Transfer and Secondment of an Employee

IN THIS ARTICLE, JUANITA CHUA EXAMINES THE SIGNIFICANT DIFFERENCE FROM THE LEGAL POINT OF VIEW BETWEEN TRANSFERRING AN EMPLOYEE AND SECONDING AN EMPLOYEE.

A transfer order entails an employee being directed to serve another company, which can be, and is very often, at a different location. The transfer order can either be to serve a subsidiary company, a parent company or even a related company. The same arrangement would also take place, when an employee receives a secondment request, where in such a situation, the employee, would also be required to serve a different company by his existing employer. However, from a legal point of view, there is a significant difference between a transfer and a secondment.

In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead the company to which, the employee has been transferred to is now regarded as his employer. The opposite is, however, the case where an employee has been seconded. In such a situation, the company which seconds the employee (the “seconder company”) remains the employer at all material times and not the company to which the employee is seconded (the “secondee company”).

In Bank Simpanan Nasional Finance Bhd & Anor v Omar Hashim¹, the Industrial Court explained the meaning of the term “secondment” at p 277 as follows:

“...The ordinary meaning of secondment as a temporary transfer, is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other. In Comex Services Asia Pacific Region, Miri v Grame Ashley Power², quoting OP Malhotra at p. 246 it reinforced the idea of a temporary transfer:

‘Therefore, so long as the contract is not terminated, a new contract is not made, and the employee continues to be in the employment of the original employer…’”

This means that when an employee is seconded to another company, that is, the secondee company by the existing employing company, which is the seconder company, the secondee company is not entitled from a legal perspective, to treat the employee concerned as its workman. Should the secondee company conduct itself otherwise and treat the employee concerned as its own workman, the secondee company would then run the risk of being regarded as the new employer.

One of the common questions posed is whether the secondee company can institute the necessary disciplinary action against the employee concerned, should the need arise. In such a situation, it appears only the seconder company should, institute the necessary disciplinary action against the employee and not the secondee company, to which the services of the employee was seconded to. As such, it would be prudent for the secondee company to highlight to the seconder company
whatever grievances it may have against the employee concerned so that the necessary disciplinary action can then be taken by the seconder company against the employee. This also means that the secondee company is not in a position to terminate the services of the employee. Should the secondee company treat the employee as its own employee by instituting the necessary disciplinary action or terminating the services of the employee, there is always a possibility that the secondee company could be brought in as a party should the employee subsequently file an industrial action.

In addition to instituting the necessary disciplinary action against the employee, the salary of the employee as well as the necessary statutory contributions should also be borne by the employing company, which seconded the services of the employee, that is the seconder company. However, due to administrative reasons, the secondee company would usually be the party who pays the employee as well as ensures that the necessary statutory contributions are made. In such a situation, the seconder company should ensure that the necessary amount is remitted back to the secondee company. In the event this is not adhered to by the seconder company, there is always a risk that the employee as well as the Industrial court would regard the secondee company as the employer and not the seconder company. The Court of Appeal in Chong Kim Sang v Metratrade Sdn Bhd has stated that who makes the statutory contributions would be one of the factors which indicate whether a person is an employee or not.

In line with the foregoing, it is always prudent for both the companies, involved in such an arrangement to keep to their respective roles as failure to do so, could have significant legal repercussions.

In relation to a transfer order, it is an established principle in industrial law that the right to transfer an employee from one department to another or from one branch to another within the organisation is the prerogative of an employer. The principles of law in relation to a transfer was succinctly laid down in Ladang Holyrood v Ayasamy Manikam & Ors where the Court of Appeal had stated that the right to transfer an employee is an implied right of an employer which the courts would not ordinarily interfere with. However, if the transfer is actuated by an improper motive, it will attract the intervention of the Industrial court. The power to transfer is therefore subject to the following well-recognised restrictions:

(a) there is nothing to the contrary in the terms of employment;
(b) the management has acted bona fide and in the interest of its business;
(c) the management is not motivated by bad faith;
(d) the transfer is not made for the purpose of harassing and victimizing the workman; and
(e) the transfer does not involve a change in the conditions of service.

Although the Industrial courts have clearly stated that it is an implied right of a company to transfer its employees, this is, however, not the case in respect of a secondment as stated in the case of Rosneil Kundor v Kelantan State Economic Development Corporation. Pursuant to the Rosneil Kundor case, it has been clearly stated that before an employee can be seconded, the employee must first consent to the same. Failure to obtain the consent would entitle the employee to object to the secondment wherein it would then be prudent for the company to determine if the employee can in such a situation be transferred instead, as was done in this case.
For further information on Employment Law matters, please contact

N. Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

1 [2002] 1 ILR 272 (Award No. 1013 of 2005)
2 [1987] 2 ILR 34
3 [2004] 2 CLJ 439
4 [2004] 2 CLJ 697
5 [2004] 4 CLJ 492