Published on 23 July 2024

Case Comment

THE SPECTRE OF THE IMPLIED TERM OF MUTUAL TRUST AND CONFIDENCE: EMPLOYER'S OBLIGATION TO COMPLY WITH ALL OF ITS OWN POLICIES

Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd [2023] 3 SLR 922

[2024] SAL Prac 14

This case comment discusses the Singapore High Court's decision in *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922, which dealt with the issue of whether an employer is obliged, by way of an implied term of mutual trust and confidence ("ITMTC"), to comply with its own internal policies. The High Court ruled that such a term was not implied on the facts or in law, citing reasons of uncertainty not just for the employer in question, but also other employers as well. The court's cautious stance on expanding ITMTC reflects a preference for contractual certainty in employment relationships, which is welcome.

Christine **TEE**
LLB (Hons), National University of Singapore;
Partner, Allen & Gledhill LLP.

Prabu Devaraj **RAMAN**
LLB (Hons), National University of Singapore;
Senior Associate, Allen & Gledhill LLP.

I. Introduction

1 A number of High Court cases in Singapore have accepted the existence of an implied term of mutual trust and confidence

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

("ITMTC") in employment contracts.[1] However, the existence and status of the ITMTC in employment contracts is not clearly settled under Singapore law and remains an open question for the Court of Appeal.[2]

2 This notwithstanding, claims arising from breaches of the ITMTC continue to be brought before the General Division of the High Court ("High Court"). A recent instance was the case of *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd*[3] ("*Kallivalap*").

3 In *Kallivalap*, the Plaintiff-employee argued that as part of the ITMTC in his employment contract, the Defendant-employer was contractually bound to comply with all of its own policies and handbooks ("Policies"). Nevertheless, the High Court held that there was no ITMTC under Singapore law that required the Defendant-employer to be bound to comply with all their policies, as such a term would be too uncertain. Moreover, even if an ITMTC with such content existed under Singapore law, the facts did not bear out the Plaintiff-employee's claim.

4 This article will first provide an overview of the High Court's decision in *Kallivalap,* before expanding on key observations and practical lessons.

II. Overview of Singapore High Court's decision

A. Key facts

5 The Plaintiff-employee, Kallivalap Praveen Nair ("Praveen"), was previously employed by GSK Consumer Healthcare Ltd in India. In 2018, Praveen was relocated to Singapore to join GlaxoSmithKline Consumer Healthcare Pte Ltd

1 See *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577, *Leong Hin Chuee v Citra Group Pte Ltd* [2015] 2 SLR 603 and *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 811.

2 The Court of Appeal in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 stated at [82] that it "remains an open question".

3 [2023] 3 SLR 922.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

("GSK") and to take on the role of Global Expert Director for the Nutrition and Digestive Health business.[4]

6 Praveen's Letter of Appointment contained the following key clauses:[5]

> Clause 5.2 – **You shall comply with all existing policies of the Company**, its parent, subsidiary and associated companies ('GSK Group of Companies') **which are applicable to you** in the course of your employment which may be varied, amended, introduced, modified or revoked from time to time ('**Policies**'). **It is your responsibility to keep yourself updated** with the latest version of such Policies as may [*sic*] made available on the Company's intranet. Any such variation, amendment, introduction, modification or revocation is effective on the date stated on the Company's intranet.
>
> Clause 5.3 – In addition, if any of the terms set out in this Letter of Appointment conflicts with or is inconsistent with any Laws and Regulations and/or Policies prevailing from time to time, the latter shall prevail and the conflicting or inconsistent terms of this Letter of Appointment shall be deemed amended to be in line with the provisions of the then prevailing Laws and Regulations and/or Policies.
>
> Clause 11.1 – This Letter of Appointment and the documents expressly referenced herein contain the entire agreement between the parties with respect to the subject matter hereof … In the event of any inconsistency between this Letter of Appointment and any of the documents expressed referenced therein, the provisions shall prevail in the following order: (a) any Laws and Regulations and/or Policies of the GSK Group of Companies, as varied, amended, introduced, modified or revoked from time to time; (b) the Letter of Appointment …
>
> [emphasis in original]

7 In end-2018, GSK announced the sale of its Nutrition and Digestive Health business to Unilever. This placed Praveen's existing role at GSK at risk of redundancy.

