Introduction

In a difficult labour market, employment-related disputes have become increasingly significant. Many of these disputes tend to centre on the issue of termination, such as the grounds of dismissal, or whether there has been any unfairness in the termination process.

Employment contracts generally contain provisions on termination, listing out potential grounds for dismissal of an employee. Across all industries, it is common to find “gross misconduct” or “serious misconduct” as one of the grounds for termination. However, employers often treat this as a sort of “catch-all” provision to cover miscellaneous reasons for dismissal.

In recent court decisions, the issue of gross misconduct has come to the forefront. It is clear that employers cannot simply unilaterally label an act as “misconduct” and proceed with termination without sufficient justification. The courts have demonstrated that they can and will inquire into whether or not the act(s) complained of constitute conduct that is sufficiently egregious to justify the termination of the employment relationship. This Client Update takes a look at the comparative positions in Singapore and the UK regarding gross or serious misconduct, and how the courts will assess termination on such grounds.

Gross or Serious Misconduct

The inclusion of gross or serious misconduct as grounds for termination may seem to be a matter of course, but there are a number of complexities which arise in its application. The first glaring question is: what constitutes gross or serious misconduct?

In both Singapore and the UK, the starting point when seeking to answer this question is to first look at the content of the employment contract itself. Does the contract provide a definition for gross misconduct; or does it list examples of gross misconduct (such as theft, harassment, etc.)? This may help to identify whether the misconduct in question is in fact gross misconduct as intended under the contract, providing either definitional or contextual clues.

In the absence of guidance from the contract itself, the court has to turn to common law principles to determine gross misconduct. It is here that the Singapore and UK courts have taken slightly different approaches.

Singapore

Like any contract, a contract of employment may be repudiated by the conduct of one of the parties. However, the breach must be sufficiently serious to be deemed a repudiatory breach.
In order to determine whether the misconduct complained of is sufficient to terminate an employment, the Singapore courts have looked to common law principles relating to repudiation. This was the holding in the recent Singapore Court of Appeal case of Phosagro Asia Pte Ltd v Piatchanine, Iouri [2016] SGCA 61, in which Rajah & Tann Singapore LLP successfully acted for the employer.

The Court of Appeal here was guided by the seminal case of RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal [2007] 4 SLR(R) 413, which listed the four situations in which a breach of contract would amount to a repudiatory breach:

(i) Situation 1: Where the contract clearly states that the innocent party is entitled to terminate the contract in the event of certain events occurring;

(ii) Situation 2: Where a party renounces his contract, conveying that he does not intend to perform his obligations;

(iii) Situation 3(a): Where the term breached was, by the intention of the parties, so important that any breach would entitle the innocent party to terminate the contract, regardless of the consequences of the breach; and

(iv) Situation 3(b): Where the breach would deprive the innocent party of substantially the whole benefit of the contract.

Situation 3(b) would ordinarily be the most relevant, as it goes towards the nature and consequences of the misconduct. However, all four situations are relevant in determining serious misconduct. For example, there may also be situations where the misconduct goes towards such an important term of the contract that it warrants termination, as under situation 3(a).

Ultimately, unless definitively specified, what amounts to serious or gross misconduct depends upon the facts of each case viewed in light of the surrounding circumstances; what is gross misconduct in one case may not be gross misconduct in another. Nonetheless, it would be safe to assume that the courts would have less hesitation labelling conduct as gross misconduct if it involved an element of dishonesty such as corruption or breach of confidentiality; or if for instance, the employee was convicted of a criminal offence.

UK

The UK courts have taken a similar starting point, which is that gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee, as held in Pepper v Webb [1969] 1 WLR 514.

However, in determining what conduct is sufficiently repudiatory, the UK courts seem to focus more heavily on the damage to the relationship between the parties. In Neary v Dean of Westminster [1999] IRLR 288, the Court held that gross misconduct may be seen as conduct so undermining the trust and confidence in the employment relationship that the employer should no longer be required to retain the employee. This is turn depends on factors such as the character of the institutional employer, the role played by the employee and the degree of trust required in the position.

In the recent case of Adesokan v Sainsbury’s Supermarkets Limited [2017] EWCA Civ 22, the UK Court of Appeal applied this principle, further elaborating that dishonesty and other deliberate acts which poison the relationship will obviously fall into the gross misconduct category. In appropriate cases, acts of gross negligence – where sufficiently grave and weighty – may also be deemed as gross misconduct justifying dismissal.
Employment

As in Singapore, what constitutes gross misconduct depends on the facts of the case. Examples of gross misconduct include theft or fraud, physical violence, gross negligence or serious insubordination.

