compensation for dismissal in a form of unfair dismissal damages, instead of trying to get reinstated into the company.

It is worth noting that there is no specific limit of the unfair dismissal damages or any rate under the law. The court determines the amount of the compensation on a case-by-case basis by taking into consideration the age of the employee, working period, the employee's hardship when dismissed, the cause of dismissal and the compensation the employee is entitled to receive, as well as the actual conduct of the employer in such dismissal.

Since the termination due to financial loss, restructuring and ceasing of business originated from the employer side, rather than from the misconduct or violation of the employee, there is a risk of unfair dismissal.

IV. Relevant Supreme Court decisions

There are several Supreme Court decisions on labour cases determining the fairness of the employment termination due to financial loss, restructuring, and cease of business. Please find below the examples of such decisions.

1. Financial loss

SCD 4753-4760/2546: The employer's business was extremely unprofitable and thus the employer had to lay off its employees. Moreover, in considering dismissal, the employer had followed all required rules. The dismissal was with justifiable reason. Thus, it was not an unfair dismissal.

SCD 271/2553: The employer's business had been constantly unprofitable. The employer offered a voluntary restructuring program to the employee to fix the unprofitable situation of the business, but the employee denied. The employer had to dismiss the employee inevitably. The dismissal was reasonable and necessary to the employer's circumstances. This case was not an unfair dismissal.

SCD 1508/2557: The employer's company had faced unprofitable situation, so it dismissed the employee. The loss of the company was up to THB 5 million, almost THB 1 million (20%) over its registered capital. The restructuring was to reduce the loss of the company, it was considered a necessary action to maintain the business. Thus, it was a fair dismissal.

SCD 2226-2304/2561: The employer's business continuously suffered financial losses. Voluntary early resignation and retirement programs were offered prior to the termination of employment, however, fewer employees than expected participated. The employer then had to terminate some employees, and rehire them under fixed-term agreements. The aim was to cut labour costs for the survival of the business, not to reduce the number of employees. This case was a fair dismissal.

SCD 1850/2557: There was no proof that the employer's company had incurred any significant financial loss that would justify cost cutting by laying off employees to maintain the business. The dismissal was without justifiable reason. Thus, it was an unfair dismissal.

SCD 10265-10274/2558: The Court ruled that the dismissal because the company has lower profit (but still profitable) was considered an unfair dismissal.

SCD 3412/2561: The employer's business did not suffer financial losses to the extent that it was no longer viable. Moreover, there was no method or announcement on the selection of employees who were dismissed, and no clarification on the termination reason. Though the employer had given the payment in lieu of advance notice and severance pay, it was considered as unfair dismissal.

It can be seen from the aforementioned decisions that when claiming for financial loss, such loss must be actual and significantly affect the continuity of the employer's business. The employer must also be able to attest such financial loss, as well as the necessity of the termination to the court. The court often considers the information from the financial statement and the profit & loss account of the company, among other documents, to determine this issue.

2. Restructuring

SCD 2124/2555: The employer restructured the entire company by minimizing the organization, so that the employees worked more

efficiently and were easier to control. The restructuring was due to high competition in the business and was done in general (not to target any specific employee). After restructuring, the employee's position was cancelled and there was no replacement. The dismissal was fair.

SCD 1808/2557: Even though the employer's business had been unprofitable, after the restructuring the business started to gain some profits. It can be seen that the business was on the rise. Dismissing the employee would not make any significant difference in reducing expenses. The dismissal was unfair.

SCD 6099/2556: The dismissal was due to business restructuring and redundancy, but there was no proof that the business of the employer had ever experienced any economic problems or necessities. It was considered as an unfair dismissal.

SCD 5714/2561: The employment was terminated owing to a business reorganisation in order to compete with other businesses. However, there was no solid proof that the company suffered any financial loss, or the employees had to be dismissed. The job description of the dismissed employees remained, but was transferred to other personnel. There were no concrete rules/criteria used to assess the employees' performance prior to their dismissal. Therefore, this was considered as an unfair dismissal.

As mentioned in the decisions, the restructuring must be done on the ground of necessity and such restructuring must help the company in resolving the losses. The employer must be able to provide proof to the court in supporting such restructuring. Additionally, clear measures and criteria must be established by employers for the selection of employees to lay off for restructuring.

Restructuring which results in laying off employees, even though it is a commonly used measure in business, will be considered fair only when there is a justifiable reason, e.g. if it is the last option to maintain the business or such measure is done without discrimination against any particular employees.

3. Cease of business:

SCD 6158-6220/2548: The dismissal resulted from the expiry of the factory lease agreement between the employer and the Department of Industrial Works, causing the employer's business license to expire. The employer could no longer conduct the business and had to return the factory. The dismissal was with a justifiable reason, it was not an unfair dismissal.

