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Implications On Employment When The Government Changes

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Since 2020, due to political circumstances, there have been a number of different political parties forming the Federal and State governments. The change in government sometimes results in the change of senior management in Government Linked Companies. This includes the dismissal of top executives of a company. This alert examines whether such a dismissal could be construed as one without just cause or excuse or could this be a case where managerial prerogative is lawfully exercised? These questions were addressed by the High Court in *Kedah Bioresources Corporation Sdn Bhd v Aminudin Shuib & Anor* [2017] 1 LNS 2192.

Facts

Kedah Bioresources Corporation Sdn Bhd (KBioCorp) is a Government Linked Company (GLC) belonging to the Kedah State Government. On the other hand, Aminudin Shuib was the CEO of KBioCorp who was employed on a two-year contract in 2012.

However, sometime in 2013, Aminudin was issued a termination letter whereby his employment with KBioCorp was terminated with immediate effect. The decision to terminate Aminudin's services was made at a special board of directors meeting pursuant to the change in the Kedah State Government. Prior to Aminudin's dismissal, the 13th General Elections (GE13) took place where the ruling party in Kedah, the Malaysian Islamic Party (PAS) was defeated by Barisan Nasional (BN).

Aminudin was compensated as required under his employment contract with KBioCorp. Initially, he did not object to his termination and accepted the compensatory payment. However, he changed his mind later and challenged his dismissal at the Industrial Court. The Industrial Court allowed the claim and ordered KBioCorp to pay RM 245,725.75 as compensation to Aminudin. KBioCorp filed an appeal against the decision by way of a judicial review application at the High Court.

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Findings Of The High Court

The High Court ruled in favour of KBioCorp where the court took the view that the change in Kedah state government was a justifiable reason to terminate Aminudin's employment. Since the state is the substantial shareholder of the company, any changes in the state government will undoubtedly affect the operations of these companies.

According to the court, this is in line with the principle that the right to reorganise a company is the prerogative of the management. In other words, an employer may reorganise his commercial undertaking for any legitimate reason, such as promoting better economic viability provided it is done *bona fide*. The court also took into account Aminudin's non-objection to his termination as an indication that he has accepted his termination. Therefore, in this case, Aminudin's termination was held to be one with just cause or excuse.

The Right To Reorganise A Company

The exercise of the right to reorganise a company often leads to the termination of employment of certain employees in a company. Some instances in which this right may be lawfully exercised include termination of employment due to redundancy¹ or to reduce the impact of financial losses². From the decision in *Kedah Bioresources*, it appears that a change in government is a justifiable reason to terminate the employment of an employee.

However, this was not the case in *Solahhudin Bin Mohamed v Ruane-Tati Sdn Bhd [2010] ILJU 51*. In *Solahhudin*, during the 11th General Elections (GE11), BN defeated PAS and took over the Terengganu State Government. Since Ruane-Tati Sdn Bhd (Respondent) was owned by the Terengganu State Government, the entire board of directors including Solahhudin was replaced to reflect the policy of the new state government. It was a double setback for Solahhudin as the new board of directors then replaced his position as the company's managing director with the position of a general

¹ *Nalani a/p Ramasamy @ Thuvkanu v Guocera Sdn Bhd [2020] ILJU 302, IC, paras 16-22.*

² *Andrew David Nicolson Dan 7 Orang Perayu Lain v Lotus Engineering Malaysia Sdn. Bhd. [2017] ILJU 60, HC, p. 7.*

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manager. This effectively meant that he no longer held the most senior position in the company. The Industrial Court held that the reduction of the powers of a managing director to force him out of the company constitutes an unfair dismissal despite it being a consequence of a change in the state government.

The decision in *Solahhudin* does not negate the position taken in *Kedah Bioresources*. Instead, it shows that an exercise of a managerial prerogative to dismiss an employee in a *mala fide* manner is unlawful. *Kedah Bioresources* would have been decided differently if Aminudin was not paid compensation or if he was given unfair treatment with the aim of forcing him to leave the company like how it happened in *Solahhudin*. Hence, a change in government remains a justifiable reason to reorganise a company via managerial prerogative. This is especially so given that Government Linked Companies are the economic vehicles of the government and as such, the senior management must be aligned with the directions taken by the new government.

Furthermore, the decision in *Kedah Bioresources* may even be applicable in a broader context involving non-Government Linked Company companies. For instance, an employee of a company may be dismissed when the leadership in the company changes or if the company is forced to adapt to new government policies which affect the company's business. In any event, such a decision would not be immune from reversal by the courts if it is among others, tainted with *mala fide*, was capricious, without reasons, was actuated by victimisation or unfair labour practices. This is simply because managerial prerogative is a qualified right. On this point, it is crucial for a balance to be struck between an employee's right to a secured tenure in employment and the exercise of managerial prerogative.

Conclusion

In as much as the employers have the managerial prerogative or discretion to dismiss their employees, such power is not unfettered and is open to judicial scrutiny. It must be exercised in a just, fair and reasonable manner. In *Kedah Bioresources*, the company compensated the employee concerned according to his contractual term after

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dismissing him. Therefore, the prerogative to reorganise a company even if it was triggered by a change in government is valid if it is exercised in a *bona fide* manner for a legitimate aim.

Authored by Thenesh Anbalagan, a pupil in the firm's Dispute Resolution practice.

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