

Case Comment

**EMPLOYMENT CONTRACTS: THE IMPLIED DUTY OF  
TRUST AND CONFIDENCE**

*Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318

[2023] SAL Prac 1

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**I. Introduction**

1 The duty of mutual trust and confidence requires that employers and employees should not undertake conduct which undermines the employer–employee relationship. Common law jurisdictions have taken different approaches as to whether such a duty should be *implied* into an employment contract. In particular, the United Kingdom recognises an implied duty of mutual trust and confidence, whereas Australia has shown strong resistance towards the implication of such a duty. In Singapore, the High Court (Appellate Division) in *Dong Wei v Shell Eastern Trading (Pte) Ltd*<sup>1</sup> held that the status of the implied duty of mutual trust and confidence remains an open question to be resolved by the Court of Appeal in future cases.

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1 [2022] 1 SLR 1318.

## II. Brief background

### A. Relevant parties

2 Dong Wei was an employee of Shell Eastern Trading (Pte) Ltd (“Shell”) from 2006 until the termination of his employment on 10 January 2018.<sup>2</sup> Notably, Dong Wei held the following positions during the relevant terms of his employment:<sup>3</sup>

Relevant Period of Employment	Position
28 July 2006	Trading Operator
In or around 2012 to 2013 until his termination	Senior Freight Trader

3 Dong Wei’s primary responsible as a Senior Freight Trader was to sell freight space in ships owned and/or chartered by Shell or its affiliates.<sup>4</sup> Lim Ming Way (“Lim”) was Dong Wei’s line manager and held the position of “Regional Team Leader (Freight)”.

### B. The phone call

4 On 29 September 2017, Dong Wei made a phone call to one Jason Balota (“Balota”), a gas oil trader with Vitol Asia Pte Ltd (“Vitol”).<sup>5</sup> Dong Wei asserted that the call was “entirely innocent” as he had contacted Balota to obtain certain cargo information.<sup>6</sup> In contrast, Balota’s chartering manager, Ben Jones (“Jones”), was under the impression that the purpose of Dong Wei’s phone call was for Balota to charter a cheaper ship for the cargo.<sup>7</sup> Based on this belief, Jones contacted Dong Wei to inquire why he had to “break with market practice by calling a trader directly, instead of contacting his chartering manager”.<sup>8</sup>

2 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [3].

3 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [2].

4 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [3].

5 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [4].

6 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [4].

7 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [4].

8 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [4].

5 On 12 October 2017, Jones met Lim during which Jones raised the following complaints in relation to Dong Wei’s phone call (“the Complaints”):

(a) first, Dong Wei had circumvented the proper practice of contacting a trader’s chartering manager to arrange for shipment of the cargo, by attempting to market a third-party vessel to a trader directly (*ie*, Balota);<sup>9</sup>

(b) second, in marketing the third-party vessel directly to Balota (the trader), it was alleged that Dong Wei had stated that the vessel belonged to his “friend’s company” which suggested that Dong Wei was acting against the interests of Shell by promoting a vessel of Dong Wei’s friend;<sup>10</sup>

(c) third, back in 2016, Dong Wei had allegedly caused a third-party shipbroker to contact Vitol so as to market a vessel for a cargo in circumstances where information about the cargo had only been made known to Dong Wei;<sup>11</sup> and

(d) fourth, in 2015, Dong Wei was investigated for showing favouritism to a third-party shipbroker known as “First Fleet”. In 2016, investigations were conducted into allegations that Dong Wei had received gifts from First Fleet. The allegations were later found to be unfounded, but Dong Wei was issued a warning for failing to disclose his close friendship with an employee of First Fleet.<sup>12</sup>

### **C. Internal investigations on Dong Wei**

6 Lim conveyed the Complaints made by Jones to Stavros Kokkinis (“Kokkinis”), the general manager of Shell’s affiliate. On 20 October 2017, Sumitra Balasundaram (“Bala”) of Shell’s Business Integrity Department commenced investigations

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9 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [5].

10 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [5].

11 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [5].

