

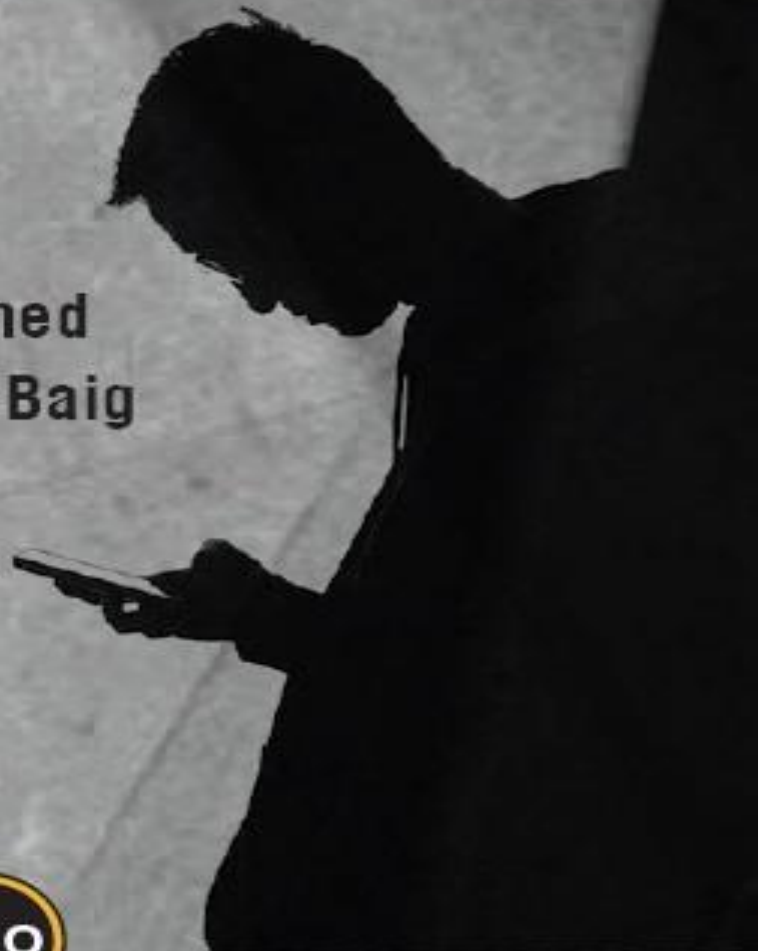


RETRENCHMENT

THE LAW AND PRACTICE IN MALAYSIA

SECOND EDITION

Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig



SWEET & MAXWELL

Retrenchment

The Law and Practice in Malaysia

Second Edition

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Ashgar Ali Ali Mohamed

LLB (Hons), Master of Comparative Laws (MCL) (IIUM),
LLM (Hons) (University of Auckland),
PhD (Business Law) (Graduate School of Management,
University Putra Malaysia)
Professor
Ahmad Ibrahim Kuliyah of Laws (AIKOL)
International Islamic University Malaysia
Advocate & Solicitor, High Court of Malaya (Non-Practising)

Farheen Baig Sardar Baig

Diploma in Islamic Studies, LLB (Hons),
Master of Comparative Laws (MCL), PhD (Law) (IIUM)
Associate Professor
Ahmad Ibrahim Kuliyah of Laws (AIKOL)
International Islamic University Malaysia
Advocate & Solicitor, High Court of Malaya (Non-Practising)

SWEET & MAXWELL



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Foreword

I am more than honoured in having been given this opportunity to write the Foreword to this book which covers a pertinent area of Industrial Relations Law, more so during the current coronavirus or Covid-19 pandemic which has hit the global economy hard and crippled economic activities across the globe. The outbreak has impacted tourism and tourism-related activities and other economic activities like manufacturing supply chains, construction, mining as well the small-to-medium enterprises and participants of the gig economy.

When economic hardship sets in, business owners would experience difficulty in maintaining their businesses. They would be forced to make adjustments to ensure the smooth running of their business ventures, including resorting to cost-cutting measures so as to stay afloat. These would inevitably involve retrenchment of workers due to redundancy in the organisation, no matter how demeaning this might turn out in practice.

Retrenchment of workers justified by economic needs is an inevitable, painful consequence of a restructuring or reorganisation process. It raises concerns about economic efficiency, industrial autonomy and social justice. This involves workers losing jobs though they are blameless and in fact, in most cases, they are regarded as dedicated and competent workers.

