
Employment & Benefits

How to Conduct an Employment Investigation: Court Rules on Applicable Standards

Introduction

When an employer has to deal with an employee who has been accused of committing an act of misconduct, the law requires that employers must inform the employee and conduct an inquiry before deciding whether to dismiss an employee or to take other forms of disciplinary action. This requirement is set out at Section 14(1) of the Employment Act which stipulates that the dismissal of an employee on the grounds of misconduct can only be after "*due inquiry*" on the part of the employer.

Given a more litigious modern workforce, employers should be prepared that their decision to discipline or dismiss an employee will almost certainly be challenged. How then should an employer conduct an investigation? What are the applicable standards and procedural requirements?

In *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123, the Singapore High Court provided guidance on the standards to be met when conducting an investigation. The Court highlighted that the term of mutual trust and confidence is implied into all employment contracts, and shed light on what this implied term means for employers in the context of suspensions and investigations into employees.

In this Update, we look at the Court's decision and examine what this means for employers, and how a proper investigation should be conducted so as to comply with the prevailing legal requirements.

Brief Facts

The Plaintiff ("**Dong**") was a former employee of the first defendant ("**Shell**"). The second defendant was his former manager ("**Lim**"), who was also employed by Shell at the material time. Following allegations made about Dong by an external party regarding Dong's business conduct, Shell commenced an internal investigation into the allegations, suspended Dong from work and informed him in writing that he would be informed of the outcome once the investigation was completed.

Contribution Note: This Client Update was written with contributions from Doreen Chia, Senior Associate, from Dispute Resolution.

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Dong remained suspended until Shell exercised its contractual right to terminate his employment some two months later. By that time, the investigation had concluded with the result that it was "inconclusive". Dong's requests for the outcome of the investigation were repeatedly denied by Shell.

In the interim, and prior to Dong's termination, an online article ("**Platts Article**") was published by S&P Global Platts ("**Platts**") claiming that, amongst others, Shell was "*investigating claims of unethical dealings including charges of corruption in its tanker chartering team and at least one employee has been asked to take leave pending further investigation*". Notably, prior to the publication of the Platts Article, Platts had reached out to Shell for details of the investigation and its findings, but Shell had declined to comment. Neither Shell nor Lim were the source of Platts' information for its query to Shell or the Platts Article.

Dong claimed that after his termination, he sought employment from other firms in the freight trading industry but was rejected by four companies, three of which allegedly rejected him because Shell did not provide a letter clarifying the outcome of its investigations against Dong and one of which allegedly rejected him on the basis that it came across newspapers reporting "*something uncertain related to [Dong's] previous job in [Shell]*".

Dong commenced legal proceedings against Shell for, amongst others, breach of the implied term of mutual trust and confidence and claimed that:

- (a) The implied term obliged Shell not to act in a manner which would undermine his current employment and future job prospects by damaging his reputation;
- (b) The implied term obliged Shell not to suspend him without proper and reasonable cause;
- (c) By mismanaging the investigations, suspending him and refusing him to inform him of the investigation outcome, Shell had caused reputational damage to him and impaired his future job prospects; and
- (d) Shell had dismissed him arbitrarily, capriciously and/or in bad faith and without proper and reasonable cause.

The Decision of the High Court

The High Court dismissed Dong's claims. While the High Court accepted that the implied term of mutual trust and confidence imposes some obligations on an employer when it carries out investigations and suspensions, it found that there was nothing in the present case that breached this implied term.

Critically, the High Court held that the implied term requires a minimum content of fairness when investigating allegations levelled against and suspending an employee:

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- (a) **Investigations:** Fairness entails that the procedures adopted and the manner of investigations would not amount to a hatchet job, meaning that the outcome was preordained against the employee or is so unfair that it would destroy the basis of any expected continuation of the relationship of employment.
- (b) **Suspension:** This ought to be carried out on the basis of clear credible source(s) of information. Suspending an employee precipitately as part of a "knee-jerk" reaction to an unclear or unspecific allegation with dubious credibility may fall below the minimum level of fairness required.
- (c) **General standard:** The High Court rejected the employee's argument that the implied term of mutual trust and confidence would require the employer to conduct investigations in accordance with all principles of natural justice, i.e. all the obligations of natural justice or due process obligations that may apply in other contexts, including informing of investigation outcome, or suspending and investigating allegations against employees in a particular way.

The High Court found that in this case, Shell's conduct did not fall below the minimum standard of fairness required – there had been no mismanagement of the investigations and Shell had provided sufficient explanation as to Dong's suspension and the non-disclosure of the outcome of the investigation, and these were reasonable or appropriate on the facts.

In addition, the High Court also made the following important findings:

- (a) The implied term of mutual trust and confidence does not contain any duty on an employer to combat misinformation pertaining to the employee, nor is there a more general duty to take reasonable care to protect employees from economic and reputational harm. Consequently, Shell had not breached the implied term by failing to correct the factual inaccuracies in Platts' query to it and in the Platts Article.
- (b) The implied term of mutual trust and confidence cannot override the express right to terminate on the provision of notice. Consequently, there was no requirement that Shell could only terminate the employment contract for "proper and reasonable cause", as argued by Dong.