12 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [6].

against Dong Wei to ascertain the veracity of the Complaints (“Investigations”).<sup>13</sup>

7 On 23 October 2017, Bala interviewed Dong Wei. Later that day, Dong Wei received a notice which stated that “he was being placed on mandatory leave with salary” and that he would be informed of “the outcome of the investigation upon its conclusion”.<sup>14</sup>

8 On 21 November 2017, Bala completed her Investigations and concluded that the Complaints were “inconclusive” as:<sup>15</sup>

- (a) there was no positive proof of wrongdoing; and
- (b) there was no valid explanation as to why Dong Wei had departed from market practice and directly contacted Balota to obtain information about Vitol’s cargo.

#### **D. Article by S&P Global Platts**

9 On 12 December 2017, S&P Global Platts published an article stating that Shell was investigating claims of “unethical dealings including charges of corruption in its tanker chartering team” (“the Article”).<sup>16</sup> Dong Wei was not identified in the Article.<sup>17</sup> Even so, the Article identified the chartering team and stated that “at least one employee has been asked to take leave pending further investigation”.<sup>18</sup> At the time of the publication, Dong Wei was the only one in the chartering team who was placed on leave.<sup>19</sup>

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13 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [7].

14 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [8].

15 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [9].

16 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [11].

17 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [11].

18 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [11].

19 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [11].

**E. Termination of Dong Wei's employment**

10 On 10 January 2018, Dong Wei was informed that his employment was terminated immediately with pay in lieu of notice. Dong Wei asked for the outcome of the investigations against him. As noted above at para 7, Shell's Business Integrity Department had said it would inform Dong Wei of "the outcome of the investigation upon its conclusion". However, Shell declined to disclose the outcome of the Investigations, stating that: (a) there was no obligation to do so; and (b) the termination of employment was not due to the Investigations.<sup>20</sup>

**F. Article's detrimental impact on Dong Wei's job search**

11 After being terminated from Shell, Dong Wei asserted that he was rejected by four freight transport companies who were aware of the Article. Given the difficulties that Dong Wei faced in seeking employment in the shipping industry, he undertook unprofitable businesses in early childhood education and art education as an alternative means of earning a livelihood.<sup>21</sup>

**G. Commencement of proceedings**

12 In 2018, Dong Wei commenced proceedings against Shell and Lim for damages which arose out of the series of events that contributed to the termination of his employment (including the publication of the Article).<sup>22</sup> In particular, Dong Wei pursued the following causes of action:<sup>23</sup>

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20 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [12].

21 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [13].

22 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [13].

23 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [14].

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Cause of Actions	Counterparty	Factual Grounds to Support Causes of Action
Breach of implied term of mutual trust and confidence found in employment contract	Shell	(a) The implied duty of mutual trust and confidence in the employment contract obliged Shell (as employer) not to act in a manner which would undermine Dong Wei's employment and future job prospects by damaging his reputation, as well as not to suspend Dong Wei without proper and reasonable cause. <sup>24</sup> (b) Shell caused reputational damage to Dong Wei and impaired his future job prospects by mismanaging the Investigations, suspending Dong Wei, and refusing to inform Dong Wei of the Investigations' outcome. <sup>25</sup>
Tort of negligence	Shell	Failure to take reasonable care to ensure that confidential information pertaining to the Investigations would not be leaked to the public. Shell owed Dong Wei a duty to ensure that the confidentiality of the Investigations was protected, as this was one of Shell's investigation principles. Dong Wei thus relied on the doctrine of <i>res ipsa loquitur</i> to establish that there had been a breach of this duty. <sup>26</sup>
Vicarious liability for Lim's tortious conduct	Shell	Dong Wei claimed that Shell was vicariously liable for the tortious conduct of Lim, and that it was fair, just and reasonable to hold Shell vicariously liable. <sup>27</sup>

24 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [22].

25 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [22].

26 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [24]; *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [16].

27 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [25].

