

Restructuring and redundancies in the KSA and Bahrain

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Introduction

In 2020, employers' focus was generally to implement cost cutting measures where possible to deal with the challenging economic conditions created by the Coronavirus pandemic. However, this year employers are likely to be under a great deal of pressure to reduce their headcount as the COVID-19 virus shows no signs of abating. Restructuring and redundancy exercises are often costly and complex so employers should be alert to their respective legal obligations in order to minimise the risk of related claims and possible reputational damage.

This article examines the legal obligations on employers in the Kingdom of Saudi Arabia ('KSA') and neighbouring Bahrain given that businesses often have a presence in both jurisdictions.

KSA

The law

The Saudi Labour Law issued by Royal Decree Number M/51 dated 23 Sha'ban 1426 (corresponding to 27 September 2005), (the 'KSA Labour Law') allows for a redundancy dismissal in limited circumstances, as follows:

- where the establishment is permanently closed (Article 74(6)); or
- where the work in which the employee is engaged ceases to be carried out by the employer (Article 74(7)).

Additionally, employers have the possibility of terminating employment with notice where an employee has an indefinite term contract provided that there is a 'valid reason' to do so in accordance with Article 75 of the Labour Law. The Labour Law offers no guidance on what will constitute a 'valid reason'; however, the courts have accepted dismissals due to restructuring or the need to reduce headcount and costs where these can be justified based on the circumstances of each case.

Redundancy process

There is no prescribed statutory process for redundancy dismissals under the KSA Labour Law. Employers are not required to consult with employees or to apply a selection process. However, it is recommended that employers notify employees who are at risk of redundancy, where possible meet them face-to-face in order to discuss the potential decision, and issue them notice in writing. The notice of termination will need to be written in Arabic and in the employee's language if Arabic is not understood. Notice will need to be served at least 60 days before the termination date where the employee has been issued an indefinite

term contract, and at least 30 days before the termination date where the contract is for a fixed term (subject to any longer contractual notice periods in both cases).

Notification to the authorities

Generally speaking, there is no requirement to notify the Ministry of Human Resources and Social Development ('MHRSD') when making redundancies. However, in accordance with Ministerial Resolution No. 50945 dated 29 January 2017 (the 'Resolution') a requirement to issue notification to the local labour office at least 60 days before a dismissal is made will be triggered where the employer:

- has 50 or more employees;
- intends to dismiss Saudi national employees for a reason attributable to the employer and not the employee (e.g. redundancy); and
- will be dismissing at a rate exceeding the greater of (i) an aggregate of one per cent of the total number of employees; or (ii) an aggregate of 10 employees within 12 months of the last Saudi employee to be dismissed.

There is no requirement to notify the labour office where the establishment will be closed permanently or is undergoing bankruptcy.

Where a notification to the labour office is required to be served then this must include:

- a financial study showing the reasons for the proposal to dismiss;
- details of the Saudi employees it is proposed to dismiss which must state the number to be dismissed, their names, a description of the positions they hold, and the reason for dismissal; and
- details of the measures to be taken to avoid the dismissals.

The notice will be reviewed by the labour office which will set up a committee to consider it. The committee will respond within 45 days and can require further information for the proposal to dismiss, suggest alternative proposals to dismissal, reject the notice which would make any dismissals potentially unlawful, or accept the notice in which case the employer has the validation of the MHRSD to proceed.

Where the employer breaches the provisions of the Resolution, the MHRSD will suspend its services to the employer (such as obtaining new visas and allowing the employer to object to the transfer of sponsorship of expatriate employees; albeit this right will be removed once the Labour Reform Initiative comes into effect in March 2021 until the breach is remedied. Suspension may last from 30 days to 720 days depending on the severity of the breach and the number of employees affected.

Redundancy costs

There is no right to a statutory redundancy payment but employees will need to be paid their termination entitlements including:

- salary and other contractual benefits owed to the employee up to the termination date;
- payment in lieu of any accrued but unutilised annual leave;
- payment in lieu of notice if the employee is not required to work it; and
- end of service gratuity.

