Returning to Work: Employer's Obligations and Employee's Refusal

for LexisNexis Resource Hub – COVID-19

Since the implementation of the first Movement Control Order ('**MCO**') on 18 March 2020, most employers have made the necessary arrangements to allow employees to work from home. The utilisation of video conferencing software has also enabled employers to conduct virtual meetings with employees and clients from the comfort of their own homes. On the one hand, the argument can be made that having such an alternative means there may no longer be a need to be physically present at the workplace. However, the working arrangements implemented during the MCO, Conditional Movement Control Order ('**CMCO**'), and subsequently Recovery Movement Control Order ('**RMCO**'), were intended to serve only as a temporary measure to accommodate the strict travel and movement restrictions imposed by the government in an attempt to curb the spread of COVID-19. Therefore, it would only be logical that as restrictions are being eased, employees should prepare themselves to gradually return to office. Thus, the question that comes to mind is: Can an employee refuse an instruction to physically report for work on grounds of health and safety?

What should employers do before instructing employees to return to the workplace?

Pursuant to the PM's announcement of the CMCO on 1 May 2020, the Ministry of International Trade and Industry ('**MITI**') published several documents detailing the Standard Operating Procedures ('SOPs')[1] that all businesses would have to comply with before resuming operations. These can be found on the MITI website (click here). While the SOPs provide strict guidelines, employers may consider taking other appropriate measures to further ensure the health and safety of their employees. The formulation of any subsequent policies or internal regulations is also in coherence with an employer's duty under the Occupational Safety and Health Act 1994 (Act 514) ('**OSHA**').

Under the OSHA, there is an inherent duty on employers to ensure the safety, health and welfare of employees at work, with specific provisions highlighting the duty to maintain a safe working environment[2] for all employees. Employers also have a duty to formulate safety and health policies.[3] In relation to the present circumstances, this involves establishing a COVID-19 policy and response team within the company responsible for updating the company's policies from time to time to ensure compliance with the SOPs. This would further allow the company to be prepared in the unfortunate event that an employee contracts COVID-19. Other policies that may be introduced include Work From Home ('**WFH**'), weekly rotations, conducting more virtual meetings, staggered lunch breaks and so on.

An employer's duty under the OSHA also extends to providing information, instruction training and supervision as far as is practicable.[4] Therefore, employers should also consistently remind employees of their personal responsibility to follow the guidelines set out in the SOPs, such as wearing face masks and

1 https://www.miti.gov.my/miti/resources/SOP_Pembukaan_Semula_Ekonomi_(latest).pdf (last accessed on 21 September 2020).
2 OSHA s 15(2)(e).
3 OSHA s 16.
4 OSHA s 15(2)(c).

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maintaining social distancing among colleagues. The use of posters and e-mail reminders can serve as an effective way to remind employees of their duties and responsibilities to ensure proper hygiene practice during this difficult time.

While there are SOPs and guidelines in place to assist employers in reopening their business, it is imperative that companies recognise their common law duty to provide and ensure a safe working environment for all.[5]

Can an employee refuse to physically report for work?

It is well established in industrial jurisprudence that any instruction from an employer to an employee must be followed, unless the instructions are illegal.[6] Failure to comply with instructions would amount to an insubordination, a serious misconduct which may be a ground for dismissal.[7] These instructions include one where employees have been ordered to report for work in light of the CMCO, which came into effect on 4 May 2020. While the economy has slowly re-opened, fears and concerns about the outbreak persist, among employees in particular, as the battle against COVID-19 is still ongoing.

Notably, in the UK, section 44(1)(d) of the Employment Rights Act 1996 (C. 18) provides for such considerations and concerns wherein an employee would not be subject to any punishment should they reasonably believe there is a serious and imminent danger which they would not be able to avert and, as such, refuse to return to work. Under the present circumstances, it may be argued that the risk of exposure to COVID-19 may amount to such a circumstance, thus giving an employee the right to not report to work for fear of contracting the disease.