***Dong Wei v Shell Eastern Trading (Pte) Ltd***

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<b>Cause of Actions</b>	<b>Counterparty</b>	<b>Factual Grounds to Support Causes of Action</b>
Tort of inducing breach of employment contract	Lim	Lim had induced Shell to breach the implied term of mutual trust and confidence by bringing the allegations to Shell's attention, prolonging the Investigations, and influencing the Investigations as an interested party. <sup>28</sup>
Tort of malicious falsehood	Lim	Dong Wei relied on circumstantial evidence to demonstrate that Lim was determined to establish some misconduct on the part of Dong Wei, and Lim's motive was to get Dong Wei terminated. <sup>29</sup>
Unlawful means conspiracy	Shell and Lim	(a) Shell and Lim had conspired to conceal the Investigation outcome from Dong Wei, procured his continued suspension, and concoct various reasons to justify his dismissal. <sup>30</sup> (b) Lim and Kokkinis intended to cause the termination of Dong Wei's employment, and the means employed in furtherance of this conspiracy were unlawful as they amounted to breaches of the implied term of mutual trust and confidence. <sup>31</sup>

13 In pursuing the above causes of actions, Dong Wei sought the following damages (which are abbreviated for ease of reference):<sup>32</sup>

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28 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [26].

29 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [26].

30 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [23].

31 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [23].

32 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [16].

Abbreviation	Damages Sought
“First Head of Loss”	Damages following from Dong Wei’s allegedly wrongful suspension and Shell’s mismanagement of the Investigations.
“Second Head of Loss”	Cash bonuses and share options which Dong Wei would have received or retained if he had not been wrongfully terminated, or had his termination not been wrongfully brought about.
“Third Head of Loss”	Damages following from the stigmatisation Dong Wei faced in the freight industry which prevented him from securing new, comparable employment.

### III. High Court’s decision

14 The High Court held that Dong Wei failed in his claims against Shell and Lim. Although Singapore law had previously recognised an implied term of mutual trust and confidence in employment contracts, there was “nothing of the nature here that would amount to a breach of [the implied] term”.<sup>33</sup> Further, the High Court held that Dong Wei had failed to provide sufficient evidence to establish the other causes of action pertaining to conspiracy, negligence and tort of malicious falsehood.<sup>34</sup> In the premises, the High Court found that “neither vicarious liability nor liability for inducing a breach of contract could attach to [Shell] and [Lim] respectively”.<sup>35</sup> Dong Wei appealed.

### IV. High Court (Appellate Division)’s decision

15 Based on the following factual premises, the High Court (Appellate Division) dismissed Dong Wei’s appeal in its entirety. The court’s decision can be summarised as follows:

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33 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [31].

34 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [31].

35 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [31].



***Dong Wei v Shell Eastern Trading (Pte) Ltd***

<b>Damages Sought by Dong Wei</b>	<b>High Court (Appellate Division)'s Reasons for Dismissal of Damages Sought</b>
<b>First and Second Heads of Loss</b>	<p>(a) Dong Wei had suffered no losses as a matter of law as he was paid full salary for the entire period of his suspension and received pay in lieu of notice pursuant to an express right of termination in his contract of employment.<sup>36</sup></p> <p>(b) Even if Dong Wei had suffered losses, his causes of actions would be dismissed. He had failed to factually establish that Shell and Lim had committed the various wrongs against him.<sup>37</sup></p>
<b>Third Head of Loss (reputational damage)</b>	<p>(a) In relation to the allegation that Shell had negligently failed to protect the confidential nature of the investigation (which he alleged led to the publication of the Article),<sup>38</sup> the High Court (Appellate Division) found that there was a <i>lack</i> of evidence to show <i>who</i> leaked the information, and that there may have been potential sources of leak given that Dong Wei had “told many people that [he had been] abused by [Jones]”. Thus, Dong Wei cannot claim against Shell for the losses suffered as a result of the Article.<sup>39</sup></p> <p>(b) In relation to the allegation that Shell had failed to disclose the outcome of the investigation to him,<sup>40</sup> the High Court (Appellate Division) found that Dong Wei had failed to plead that Shell was contractually obliged to provide him a formal document which stated the Investigations’ outcome. This document would have cleared up the false allegations made against Dong Wei in the Article, and the document could have been used in applications for comparable roles in the shipping industry. That said, Dong Wei did not establish that the document would have made a material difference to the prospective employers.<sup>41</sup> Dong Wei’s claim thus failed.</p>

36 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [20].

37 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [24].

38 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [48].

39 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [55]–[57].

40 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [49].

41 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [63]–[64].

## V. Observations by the High Court (Appellate Division)

16 Notwithstanding that the High Court (Appellate Division) dismissed Dong Wei’s appeal in its entirety, the court made important observations in relation to the following:

- (a) Shell’s failure to disclose the Investigations’ outcome to Dong Wei; and
- (b) the implied term of mutual trust and confidence.

