

# EMPLOYMENT LAW UPDATE

17 October 2014

## RE- EMPLOYMENT OF EMPLOYEES FROM 65 TO 67 & CONSTRUCTIVE DISMISSAL CLAIMS

### INTRODUCTION

This update reports recent developments on employment law and practice in Singapore.

### RE-EMPLOYMENT OF EMPLOYEES FROM 65 TO 67

On 29 September 2014, the Tripartite Committee on Employability of Older Workers (“**Tricom**”) announced its recommendation that the Government adopt a promotional approach towards raising the re-employment age from 65 to 67 years old, and to provide interim incentives to encourage companies to re-employ older workers beyond the age of 65 before such measures are legislatively required. Under the Retirement and Re-employment Act, employers are currently required to offer re-employment to employees when they are 62, up to the age of 65. The Ministry of Manpower has accepted Tricom’s recommendations, and is working with tripartite partners and the Ministry of Finance on an interim incentive package, which will be announced early next year and be effective from 1 January 2015.

Tricom has also issued a tripartite advisory on re-employment of employees from age 65 to 67, to guide employers on the implementation of re-

employment of these older employees. Notably, the advisory recommends that employers should, where possible, continue to extend the same re-employment practices to these older employees in accordance with the recommendations in the main section of the *Tripartite Guidelines on the Re-employment of Older Employees (for aged 62 to 65)* (available [here](#)). If employers are unable to find suitable jobs within or outside the company for eligible employees aged 65 to 67 after making reasonable efforts to do so, the advisory recommends that employers should provide a payment to these employees as a form of outplacement assistance.

### CONSTRUCTIVE DISMISSAL CLAIMS

The Singapore Court of Appeal discussed the heads of damages that may be claimed in constructive dismissal cases in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] SGCA 43. This case is noteworthy because, apart from upholding the longstanding principle that damages may be awarded for loss of remuneration for the contractual notice period, it indicates that the Singapore courts may also consider damages that are proven to arise from a breach of the implied term of mutual trust and confidence between the employer and the employee. This serves as an important reminder to employers, when deciding on termination of employee matters, to be mindful of any conduct that could give rise to a breach of the mutual trust and confidence between employers and employees.

### The judgment

#### Facts

The appellant, Mr Wee Kim San Lawrence Bernard (“**Wee**”) was employed by the respondent, Robinson & Company (Singapore) Pte Ltd. (“**Robinsons**”) which operates the Robinsons chain of department stores. He resigned from Robinsons on 24 August 2012. While his contract of employment provided for termination by payment of two months’ salary in lieu of notice, Robinsons paid him four months’ salary in lieu of notice, and the value of his unconsumed annual leave.

Wee commenced a suit against Robinsons, alleging that he had been forced to resign as a result of persecution and unreasonable bias by Robinsons or its officers, because of his sexual orientation. In response, Robinsons filed, among others, a motion to strike out the suit. After hearing parties' arguments, the Court of Appeal, in this judgment, dismissed Wee's appeal and upheld the High Court's decision to strike out the suit.

The question before the Court of Appeal was whether, on the assumption that Robinsons had constructively dismissed Wee, he was entitled to any damages, in addition to what he had already been paid by Robinsons.

#### ***Measure of damages for constructive dismissal***

Wee argued that Robinsons had constructively dismissed him by breaching the implied term of mutual trust and confidence. The company had, without reasonable and proper cause, conducted itself in a manner that was calculated and likely to destroy or seriously damage the relationship of mutual trust and confidence between itself and Wee. This was a repudiatory breach of the terms of the employment contract, entitling Wee to treat himself as discharged from the employment contract. Wee claimed that he was entitled to:

- (a) the amount of salary payable for his contractual notice period for premature termination of his employment contract ("**notice period damages**"); and
- (b) additional damages in respect of the financial loss arising from the premature termination of his employment.

Specifically, in relation to the second head of damages, Wee argued that his loss should be measured by reference to what he would have earned if the breach had not occurred, and he remained employed by Robinsons.

The Court of Appeal disagreed with Wee, and held that he could only claim for notice period damages.

