

Employment & Benefits

Wrongful Dismissal Arising from Terminating Employees with Cause – Cautionary Note for Employers

Introduction

Two recent Singapore High Court decisions are stark reminders that the summary dismissal of an employee can cause serious legal issues for a company if not handled well, and can result in wrongful dismissal claims. This is particularly so if it is unclear whether the employee had conducted himself in such manner as to have repudiated the employment contract or engaged in misconduct, amongst other things. The High Court decisions of *Wong Sung Boon v Fuji Xerox Singapore Pte Ltd and another* [2021] SGHC 24 ("**Fuji Xerox case**") and *Singapore Recreation Club v Abdul Rashid Mohamed Ali and another* [2020] SGHC 156 ("**Singapore Recreation Club case**") are examples of summary dismissals gone wrong.

While the employees in these two cases were respectively terminated in 2014 and 2017 (i.e. before the Employment Act ("**EA**") was expanded in 2019 to apply to all private sector employees), the cases raise important learning points and serve as a helpful reminder on how employers must operate post-2019, in particular in relation to the Section 14 EA due inquiry requirement before an employee may be summarily dismissed for misconduct. This Update provides a brief overview of the events in the two decisions and our comments on employers summarily dismissing an employee post-2019.

Fuji Xerox case

In the *Fuji Xerox* case, the Court held in favour of Fuji Xerox's former managing director ("**MD**") who was awarded over S\$1.4 million in damages, encompassing three months' salary in lieu of notice, an end of term payment provided for in his employment contract, and loss of his variable bonus and unconsumed leave. The Court, agreeing with the MD, held that the company had wrongfully dismissed the MD by summarily dismissing him from his position in 2017 without any basis as the company did not have any evidence to support allegations that the MD had breached his fiduciary obligations as well as certain provisions in his employment contract, i.e. prohibitions against causing material damage to the company, being guilty of gross default or misconduct and/or acting in a manner incompatible with the due and faithful discharge of his duties.

In arriving at this conclusion, the Court reviewed whether there was a breach of the provisions by deliberating on the MD's various acts or business decisions, which allegedly caused the company to enter areas of business that were not its core business, failed to comply with its credit evaluation process, or exposed the company to liability unreasonably and unnecessarily, and more. The Court



Client Update: Singapore

2021 FEBRUARY

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eventually held that company had failed to prove these breaches and hence it had no sufficient grounds to summarily dismiss the MD on the above-mentioned provisions. One factor for this decision included the fact that there were no internal company restrictions on the MD's scope of business and he could cause the company to undertake a form of business as long as he complied with his duties owed to the company.

An important point to note was that none of the allegations against the MD were told to him before his termination, which led him to commence this action. The MD further alleged that the company had not followed internal processes in dismissing him for cause.

Our comments

The Tripartite Guidelines on Wrongful Dismissal ("**Guidelines**") provide that where an employee is to be terminated for cause, specific reasons must be provided and it is the employer's burden to prove those reasons relied on for the termination for cause. This applies even if the employment contract is silent as to providing specific reasons for dismissal. Here, the company had not given any reasons for the MD's dismissal in the termination notice, which only stated that the company was entitled to summarily dismiss the MD on the basis of the above-mentioned provisions. We cannot emphasise enough the importance of giving and properly justifying the reasons relied on when an employee is to be terminated for cause.

Another interesting point from the case goes towards how a due inquiry ought to be conducted. On the facts, it was found that during the company's investigation, the MD had left one teleconference (held as part of the investigation) before he could answer any questions by the auditor, as he was feeling unwell. There was no follow up. While the Court did not elaborate, the fact of this brief mention suggests that the Court is mindful as to whether an employee being summarily dismissed had a chance to reply to allegations, as well as the specific reasons for the summary dismissal.

Since April 2019, the conduct of due inquiries has become compulsory where an employee is to be dismissed for cause, regardless of the level of the employee. Ensuring that a due inquiry is properly conducted is important. Amongst other things, employers must ensure that they arrive at their conclusions in a fair-minded way, which means that employees must be provided a fair chance to respond to any misconduct allegations before resorting to summary dismissal.

Singapore Recreation Club case

In the *Singapore Recreation Club* case, Singapore Recreation Club's former general manager and secretary ("**GM**") succeeded in his counterclaim for wrongful termination and was entitled to unpaid salary for his notice period of two months and CPF contributions, amounting to a total of S\$27,258. The club had summarily dismissed the GM in 2014 for alleged unprofessional conduct, which included collecting his personal belongings in disregard of the club's instructions and for failing to handover a work laptop. Amongst other reasons, the club argued that the summary dismissal was justified as the

Client Update: Singapore

2021 FEBRUARY

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GM failed to provide any explanation at an inquiry (which was more a meeting where he was questioned), and hence must have impliedly accepted that he was in repudiatory breach of his employment agreement.

The Court rejected this argument, finding that the inquiry had been conducted in an oppressive and aggressive manner. Transcripts of the inquiry recorded by the club showed that the GM could not properly explain himself because he was repeatedly interrupted and cut off by the club's management committee members, who reinforced each other's statements and continuously talked down to the GM. Importantly, the GM was also not informed of the agenda of the inquiry beforehand and was given the impression that it was only a meeting to discuss his accumulated leave. The club's management committee members also made serious allegations against him and threatened him that the police were already involved. The Court held that how the inquiry was held had the intended effect of throwing the GM off balance in his thought process, hindering him from giving all his reasons for his actions. Hence, the Court held that the club had not established the grounds for summary dismissal.