### A. Failure to disclose Investigations’ outcome

17 Although there was no legal obligation on Shell’s part to inform Dong Wei of the Investigations’ outcome, the High Court (Appellate Division) expressed its disappointment towards Shell’s failure to do so. This is because Shell’s own notice provided that Dong Wei would be informed of the outcome, and “it would only be fair for [Shell] to inform [Dong Wei] of the outcome since he was the subject of the investigation, whether or not [Shell] was legally obliged to do so”.<sup>42</sup> On this basis, the court was *not impressed* by Shell’s subsequent conduct and approach, which lacked “sense and sensibility”.<sup>43</sup> Summing up, the court observed that “employment is a two-way relationship” and that employers such as Shell should “consider with greater circumspection, how to treat their employees with dignity and respect even upon the parting of ways”.<sup>44</sup>

18 The High Court (Appellate Division)’s observations form an important pronouncement about employee investigations. This is because employee investigations do not have the procedural safeguards that are readily available within legal proceedings. It would thus be useful for future courts to formulate an implied duty of trust and confidence in the context of employee investigation, which could include, amongst others, a duty to inform an employee of an investigation outcome.

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42 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [67]–[68].

43 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].

44 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].

**B. Implied term of mutual trust and confidence**

19 In presenting his arguments to the court below, Dong Wei relied extensively on the implied term of mutual trust and confidence (“Implied Term”). As such, the High Court considered the following case law, and concluded that the Implied Term has been accepted into Singapore law in previous cases:<sup>45</sup>

Relevant Court	Citation of Case Law	What was Held
Court of Appeal	<i>Wee Kim San Lawrence Bernard v Robinson &amp; Co (Singapore) Pte Ltd</i> [2014] 4 SLR 357 (“ <i>Wee Kim San</i> ”)	The Court of Appeal dealt with an application to strike out a claim for damages for constructive dismissal and alternatively, a breach of the implied term of mutual trust and confidence. In doing so, it analysed the types and extent of damages recoverable from a breach of the implied term. The Court of Appeal struck out the appellant’s claim on the basis that the extent of damages he was claiming was legally unsustainable (at [22]), and appeared to have proceeded on the assumption that the Implied Term was part of Singapore law, though this was not explicitly stated. <sup>46</sup>
High Court	<i>Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd</i> [2013] 2 SLR 577 (“ <i>Cheah Peng Hock</i> ”)	(a) The Implied Term is implied by law into a contract of employment under Singapore law unless there are express terms to the contrary, or the context implies otherwise (at [59]).

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<sup>45</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [70]–[71].

<sup>46</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [42].

**SAL Practitioner**

Relevant Court	Citation of Case Law	What was Held
		<p>(b) The Implied Term includes a duty of fidelity, <i>ie</i>, a duty to act honestly and faithfully (at [55]) but is limited to the manner of treatment within the employment relationship (at [58]).</p> <p>(c) Parties may exclude or modify the implied term to limit its content (at [59]).</p> <p>(d) As for the breach of the Implied Term, an objective assessment must be undertaken (at [58]), and a cumulative series of acts taken together can result in a breach of this implied term (at [132]).</p> <p>(e) The court in <i>Cheah Peng Hock</i> then applied these general principles to its facts, eventually finding that there was a breach of this implied term. As this breach amounted to a repudiatory breach, the court found that there had been constructive dismissal and awarded damages to the employee accordingly. The breach of the implied term of mutual trust and confidence thus formed part of the ratio in <i>Cheah Peng Hock</i>.<sup>47</sup></p>
High Court	<i>Wong Wei Leong Edward v Acclaim Insurance Brokers Pte Ltd</i> [2010] SGHC 352	The Implied Term was recognised in <i>obiter</i> at [52]. <sup>48</sup>
High Court	<i>Brader Daniel John v Commerzbank AG</i> [2014] 2 SLR 81	The Implied Term was recognised in <i>obiter</i> at [110]–[113]. <sup>49</sup>

<sup>47</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [40].

<sup>48</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [41].

<sup>49</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [41].