**Termination Procedure**

Once an employee has committed gross misconduct, the employer may proceed with the termination process. However, the employer should ensure that the appropriate dismissal procedure is complied with.

**Singapore**

The procedural requirements for termination of employment in Singapore are contained in the Employment Act.

(i) The employer must first conduct an inquiry to determine if an employee should be dismissed for misconduct, or whether other forms of disciplinary actions should be taken.

(ii) The Ministry of Manpower advises that the person holding the inquiry should not be in a position which may suggest bias, and that the employee should have the opportunity to present his case.

(iii) The employer may suspend the employee from work during an enquiry for a period of up to one week, provided that the employee is still paid at least half his salary for that period.

(iv) If the inquiry finds the employee guilty of misconduct, the employer may terminate the employee’s employment without notice, or may instantly downgrade the employee or suspend him from work without salary for up to one week.

**UK**

The procedure for dismissal in the UK is laid out in the Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures.

(i) The employer must first conduct an investigation into the misconduct.

(ii) During this period, the employee may be suspended with pay, but for as brief a period as possible.

(iii) The employee should be notified of the issues in writing, and be given sufficient information and time to prepare his case.

(iv) A disciplinary hearing or meeting should be conducted, at which the employer will explain the complaint, and the employee will set out his case and have the opportunity to ask questions or call witnesses.

(v) If a finding of gross negligence is made, the employer may dismiss the employee without notice, even for a first offence.
Concluding Words

Gross or serious misconduct often carries with it drastic consequences for an employee, such as termination of employment without notice or salary in lieu. Therefore, employers should be cautious before labelling an act or series of acts as “gross misconduct”.

Importantly, just because an employer has stated something to be “gross misconduct” in a letter or notice of termination does not mean that the courts will necessarily treat it as gross misconduct. Employers should be aware of what behaviour actually constitutes gross or serious misconduct, and be able to assess such conduct within the context of their own organisation and their relationship with the employee in question. Ultimately, should the matter be brought before the courts, the employer needs to be able to justify why such conduct would constitute conduct sufficiently serious as to permit the termination of the employment relationship.

In addition, employers should also ensure that they observe the necessary procedures for determining gross misconduct, and finally, for dismissal of the employee once such misconduct is found. This means that unless the conduct of the employee is so clearly detrimental or dangerous that it would warrant his/her immediate removal from his/her usual place of work (if for instance, the employee has been found to be downloading confidential information and is likely to do so unless immediately stopped), the employer should observe the requirements of natural justice and provide the employee concerned the time and opportunity to respond to the complaints or allegations levied against him/her before a decision is made to terminate the employment relationship with cause on the basis that the employee had engaged in “gross misconduct.” If the employer chooses to skip this important procedural step, it may expose itself to a wrongful termination lawsuit and end up being liable for damages to the employee.

For further queries, please contact us below.
ASEAN Economic Community Portal

The launch of the ASEAN Economic Community ("AEC") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com.
Our Regional Contacts

RAJAH & TANN | Singapore
Rajah & Tann Singapore LLP
T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

R& T SOK & HENG | Cambodia
R& T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | China
Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | Indonesia
Assegaf Hamzah & Partners
Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | Lao PDR
Rajah & Tann (Laos) Sole Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | Malaysia
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN NK LEGAL | Myanmar
Rajah & Tann NK Legal Myanmar Company Limited
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9665537
mm.rajahtannasia.com

GATMAYTAN YAP PATACSLIL
GUTIERREZ & PROTACIO (C&G LAW) | Philippines
Gatmaytan Yap Patacslil Gutierrez & Protacio (C&G Law)
T +632 894 0377 to 79 / +632 894 4931 to 32 / +632 552 1977
F +632 552 1978
www.cagatlaw.com

RAJAH & TANN | Thailand
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | Vietnam
Rajah & Tann LCT Lawyers
Ho Chi Minh City Office
T +84 8 3821 2382 / +84 8 3821 2673
F +84 8 3520 8206

Hanoi Office
T +84 4 3267 6127
F +84 4 3267 6128
www.rajahtannlct.com

Member firms are constituted and regulated in accordance with local legal requirements and where regulations require, are independently owned and managed. Services are provided independently by each Member firm pursuant to the applicable terms of engagement between the Member firm and the client.
Our Regional Presence

Rajah & Tann Singapore LLP is one of the largest full service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Singapore, Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Vietnam. Our Asian network also includes regional desks focused on Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or e-mail Knowledge & Risk Management at eOASIS@rajahtann.com.