However, in Malaysia, there is currently no legal position to the same effect. Under section 14 of the Employment Act 1955 (Act 265) ('**EA**'), the only provision which governs this is in relation to where an employee may terminate their contract of service without notice should they or their dependants be immediately threatened by danger to the person by violence or disease which is inconsistent with their contracts.[8] It does not, however, address the issue if an employee may be exempted from any punishment if they refuse to report for work on the grounds of health and safety. The OSHA, however, does provide some relief in this area where it is stated under section 27 that an employer cannot punish an employee should the latter make a complaint where they consider it unsafe or where there is a risk to their health. Therefore, it would appear that under extreme circumstances, if there is an unreasonable and immediate danger at the workplace, an employee may exercise their rights to terminate their contract under section 14. Alternatively, employees may voice their concerns to their employer.

In essence, the current legal provisions in Malaysia do not provide an absolute right for an employee to refuse to return to work upon the instruction of their employer on the grounds of health and safety. However, if a complaint has been brought up to the employer with regards to a concern on health and safety, no punishment can be taken against them and their valid concerns should instead be addressed before requiring them to return to work.

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5 *Ting Jie Hoo v Lian Soon Hing Shipping Co* [1990] 2 MLJ 56.

6 *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113.

7 *Kesatuan Pekerja-Pekerja Perusahaan Alat-Alat Pengangkutan dan Sekutu v Kilang Pembinaan Kereta-kereta Sdn Bhd, Johor Bahru* [1980] MLLR 139.

8 EA s 14(3).

High-risk employees

According to the World Health Organization ('**WHO**'), COVID-19 is often more severe in certain groups of people, such as those who are over 60 or who have underlying health conditions like lung or heart disease, diabetes or conditions that affect their immune system.[9] Therefore, there is a considerably higher risk in relation to those individuals who fall within these categories when requiring them to report for work. While there are no specific guidelines addressing their position under the SOPs, it is suggested that they be given other alternatives — for instance, shorter work hours in the office or WFH — for the time being until conditions improve.

What actions can employers take against employees who unreasonably refuse to return to work?

Where an employer has taken all affirmative action to ensure that SOPs and policies are in place during the course of this pandemic, an employee cannot then unreasonably refuse to come to work. Such refusal may constitute insubordination, which can be a ground for dismissal. Therefore, where an employee insists upon not returning to work, it would be in the interest of the employer to enquire first as to the reasons for refusal and to assess the reasonableness of the reasons provided.

In the event the reason(s) prove unsatisfactory, the employer may then consider issuing a letter detailing the efforts taken to address the issues on COVID-19 and to afford the employee concerned another opportunity to report to work on the following day. Should they continue to unreasonably refuse to do so, the employer may then consider taking stricter disciplinary actions that it deems fit and appropriate and proportionate to their insubordination.

While insubordination is a ground for dismissal, any punishment or disciplinary action should be proportionate to commensurate with the misconduct of the employee. The Federal Court case of *Norizan bin Bakar v Panzana Enterprise Sdn Bhd*[10] has emphasised the importance of the doctrine of proportionality. As such, employers are encouraged to consider other punishments when managing employees who have unreasonably refused to return to work before resorting to dismissal, such as withholding pay for the period they refused to work and, in certain cases, issuing a show cause letter and subsequently a warning letter before dismissing the employee.

Moving forward

As Malaysians look to embrace the 'new normal' of working, the concerns of COVID-19 remain a relevant issue until a vaccine is found/ready. Employers should therefore take all appropriate measures, particularly those contained in the SOPs, to not only ensure compliance with the law but also to provide a safe working environment for their employees and themselves. As employers look to resume operations under the new normal and reinvigorate their businesses, they should not do so at the expense of the health and safety of their employees.

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9 WHO website, "COVID-19: vulnerable and high risk groups": see https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups

10 [2013] 6 MLJ 605.

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.

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