In arriving at the conclusion, the court noted that different types of consequences could flow from a breach of the implied term of mutual trust and confidence. In some cases, the breach would result in wrongful dismissal (for example, in the form of a constructive dismissal), in which case,

notice period damages would apply. However, in other cases the breach may result in other distinct consequences in addition to wrongful dismissal, for example, in the form of psychiatric or other illnesses brought about by the breach, or in the form of "stigma" damages that harm the employees' future employment prospects caused by the corrupt manner in which the employer's business had been run. In these cases, such losses form independent heads of losses apart from wrongful dismissal, and may properly be recovered on top of any notice period damages recoverable from the claim for wrongful dismissal.

The Court of Appeal noted that there is Singapore case law that losses from such distinct consequences (apart from wrongful dismissal) may be recoverable even if they arose as a direct result of the wrongful dismissal (*Wong Leong Wei Edward v Acclaim Insurance Brokers* [2010] SGHC 351). This differs from the position in English law. In *Johnson v Unisys Ltd* [2003] 1 AC 518, the House of Lords held that claims for damages based on breaches of the implied term of mutual trust and confidence can only be brought if they accrued before and existed independently of the cause of action for wrongful dismissal ("**Johnson exclusion**"). The Court of Appeal did not opine on whether the Johnson exclusion applies in Singapore.

On the facts, Wee had not shown that he had suffered any distinct consequences apart from wrongful dismissal that resulted from Robinsons' breach of the implied term of mutual trust and confidence (*ie* he did not show additional losses). On the assumption that the only consequence suffered by Wee was wrongful dismissal in the form of a constructive dismissal, the Court of Appeal determined that Wee was only entitled to notice period damages. He had already received four months' salary in lieu of notice when his employment contract only entitled him to two months' salary, and therefore there were no damages.

### **Practical implications**

#### ***Constructive dismissal***

Employers should be aware that they have an implied duty of mutual trust and confidence (which includes a duty of to act honestly and faithfully) to their employees. If they breach this duty, they may

expose themselves to claims for constructive dismissal, if such breaches are determined to go to the essence of the employment contract. It is particularly important that employers consider this risk when addressing their employees' performance or conduct issues.

In this case, the Court of Appeal did not have to decide whether Wee was constructively dismissed. However, there have been other instances where employees have successfully claimed for constructive dismissal. In *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577, the employer had excluded the employee (a senior director of the company) from day to day operations of the company, withdrawn his use of the company car, allowed another person to take over his office, and excluded him from meetings held to discuss the executive decisions that he made as Chief Executive Officer of the company. The High Court found that these actions amounted to a breach of the employer's duty of mutual trust and confidence, and resulted in the employee's constructive dismissal.

**Liability beyond contractual notice period**

Where an employer intends to prematurely terminate the employment of an employee, it should be aware not to expose itself to the risk of damages beyond the contractual notice period damages. If an employee is able to demonstrate that he had suffered other distinct loss of damage such as financial loss from psychiatric or other illnesses caused by unfair pre-dismissal treatment (eg *Eastwood v Magnox Electric plc* [2005] 1 AC 503), or harm to the employee's future employment prospects due to the stigma that attached from being associated with an employer whose business was run in a corrupt manner (eg *Malik v Bank of Credit and Commerce International S.A.* [1998] 1 A.C. 20), the employer may be exposed to liabilities over and above the notice period damages.

**Addressing the risks**

Employers would therefore be well-advised to take steps to comply with the implied duty of mutual trust and confidence. In dealing with employee performance or conduct issues, for example, employers should consider documenting the reasons for any measures against an employee. Employers should also consider giving feedback to

employees if their performance is unsatisfactory, and provide opportunities to allow employees to address such concerns. Where an employer decides that it no longer requires the services of an employee, it may be useful to enter into a separation agreement setting out the rights and obligations of the employer and the employee at the point of termination. Further, since employers may modify and limit the scope of the implied term of mutual trust and confidence, employers may consider including an express clause in the employment contract expressly stating that the employer reserves the right, in its sole discretion, to demote or make changes to the employee's position and job scope, if his or her performance is not up to standard, or if otherwise required due to other exigencies. It remains to be seen if such clauses will be effectively upheld by the courts.

Ultimately, the content of the duty of mutual trust and confidence will necessarily be a fact specific enquiry, and can vary greatly depending on circumstances of each case. Nonetheless, employers should be aware in every case to maintain the level of trust and confidence that the law imposes between them and their employees.

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