However, if the employer carries on business in times of difficulty, keeping all its workers, and suffers losses in the process, the company may go into liquidation. In such a situation, both the employer and the workers would be at risk of losing their livelihood. Hence, the only option in such circumstances is to "sacrifice" some workers thereby saving the viability of the business and the employment of the remaining workers. In the aforesaid circumstances, the law cannot provide an answer that can fully satisfy both the employer and the workers, as they will have to face this bitter reality.

However, when carrying out the retrenchment exercise, the employer must ensure that the existing laws, rules and procedures are adhered to, which involves taking a range of steps that go beyond the payment of retrenchment benefits. This would include freezing on new hiring, reducing working hours and overtime, eliminating temporary labour, transferring of workers and considering alternative employment in the organisation, among others. The above steps are intended to ensure that the termination is *bona fide* and in accordance with established principles and procedures of industrial jurisprudence.

This book, *Retrenchment: The Law and Practice in Malaysia* (2nd Edition), which consists of 18 chapters, provides an extensive coverage on the retrenchment law and practices in Malaysia with a detailed guide to most of the salient aspects of this subject. Undoubtedly, it is an excellent reference point for judges, lawyers, ministry officials, academicians, students and Human Resources practitioners.

The authors are highly commended and I congratulate them both for their valuable contribution and great success in the publication of the second edition to this book. Their efforts can be seen in the extensive research of the law and their ability to write it in a simple and pleasant style. The contents can be easily understood as it caters for a broad spectrum of readers. The book will certainly add to the pool of accumulated knowledge and prove to be a valuable illumination on Retrenchment Law and Practice for years to come.

Tan Sri Dato' Seri Dr Syed Hamid Syed Jaafar Albar

Adjunct Professor, Faculty of Law, Universiti Kebangsaan Malaysia (UKM)
and Asia e-University

Visiting Fellow, Oxford Centre for Islamic Studies,
University of Oxford, England

Preface

Retrenchment of workers on grounds of redundancy is a difficult area of industrial relations law as it raises concerns on economic efficiency, industrial autonomy and social justice. It involves workers who have not committed acts justifying their termination, who, in most cases, are loyal and dedicated workers.

However, in times of economic difficulties, should the employer carry on business and incurs losses in the process this may lead to its insolvency or winding-up and thus, both the employer and the workers losing their livelihood. The viable option in the aforesaid circumstances is to retrench the redundant workers, thereby ensuring the viability of the business, and the employment of the remaining workers.

The employer's unilateral declaration of redundancy, however, must be justified on the basis of genuine commercial reasons and the decision to retrench workers must be carried out in good faith. The employer must consider various options to avert or minimise workforce reduction and should retrenchment be inevitable, the employer should consider offering the affected workers retrenchment benefits or a voluntary separation scheme, with priority for their re-employment in the organisation whenever there is new opening of jobs.

The employer should follow closely the guidelines in the Code of Conduct for Industrial Harmony as they are consonant with the current ethos of corporate social responsibility with the employer showing compassion, concern and care of its workers.

Where the alleged dismissal without just cause or excuse is referred to the Industrial Court pursuant to section 20(3) of the Industrial Relations Act 1967, the court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether the employer's exercise of power was in fact *bona fide*. Generally, the court will not intervene with a management decision to retrench workers

unless it can be shown that the decision was capricious, without reason, *mala fide*, actuated by victimisation or tainted with unfair labour practice.

The book *Retrenchment: The Law and Practice in Malaysia* (2nd Edition) discusses, inter alia, the commonly used terminologies such as "redundancy", "retrenchment", "lay-off" and "termination"; factors contributing to the creation of redundancies leading to retrenchment of workers, retrenchment procedures in the Code, such as the early warning of impending retrenchment, exploring alternative employment within the organisation, and the "last in first out" (LIFO) principle; employer's prerogative to outsource its non-core business activity or business process; principles regulating voluntary or mutual separation schemes; employer's obligation to pay retrenchment benefits and its taxability, and the post-termination benefits under the Employment Insurance System Act 2017 as well as the training and development programmes for retrenched workers under the Pembangunan Sumber Manusia Berhad Act 2001.

