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Constitutional Court extends protection against arbitrary dismissal up to time of final determination by Supreme Court

With business associations warning of the possibility of large-scale layoffs in coming months due to a flood of cheap imports into the Indonesian market, a Constitutional Court decision (No. 37/PUU-IX/2011) handed down in September 2011 has taken on renewed significance.

The case involved a challenge by labor union activists against a provision of the Manpower Act (No. 13 of 2003) on the grounds that it gave rise to a lack of legal certainty and deprived the petitioners of their constitutional rights. In a judgment with far-reaching implications for employers, the Constitutional Court (the “Court”) ruled that the protections afforded by law against unfair or arbitrary dismissal remain in place until a final and conclusive judicial determination is handed down on the matter, even if the case were to go all the way to the Supreme Court. Essentially, what this means from the employer’s perspective in a case involving disputed redundancies is that the employer will be required to continue paying employee salaries until the appeal process has been exhausted – something that could take a number of years.

As in a series of recent Constitutional Court decisions, the ruling in this case once again highlights the problem of poor legislative drafting, and the unanticipated consequences that can arise as a result.

The Background

The Manpower Act sets out detailed rules governing the process by which employees may be dismissed/made redundant. In general terms, Article 151 of the Act provides that employer and employees must strive to the maximum extent possible to avoid layoffs. If dismissals or redundancies are unavoidable, employer and employees are required to negotiate an agreement that is satisfactory to both sides. Should an agreement prove impossible to achieve, then the dismissals/redundancies may only be carried out following the issuing of a determination (penetapan) granting approval for such action by an industrial relations tribunal “to be established by law.” Without such determination, the dismissals/redundancies will be annulled by operation of law (Article 155(1) of the Manpower Law).

Article 155(2) of the Manpower Law then goes on to provide that until such time as a determination has been entered, employer and employees are required to continue performing their respective obligations vis-à-vis one another, meaning that employees are required to continue working and the employer to continue paying the employees their salaries and other benefits .

A year after the passing of the Manpower Act, the House of Representatives (DPR) enacted the Industrial Disputes Resolution Act (No. 2 of 2004), which, among other things, establishes a system of industrial relations tribunals, as envisaged by Article 136(2) of the Manpower Act. The tribunals are constituent

parts of the District Court and, for the most part, they adhere to the normal rules of civil procedure that are applied in the District Court.

The Petition

As mentioned above, the Petitioners argued that the “imprecise wording” of Article 155(2) gave rise to a lack of legal certainty. Article 155(2) reads in full as follows:

Until such time as a determination of the Industrial Relations Tribunal has been entered, both the employer and the employee shall continue to perform all of their obligations.

Given that the Industrial Disputes Resolution Act provides for an appeal to the Supreme Court against tribunal decisions in most industrial relations matters (including cases involving dismissal/redundancy), the Petitioners argued that Article 155(2) gave rise to a lack of legal certainty as it was not clear whether the obligations of employer and employee under the relationship of employment ceased upon the entering of a determination by the tribunal at first instance or only upon the handing down of a final and conclusive determination by the Supreme Court on appeal. The Petitioners argued, inter alia, that such lack of certainty was a violation of Article 28D sections (1) and (2) of the Constitution, which respectively enshrine the right to legal certainty, and the entitlement to work and to reasonable remuneration and treatment in employment relations.

The Decision

The Court agreed with the Petitioners, and held that Article 155(2) would be unconstitutional if construed as meaning that the obligations of employer and employees to each other ended with the decision of the tribunal (at first instance). However, the Court did not strike down the article but rather ordered that it henceforth be interpreted as meaning that the obligations of employer and employees vis-à-vis each other under the relationship of employment persist until such time as a final and conclusive determination has been handed down. A final and conclusive determination results automatically in the case of a tribunal decision that is not appealed to the Supreme Court within 14 days. However, should the tribunal’s decision be appealed, then the obligations of both parties, including the obligation of the employer to pay the employees’ salaries, remain in effect until the Supreme Court enters a judgment on the matter.

No Escape

We believe that it will be virtually impossible for employers to circumvent this ruling. Traditionally, the Indonesian courts have applied a presumption that employment law is intended to benefit the employee. Thus, while an employer and employee may agree to waive the protections afforded by law, such agreement is only worth the paper it is written on for as long as the employee continues to cooperate. Should the employee repudiate the agreement, then the courts are likely to side against the employer. Thus, an employer is free to extend more protections to an employee than are afforded under law, but may not attempt to reduce or limit the protections available to the employee. Any legal stratagem that purports to do so will in all probability be struck down by the courts.

Conclusion

This ruling has major implications for employers, and makes the dismissal/redundancy process even more difficult than it was previously should employees be determined to resist. If an employer is obligated to continue paying wages to an uncooperative workforce with which it is involved in a bitter dispute until such time as the Supreme Court hands down a decision on the matter, which could take some years, then this will make it very difficult indeed for the employer to manage its business in a rational manner in accordance with normal commercial principles.

Perhaps the only consolation for employers is the fact that the Supreme Court's decision on appeal (cassation) constitutes a "final and conclusive determination" that is immediately enforceable, even if the employees seek a final review(*) in the Supreme Court. Accordingly, the Supreme Court's decision in cassation is when the employer's obligation to continue paying salaries comes to an end (provided that the employer wins).

On a more general note, the decision once again highlights the fact that the manpower regime in Indonesia is very much weighted in favor of the employee side, at least in situations where employees are able to enforce their legal rights with the backing of a labor union. There is little doubt that sweeping decisions such as the Constitutional Court's ruling in this case have an impact on investment and hiring decisions, with employers also no doubt keeping a wary eye on those parts of the country that are heavily unionized, particularly in the light of the recent labor disturbances in Jakarta's industrial satellite cities.

() A final review (or peninjauan kembali) is a process whereby the Supreme Court reviews its own decisions. Originally intended to only be available in exceptional cases based on new evidence (in fact, the process is known in Indonesian law as an "extraordinary" legal measure), final reviews have become commonplace in recent years, with the novelty or "newness" of the evidence often being tenuous at best.*

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