Dong has filed an appeal against the High Court's decision, which may provide further clarification on the above issues.

What This Means for You as an Employer

This case is significant for all employers in Singapore and it is pertinent for employers to take note of the following pointers when conducting an employee investigation:

- (a) **Reviewing employment contracts:** What is required of the employer under the implied term

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of mutual trust and confidence may be varied by the terms of the employment contract. As such, in the context of investigation procedures, employers should assess their employment contracts to determine what their obligations are and whether they should be better defined.

- (b) **Suspending an employee:** When a complaint is lodged against an employee, an employer's immediate reaction may be to suspend the employee in question while investigations are being conducted. The Employment Act does provide for the suspension of an employee during an inquiry for a period not exceeding one week (beyond which the Commissioner for Labour's approval is required). However, employers should still tread carefully and properly assess the clarity and specificity of the allegations as well as the credibility of the source of the allegations before proceeding with any action against the employee in question.
- (c) **Setting out the investigation framework:** Employers should put in place a robust grievance reporting, investigation and disciplinary policy ("**GRID policy**") which meets the requirement of fairness so that there is a set of standard investigation procedures in place which employers can utilise when investigating complaints.
 - i. The allegations put to the employee must be sufficiently clear such that he understands the case that is made against him and has an opportunity to clarify his position. This does not mean however, that an employer is obliged to convene a full investigation each time an act of misconduct has occurred. This requirement may be modified in the event that the misconduct is so clear and unequivocal, that it could justifiably be said that there could be no other way, apart from the misconduct, to explain the employee's action — or that the misconduct was a direct contravention of a clear company policy or lawful directive.
 - ii. The investigation and decision-making process must be in an objective and fair manner, and its result should follow the facts uncovered and cannot be preordained.
 - iii. There is no overriding obligation to disclose the outcome of the investigation; such disclosures should be made to the employee where appropriate and reasonable.
- (d) **Post-investigation action:** After an investigation has been concluded, should the employer wish to take action against an errant employee, the employer should ensure that, under the terms of the employment contract, such action is within their right as a result of the misconduct discovered.

Given that the legal rights in the above scenarios are highly dependent on the facts, if you have any queries or require any advice on employment issues, please do reach out to us for assistance.

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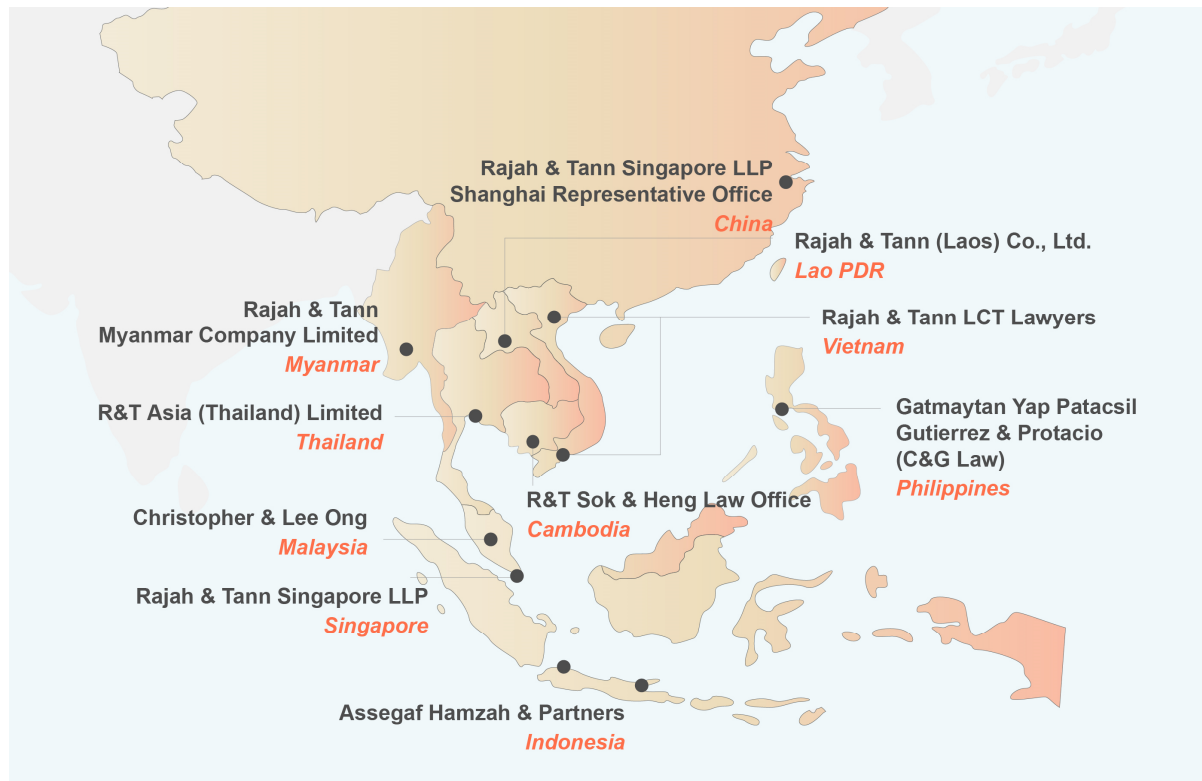
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