20 The High Court (Appellate Division) also acknowledged other cases which have “alluded to or implicitly accepted” the existence of the Implied Term:

Citation of Case Law	What was Held
<i>Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon</i> [2005] 4 SLR(R) 344	Choon Han Teck J allowed an application to injunct five employees from working for a third party. The employees had argued that they ought not to have been enjoined on the basis that their previous employer had breached the implied term, and that they were constructively dismissed (at [5]). Choo J rejected this argument and held that whether there had in fact been such a breach was more appropriately determined at trial, thus implicitly accepting that such a term existed and could therefore have been breached. <sup>50</sup>
<i>Leong Hin Chuee v Citra Group Pte Ltd</i> [2015] 2 SLR 603	Tan Siong Thye J directly affirmed <i>Cheah Peng Hock</i> (at [149]). <sup>51</sup>
<i>Arul Chandran v Gartshore</i> [2000] 1 SLR(R) 436	G P Selvam J alluded to the consequences of <i>Malik and Mahmud v Bank of Credit and Commerce International SA</i> [1998] AC 20 (“ <i>Malik</i> ”) in relation to claims in contract (as opposed to tort) for damage to one’s reputation, without accepting or rejecting the existence of the implied term that gave rise to such a claim in <i>Malik</i> (at [20]–[23]).

21 The High Court (Appellate Division) recognised that the above cases “[appear] to have accepted the [Implied Term]” but was of the view that the Court of Appeal in *Wee Kim San* “did not formally endorse the [Implied Term] as Loh J did in *Cheah Peng Hock*” and that the Court of Appeal’s discussion of the Implied Term was “limited substantially by the factual and procedural context of the case before it”.<sup>52</sup> In particular:

50 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [72].

51 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [72].

52 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [73].

Decision in <i>Wee Kim San</i>	High Court (Appellate Division)'s Analysis of <i>Wee Kim San</i>
<p>The Court of Appeal was only asked to decide whether the employee's claim for damages, which relied on breaches of implied term, ought to be summarily struck out. It thus analysed the boundaries of the Implied Term and concluded that the head of damages which the employee sought to recover were "legally unsustainable" (at [21]-[36]).</p>	<p>The Court of Appeal's decision at [21]-[36] is not clear authority for the existence of the Implied Term. Instead, the Court of Appeal held that where the consequences of breaches of different types of terms are the same (<i>ie</i>, damages for financial loss arising from the premature termination of employment), there is "no legal reason" to recompense an employee differently. On this basis, the Court of Appeal held that the employee in question had "no legally sustainable basis to claim anything more than what he had received". The Court of Appeal did not conclude that the Implied Term is accepted into Singapore law.<sup>53</sup></p>

22 The High Court (Appellate Division) then went on to consider case law from other common law jurisdictions. On the one hand, the Implied Term was accepted as part of English law:

Court	Case Citation	Decision
<p>English Court of Appeal</p>	<p><i>Western Excavating (ECC) Ltd v Sharp</i> [1978] QB 761 ("Western Excavating")</p>	<p>Held that an employee would only be "entitled to terminate", under the then applicable Trade Union and Labour Relations Act 1974 ("TULRA 1974"), if his employer had first committed a repudiatory breach of the contract of employment at common law. The Implied Term was thus formulated under these circumstances.<sup>54</sup></p>

<sup>53</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [74].

<sup>54</sup> *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [76]; *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 at 769.

***Dong Wei v Shell Eastern Trading (Pte) Ltd***

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English House of Lords	<i>Malik</i>	Lord Nicholls laid down the classic formulation of the Implied Term wherein it places a “portmanteau, general obligation” on the parties “not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages” (at [35A]).
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23 It is worth noting that in the UK, *Western Excavating* drew a connection between the statutory unfair dismissal regime stipulated within the then applicable TULRA 1974, and that of the common law of employment contracts. Through this connection, the court in *Western Excavating* rendered the application of the statutory regime subject to common law principles (which included the Implied Term).<sup>55</sup>

24 On the other hand, the High Court (Appellate Division) recognised that Australia took a broad approach against the acceptance of the Implied Term:

Court	Case Citation	Decision
Australian High Court	<i>Commonwealth Bank of Australia v Barker</i> (2014) 312 ALR 356	The Australian High Court unanimously held that the Implied Term did not form part of Australian employment law. It recognised that the Implied Term had specifically arisen within the UK’s legislative framework, and that outside that framework, the Implied Term was not necessary to secure the effective operation of employment contracts (at [91]–[110]). Further, the Australian High Court remarked that the Implied Term “is a step beyond the legitimate law-making function of the courts” (at [1]).