SCD 6252/2540: There is no law preventing the employer to close its business. However, the unfair dismissal will be considered if the reason for closing the business justifies the dismissal. The employer closed its business claiming that it was unprofitable, but the employer could not attest so to the court. The dismissal was unfair.

Even though the business owners have the right to cease their businesses, ceasing of business alone does not mean that such dismissal is fair under Section 49 of the ELC. The court also determines the root cause of the decision to cease the business that leads to dismissal. If such root cause cannot justify the ceasing of business, the dismissal of the employment can be an unfair dismissal.

V. Additional recommended measures

The court determines the fairness of the dismissal also upon the action of the employer. Some pre-dismissal measures tend to be taken into consideration by the court as a proof that the employer has tried to avoid the dismissal and that the dismissal is the last resort.

There are several measures that can be taken by the employers to reduce the wage ex-

penses while avoiding employment termination. Some examples of such measures are as follows:

- **Temporary cease of operation**: The employer may opt to temporarily suspend its operation, in whole or in part, and "*the employer shall pay wages to the employee in amount of not less than 75% of wages of working days*". This is possible under Section 75 of the LPA.

- **Long vacation leave without pay:** The employer may allow employees to take long vacation leave to travel or pursue additional education, in addition to regular vacation leave. This will help reduce wage expense, as it is an extra leave without pay.

- **No new hiring policy**: No hiring of new employees, to replace the vacant position from resignation or retirement. The works of the vacant position can be distributed among the current employees.

- **Early retirement package**: Offering voluntary early retirement program plus extra ex-gratia for voluntary resignation from the company.

- **Adjust/decrease executive/management benefits and salary**: Some companies made this sacrifice and it is appreciated by the court in determining the fairness of the dismissal. Since the decrease or adjustment only affects the high-level officers, it is also maintaining a good HR relationship as a whole.

- **Alternative job training or offer from affiliated companies**: The company may try to ask collaboration from an affiliated company to transfer the employment contract or persuade the employee to join the vacant position in the new company and voluntarily resign from the old company. It is a win-win situation for all parties, as the employee will get job security, and the new employer will get qualified personnel without addition head-hunting cost.

- **Separation package**: The most common measure may be offering a sum of money for voluntary resignation. The package must be carefully designed for each situation and should be coupled with a settlement agreement to give clear cut/protection of the employer.

These measures are recommended for the employer to carry out prior to the dismissal, so that the court sees that the dismissal is the last option for the employer, hence tends to consider that the dismissal is fair.

VI. Severance pay

The employer has a duty to pay severance pay to an employee whose employment is terminated by the employer and who has worked for at least 120 days. There are only few exceptions from this duty, for example, the end of the fixed-term agreement (only for few limited cases, e.g. seasonal work or project work less than 2 years) or the employee's severe misconduct under Section 119 of the LPA.

We would like to note that the dismissal due to financial loss, restructuring, and cease of business is not due to the default or misconduct of the employee under Section 119 of the LPA. Therefore, severance pay must be paid to the employee.

VII. Advance notice

Under Section 17 of the LPA, for a non-fixed-term employment (unlimited-term), if the employer wishes to terminate the contract, a written advance notice must be given to the employee. On the other hand, the employment can be terminated immediately, but

it is subject to the payment in lieu of advance notice.

The exceptions for the advance notice requirement are specified under Section 17 para. 4 of the LPA or Section 583 of the Civil and Commercial Code, applying to cases of severe misconduct of the employee. In such case, the employer can terminate an employee with immediate effect, without making payment in lieu of advance notice or compensation.

However, dismissal due to financial loss, restructuring, and cease of business does not fall into the exceptions as mentioned above. Therefore, the employer cannot immediately dismiss the employee, unless the employer grants payment in lieu of advance notice to the employee, if elect to do so.

VIII. Conclusion

The dismissal due to financial loss, restructuring, and cease of business may be common in the eye of the business operator, but it can sometimes be very complicated with regard to labour law. The employers may end up with several risky legal cases if this process is not handled properly, as these kinds of dismissal generally affect a lot of employees (if not all employees of the company, in case of cease of operation).

The severance pay, payment in lieu of advance notice, together with other payments under the LPA (e.g. compensation for unused vacation, overtime, wage, etc.) must be paid to the employees at all time in the event of such dismissal.

There is also the question regarding the unfair dismissal damages that may create uncertainty to the situation, as the court considers the fairness and the damages on a case-by-case basis. Therefore, other measures to minimise the loss are recommended to be taken by the company.

All in all, if the company is at the point that it needs to make the decision toward restructuring or cease of business which results in massive (if not all) termination of employment, the more recommendable way for this situation is to enter into a settlement agreement and ask for a resignation letter from the employees to avoid any further legal complication.

We hope that the information provided in this newsletter was helpful for you.
If you have any further questions, please do not hesitate to contact us.

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