

SINGAPORE: IS THERE AN IMPLIED DUTY OF MUTUAL TRUST AND CONFIDENCE AT COMMON LAW?

The implied duty of mutual trust and confidence requires the employer and employee not to conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between them. This implied duty is recognised in the United Kingdom and in Hong Kong, but not in Australia after the High Court of Australia in Commonwealth Bank of Australia v Barker (2014) 312 ALR 356 held that recognising such a duty would be a "step beyond the legitimate law-making function of the courts".

In Singapore, several High Court decisions appeared to recognise the existence of the duty. However, the Appellate Division of the High Court in Dong Wei v Shell Eastern Trading (Pte) Ltd [2022] SGHC(A) 8 recently opined *in obiter* that the position in Singapore is not so clear.

Background Facts

Prior to the termination of his employment, Dong Wei (**DW**) was employed by Shell Eastern Trading (Pte) Ltd (**Shell**) as a Senior Freight Trader, where he sold freight space in ships owned and/or chartered by Shell.

In 2015 and 2016, DW was subject to an investigation; it was alleged that that he had shown favouritism to a third-party company and received gifts from that company. In each instance, the investigation concluded that the allegations were unsubstantiated.

In October 2017, Shell commenced another investigation into complaints that DW had attempted to market a third-party vessel belonging to his "*friend's company*" to a gas oil trader at an energy and commodities trading company. This circumvented the proper practice of contacting a trader's chartering manager, rather than a trader directly. DW was placed on mandatory leave and was told that he would be informed of the outcome of the investigation upon its conclusion.

The investigation concluded on 21 November 2017. The allegations were found to be "*inconclusive*" in that though there was no positive proof of wrongdoing, there was no valid explanation as to why DW knowingly departed from market practice by contacting a trader directly, when Shell had no vessel available to offer freight space.

On 12 December 2017, S&P Global Platts (**Platts**) published an article stating that Shell had been investigating claims of "*unethical dealings including charges of corruption in its tanker chartering team*". The article did not name DW but remarked that "*at least one employee has been asked to take leave pending further investigation*". DW was the only one in the team placed on leave at the time. Prior to the publication, Platts contacted Shell for comments, but Shell only stated that it was inappropriate to comment on personnel matters but employees were expected to comply with Shell's code of conduct and that investigations would be conducted into alleged breaches.

On 10 January 2018, DW's employment was terminated immediately with pay in lieu of notice. Up to that time, DW remained on mandatory leave. DW was also never told of the outcome of the investigation (despite multiple requests).

Following the termination, DW claimed to have been unable to find employment in the shipping industry and brought an action against Shell and his line manager to recover the damages he claimed

to have suffered.

Decision of the General Division of the High Court

DW argued amongst others that Shell breached the implied term of mutual trust and confidence by:

- mismanaging his investigation, suspending him and refusing to inform him of the investigation outcome, causing reputational damage and impairing his future job prospects; and
- dismissing him arbitrarily, capriciously, and/or in bad faith, without proper and reasonable cause.

The court accepted that the obligation of mutual trust and confidence was implied by law in employment contracts but found that the duty was not breached on the facts. The court also rejected DW's other claims of conspiracy, negligence, tort of malicious falsehood, vicarious liability and liability for inducing a breach of contract.

DW appealed.

Decision of the Appellate Division of the High Court

The court dismissed DW's appeal in its entirety. Given the overlap in the underlying facts supporting the various causes of action, the court focussed its inquiry on the losses DW sought to recover:

- damages flowing from the mismanagement of the investigation and the suspension (the **First Head of Loss**);
- cash bonuses and share options DW would have received or retained had he not been wrongfully terminated, or had his termination not been wrongfully brought about (the **Second Head of Loss**); and
- damages flowing from the stigmatisation DW faced in the freight industry which prevented him from securing new, comparable employment (the **Third Head of Loss**).

With respect to the First and Second Heads of Losses, the court found that DW failed to establish the relevant causes of action. The court also found that DW failed to show that he suffered the First and Second Heads of Losses (he was paid a full salary for the entire period of his suspension and received pay in lieu of notice upon termination). Similarly, the court found that the relevant causes of action with respect to the Third Head of Loss were not made out.

The court also made a number of pertinent observations:

- the Court of Appeal's decision in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 35 did not formally endorse the implied duty of mutual trust and confidence. The Court of Appeal in that case was only asked to decide whether the employee's claim for damages (which relied on breaches of the implied term of mutual trust and confidence) ought to be summarily struck out. The Court of Appeal found that the heads of damages were legally unsustainable. The position as to whether the implied term was accepted into Singapore law therefore remained unsettled;
- "employment is a two-way relationship" and that it would be "fair" for Shell to inform DW of the outcome of the investigation, even if there was no legal obligation to do so. The court was "not impressed by [Shell's] subsequent conduct and approach, both of which lacked sense and sensibility"; "[i]t did not appear that [Shell] paused to think what [DW] might have found meaningful, productive, or cathartic to be told". The court even went on to say that "employers will do well to consider with greater circumspection, how to treat their employees

- with dignity and respect even upon the parting of ways"; and*
- while contractual discretion was not entirely unfettered, the restrictions did not apply to an employer's exercise of their express contractual right to terminate employment without cause, either with notice or pay in lieu of notice. The restrictions served to ensure that a party's contractual discretion was not exercised in a manner which deprived its counterparty of its rights within the contract but did not limit the right to bring the contract to an end. The court also saw no reason to alter parties' freedom of contract given the express termination clause. Further, fettering the right to terminate cut both ways and thereby affected an employee's discretion to resign. The court considered this to be an unpalatable position, given that it was trite that employers could not be compelled to hire or retain, and employees could not be forced to work.

Key Takeaways

While the status of the implied duty of mutual trust and confidence remains unsettled in Singapore, employees may still challenge the termination of their employment on the basis that it is 'without just cause or excuse' under section 14(2) of the Employment Act 1968.

The interplay between the right of an employee to challenge the termination as being 'without just cause or excuse' and the right of an employer to invoke the contractual right to terminate remains uncomfortable. However, the court's confirmation that the contractual right to termination is not fettered by the implied duty of mutual trust and confidence is useful. That said, employers should ensure that they remain compliant with the Tripartite Guidelines on Wrongful Dismissal. For instance, where contractual termination is relied upon, employers should take care to ensure that there are no communications with the employee that indicate another reason for termination.

The court's rebuke of the employer's conduct following the investigation in this case also emphasises the need to treat employees with respect and dignity – solely insisting on complying with the minimum legal obligations is not sufficient. Employers should review their investigation processes to ensure procedural fairness, particularly where termination of employment is contemplated.