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55 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [79].

25 Despite the polarising approaches put forth by Australia and the UK, the High Court (Appellate Division) observed that the status of the Implied Term has not been clearly settled in Singapore, and that it remains open for the Court of Appeal to resolve in a “more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the [Implied Term]”.<sup>56</sup> Notably, it observed that:

(a) Unlike the UK, Singapore does not have a legislative framework akin to the then applicable TULRA 1974 or the Employment Rights Act 1996 (presently enacted).<sup>57</sup>

(b) The Court of Appeal in *Wee Kim San* did not specifically analyse whether the Implied Term is part of Singapore law.<sup>58</sup>

(c) The Court of Appeal in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd*<sup>59</sup> indicated that *Wee Kim San* left the status of the Implied Term open for decision in a future case (at [44]).<sup>60</sup>

(d) Assoc Prof Ravi Chandra suggested in his article “*Fate of Trust and Confidence in Employment Contracts*”<sup>61</sup> that it is unclear whether *Wee Kim San* can be construed as support for the existence of the Implied Term (at [10]).<sup>62</sup>

## VI. Conclusion

26 The relationship between an employer and an employee is a two-way street. Even if an employer is not legally obliged to disclose the outcome of an investigation to its employee, the failure to disentangle what is legal from what is fair may attract unwanted reputational repercussions against the employer. The dismay portrayed by the High Court (Appellate Division) in relation to how Shell had treated Dong Wei serves as a pressing

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56 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [82].

57 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [80].

58 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [80].

59 [2015] 3 SLR 695.

60 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [81].

61 (2015) 27 SAcLJ 31.

62 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [80].



indication for employers to take into account the interests of its employees even when deciding to terminate their employment.

27 Notably, Shell was not liable because Dong Wei could not show that the formal document from Shell (which stated the Investigations' outcome) would have made a difference to his job applications to the freight transport companies. This was arguably a factual causation point. If the facts were varied, there could possibly have been a different outcome.

28 As to the eventual acceptance of the Implied Term into Singapore law, this author takes the view that the Court of Appeal should not necessarily take a rigid approach when determining its applicability. As observed by the High Court (Appellate Division), the lack of a legislative framework in Singapore *should not* constitute a “fundamental and insurmountable objection” to the acceptance of the Implied Term. Ultimately, there is potential for the Implied Term to “exist in and of itself, independent of the specific and unique legislative backdrop against which it was developed”. This is because a court should be able to “delineate the scope of the [Implied Term] ... and elucidate the appropriate remedial consequences which should follow from a breach of such term (as the Court of Appeal did in *Wee Kim San*)”.

29 In this regard, it is possible for future courts to formulate a duty of trust and confidence in the context of: (a) the relationship between an employer and an employee; and (b) employee investigations. In relation to (a), an implied duty of trust and confidence could potentially give rise to a range of employer responsibilities such as the implementation of procedures to frame the issuance of bonuses, promotions, retentions, assignment of duties and termination. Even if a company can be said to be not contractually bound by its own policies, a company which deliberately and flagrantly acts unfairly may nevertheless breach its duties of trust and confidence.<sup>63</sup> In relation to (b), an employer should have the duty to inform an employee about

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63 At the time of this article's publication, the High Court decision of *Kallivalap Praveen Nair v GlaxoSmithkline Consumer Healthcare Pte Ltd* [2022] SGHC 261 was released. That case held at [55] that as a matter of Singapore law, “even on the assumption that the [implied duty of trust and confidence] exists in Singapore, (cont'd on the next page)

an investigation outcome. Ultimately, an employer–employee relationship – which is a “two–way relationship” as noted by the High Court (Appellate Division)<sup>64</sup> – could include considerations of fairness and reasonableness that could go beyond a framework of strict “black letter” legal rights.

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*the [duty] as pleaded by the plaintiff, ie, that a company is contractually bound to comply with all its policies, is not part of Singapore law”*. [emphasis added]

64. *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].