The other highlights of this book are the discussions of retrenchment from the Islamic perspective, the setting up of a national retrenchment fund and a suggested mechanism for its effective implementation in Malaysia. The book also presents the principles and guidelines which a prudent employer must follow in order to ensure that a termination on grounds of redundancy is *bona fide* and in accordance with the established principles and procedures of industrial jurisprudence.

Having said that, we would like to extend our sincere appreciation and thanks to Tan Sri Dato' Seri Dr Syed Hamid Syed Jaafar Albar, for spending his invaluable time in preparing the Foreword to this book. Our gratitude further extends to the publisher, Thomson Reuters, in particular, Tabitha Dass and her dedicated colleagues for taking a great deal of interest in the publication and for the support in finally getting this book published.

We sincerely wish and hope that this book will benefit the whole legal and non-legal working community such as judges, Industrial Court chairmen, legal practitioners, the Federation of Malaysian Manufacturers (FMM), the Malaysian Employers Federation (MEF), CUEPACS or Congress of Unions of Employees in the Public and Civil Services, the Malaysian Trade Union Congress (MTUC), human resource/industrial relations consultants, along with academicians, students and business owners.

We alone are responsible for any shortcomings in this book and would certainly welcome any suggestion for its improvement.

Prof Dato' Sri Dr Ashgar Ali Ali Mohamed

Ahmad Ibrahim Kuliyah of Laws (AIKOL)
International Islamic University Malaysia

Datin Sri Dr Farheen Baig Sardar Baig

Ahmad Ibrahim Kuliyah of Laws (AIKOL)
International Islamic University Malaysia

September 1, 2020

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In the name of Allah, the Compassionate, the Merciful.

All praise is due to Almighty Allah *subhanahu wa Ta'ala* (SWT) alone, the exalted, the Lord of the universe. It is only through His blessing and guidance that we have been able to bring this book to completion. May Allah's peace and blessing be upon Prophet Muhammad (SAW), his family and his righteous companions.

The authors would like to express their deepest appreciation to the Research Management Centre, International Islamic University Malaysia (IIUM) for the financial support of this research project (1st Edition) and further, for their support towards the publication of this work. Our heartfelt thanks are due to Tan Sri Dato' Seri Dr Syed Hamid Syed Jaafar Albar for spending his invaluable time in preparing the Foreword to this book.

Our gratitude is further extended to the publisher, Thomson Reuters, especially Tabitha Dass, for taking a great deal of interest in the publication and for the support in finally getting this book published.

Individually, Ashgar Ali Ali Mohamed extends his gratitude to the International Islamic University Malaysia for the sabbatical leave to complete this research. Farheen Baig Sardar Baig records her sincere appreciation and heartfelt thanks to the editors of the *Shariah Law Reports* (ShLR), LexisNexis (M) Sdn Bhd, for their kind permission in allowing her to reproduce part of her article entitled "Retrenchment from the Islamic Law Perspective: With Reference to the Obligation of an Islamic State Towards the Retrenched Worker" published in [2006] 2 ShLR 61. This research is also part of her revised thesis submitted in 2005 to the Ahmad Ibrahim Kulliyah of Laws, IIUM for the Doctor of Philosophy (PhD) degree.

About the Authors

Ashgar Ali Ali Mohamed is a Professor at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB (Hons)) and Master of Comparative Laws (MCL) from IIUM, Master of Laws (LLM (Hons)) from the University of Auckland, New Zealand and Doctor of Philosophy (PhD) from the Graduate School of Management, University Putra Malaysia. He was admitted to the Malaysian Bar as an advocate and solicitor by the High Court of Malaya in 1992. His areas of interest include Employment Law, Civil Litigation and Alternative Dispute Resolution. He has authored several books on the above subjects, published numerous articles both in local and international journals/reports and further, presented papers on the abovementioned areas at various international and local conferences. (ashgar@iium.edu.my)

Farheen Baig Sardar Baig is an Associate Professor at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). She graduated with Diploma in Islamic Studies, Bachelor of Laws (LLB (Hons)), Master of Comparative Laws (MCL) and Doctor of Philosophy (PhD) from IIUM. She was admitted to the Malaysian Bar as an Advocate and Solicitor by the High Court of Malaya in 1996 and her areas of interest include Employment Law and Tort Law. She has co-authored several books on employment law, published numerous articles both in local and international journals/reports and further, presented papers on the abovementioned areas at various international and local conferences. (farheenb@iium.edu.my)

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