COVID-19 measures

The government placed a prohibition on terminating employment for a force majeure (COVID-19) by introducing measures under a new Article 41 to the Executive Regulations of the Labour Law. Although, the MHRSD has now stated that Article 41 is no longer applicable, it has separately advised that it will be unlawful for employers to dismiss employees if the employer has availed of the salary subsidies available under the SANID programme. Therefore, employers should be mindful of this if they are considering

terminating employment.

Bahrain

The law

Redundancy dismissals are permitted by the Bahrain Labour Law for the Private Sector No. 36 of 2012 ('Bahrain Labour Law') in the following circumstances:

- a total or partial closure of the establishment;
- a downsizing of the establishment's activities; or
- the replacement of the production system by another which will affect the number of employees that are required.

Redundancy process

There is no need to consult employees on proposed redundancies unless there is a collective labour agreement in force which requires it. Employers must ensure that they select non-Bahraini employees for redundancy ahead of Bahraini nationals where they occupy the same roles. Consequently, it is recommended that employers notify employees whose roles have been identified as redundant, and meet them in person to discuss the potential loss of their employment and whether there is any alternative to dismissal. When serving notice to terminate employment (which can only be done after notice has been served on the Ministry of Labour, as discussed below), the employer should set it out in writing and specify the reason for making the employee redundant.

Notification to the authorities

Once employers have identified who they propose to make redundant they are then required to serve notice on the Ministry of Labour at least 30 days before notice of termination is served on the affected employees in accordance with Article 110 of the Bahrain Labour Law ('Article 110 Notice'). The Article 110 Notice must identify the employees who it is proposed to make redundant, their nationality, position, and length of service. A failure to serve the Article 110 Notice on the Ministry will make decisions to dismiss potentially unlawful. Also, in the cases of a downsizing or total or partial closure of the establishment, failing to serve the Article 110 Notice may also result in the imposition of a minimum fine of 500 Bahraini Dinars and a maximum fine of 1,000 Bahraini Dinars.

Redundancy costs

On termination, employees are entitled to receive a redundancy payment that is calculated as follows:

- one working day's wages per month of service with a minimum of 15 days wages and a maximum of six months' wages for employees on indefinite term contracts; and
- half the value of the wages for the remaining period of the contract for employees on fixed term contracts or contracts for specific work provided that they are not less than one and a half month's wages or the remainder of the contract, whichever is lesser.

Employees will also be entitled the following:

- salary and benefits owed to the employee up to the termination date;
- payment in lieu of any accrued but unutilised annual leave;
- payment in lieu of notice if the employee is not required to work it; and
- if eligible, the end of service gratuity.

COVID-19 measures

The Ministry of Labour had placed a prohibition on employers terminating the employment of Bahraini nationals where they were receiving the state salary subsidy that was extended in September 2020. The subsidy ended last year and the Ministry has not given any indication that it will be resumed in 2021. Therefore, employers are no longer restricted from terminating the employment of Bahraini nationals for a lawful reason. However, as the pandemic continues to affect the global economy, the government may consider introducing new measures in 2021 to protect employment.

Conclusion

Although redundancy dismissals are permitted in the KSA and Bahrain, the scope for making employees redundant is limited and simply reducing headcount to achieve cost savings could be problematic. Employers will need to ensure that they follow all the legal requirements to minimise the risk of legal claims and potential reputational damage. Where alternatives to dismissal, such as changing terms and conditions of employment to reduce costs, redeploying or seconding staff or placing them on sabbatical to retain key skills, and freezing recruitment are available then these should be considered.

Employers will also need to remain vigilant of any measures that may be brought in by the government to address the implications of the Coronavirus pandemic. As has been the case last year, these could carry prohibitions on terminating employment whilst the measures are in effect.

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