Our comments

Although there was no legislative requirement to conduct due inquiry before an employee could be dismissed at the relevant time of this case, the Court nevertheless did discuss the need thereof where an argument of repudiatory breach was alleged. Specifically, the case provides useful OB markers as to how a due inquiry must be conducted. This is now in keeping with the EA amendments in 2019 as well as the Guidelines that have been issued inter alia by the Ministry of Manpower.

Practically speaking, employers must ensure that the process allows them to get a proper response from the employee, rather than seek to undermine his or her response unfairly, or worse, prevent the employee from responding. To the extent possible, the process must not surprise and frighten the employee in such manner that any response by the employee (or lack of) may instead be construed against the employer. A key element here is that the employee must be specifically told of their alleged misconduct. Even as employers conduct inquiries in a robust manner to guide the conversation along, employers must be aware of the tone being used and refrain from acting in such manner that threatens its validity. To this end, even the Ministry of Manpower notes that the persons hearing the inquiry should not be in a position where bias is suggested, like in this case where there was already a history of animosity. All these call for advance preparation, including what and how much to say, how to say it, and who should say it.

Concluding Words

While these two cases took place before the EA updates in 2019, they still provide useful learning points and reminders moving forward and employers must bear them in mind. Please ensure that you comply with the due inquiry requirement of Section 14 EA if you decide to summarily dismiss an employee. Otherwise, this can amount to wrongful dismissal and consequences include claims for damages or reinstatement. These are preventable consequences. Our strong recommendation is for all employers

Employment & Benefits

to implement an appropriate due inquiry process prior to summarily dismissing their employees, bearing in mind that each case will have its own unique facts and must be managed accordingly. Furthermore, employers should remember to provide proper reasons to employees during the termination process, so that they can defend themselves should an employee decide to challenge his dismissal.

If you wish to discuss the above, please feel free to approach our team below.

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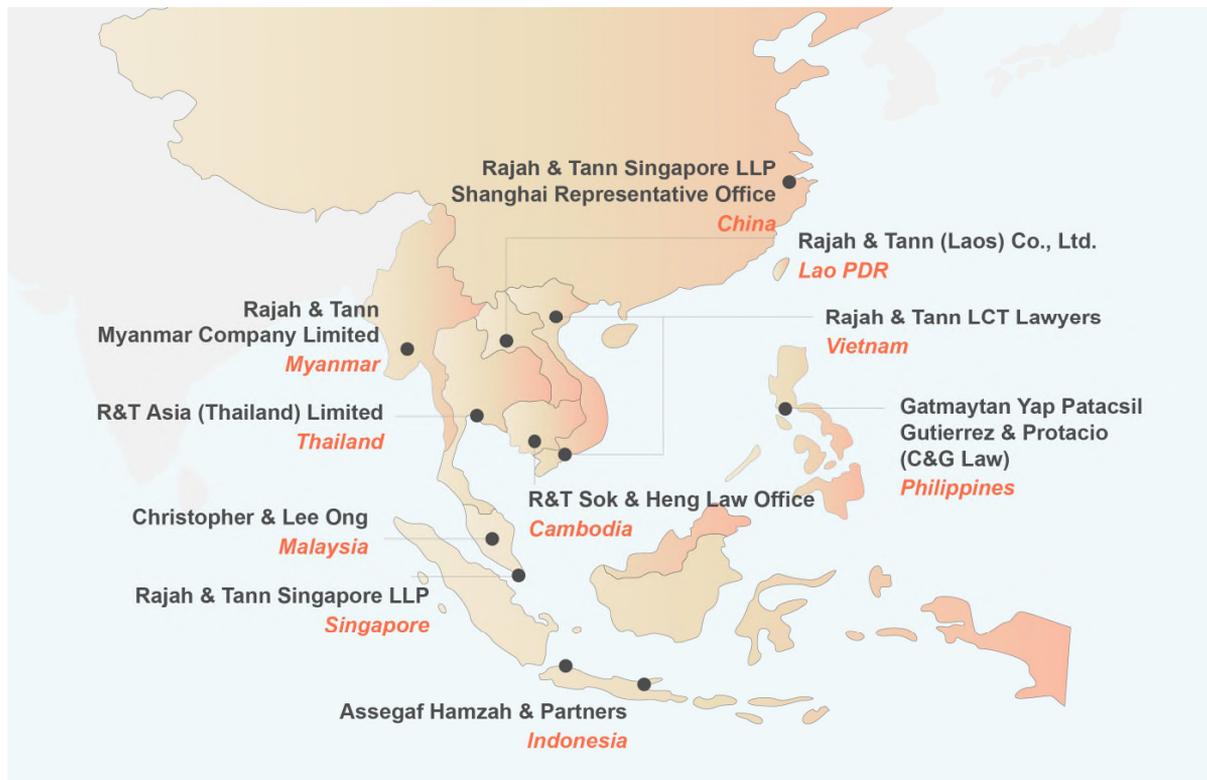
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