4 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [2]–[3].

5 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [13].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

8 During the course of 2019, Praveen: (a) explored opportunities at Unilever but was not selected for any role with Unilever;[6] (b) was not invited to apply for a new Global Head of Expert Marketing role created by GSK;[7] and (c) participated in GSK's assessment and selection process for other similar roles but was not selected for those roles either.[8]

9 In December 2019, Praveen was informed that there were no roles available for him at GSK and that he would be made redundant. In January 2020, Praveen was issued a formal notice of redundancy which stated his last day of employment to be 14 April 2020. This was subsequently extended to 30 June 2020.[9] Praveen was informed that as part of his severance package, he would be entitled to a severance payment of $144,716 and a pro-rated performance bonus of $35,781.70 if he signed and returned a "No Claims Acknowledgment and Undertaking" form ("No Claims Form").[10] Praveen did not sign the No Claims Form. However, GSK credited part of the severance payment to Praveen and made payment to the Inland Revenue Authority of Singapore for withholding tax in relation to the same.

10 Following the termination of his employment, Praveen sued GSK, alleging that GSK breached its own policies, such as the principles of equality in GSK's "Code of Conduct", "Policy on Equal and Inclusive Treatment of Employees" as well as "Policy on Non-Retaliation and Safeguarding Individuals Who Report Significant Misconduct", in omitting to consider Praveen for the Unilever roles, not providing Praveen the opportunity to apply for the Global Head of Expert Marketing role, and passing him over for other roles within GSK.[11] According to Praveen,

6 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [5].
7 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [6].
8 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [7].
9 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [8].
10 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [151].
11 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [73].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

GSK's breaches resulted in loss of opportunity to land a role with Unilever or GSK,[12] and claimed damages of $1,239,158.91. Praveen also claimed the shortfall in his severance payment[13] and the sum of $49,503.21 in salary withheld by GSK to satisfy any tax payable on Praveen's behalf.[14]

11 GSK counterclaimed for $95,211.87, which it claimed comprised excess sums mistakenly credited to Praveen, in excess of what he was legally entitled to.[15]

B. High Court's decision

12 Praveen's claims against GSK were dismissed in their entirety.[16]

13 The High Court held that there was no express or implied obligation for GSK to comply with the Policies.

(a) There was *no express obligation* imposed on GSK to comply with the Policies. On a plain reading, cl 5.2 only obliged Praveen, the employee, to comply with the Policies. It did not impose an obligation on GSK, the employer, to comply with the Policies.[17]

(b) There was *no ITMTC, implied in law or on the facts*, which required compliance by Praveen and GSK with all the Policies.

(i) The ITMTC was not implied in law as it was too uncertain, for GSK as well as other companies or entities. There was no precedent for the content

12 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [9].
13 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [9].
14 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [9].
15 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [163].
16 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [170].
17 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [14].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

of the ITMTC which Praveen sought to ascribe, *ie*, an employer is contractually bound to comply with all of its internal policies.[18]

(ii) The ITMTC was not implied in fact as the three-step test in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[19] ("*Sembcorp*") was not met. The purported ITMTC was not necessary in the business or commercial sense to give efficacy to the employment contract. There was also no evidence to conclude that at the time of the Letter of Appointment, GSK as an entity, would have said "Oh of course" to the suggestion that it was contractually bound by the ITMTC by Praveen.

14 The High Court also held that Praveen was not entitled to the sum of $49,503.21 withheld by GSK, as it was only required to be paid out if Praveen had signed the No Claims Form, but Praveen did not do so.[20]

15 GSK's counterclaim was dismissed.[21] The High Court found, on the evidence, that GSK was aware that Praveen had reservations about the No Claims Form but proceeded to make the severance payment. Even if GSK was mistaken, the High Court was of the view that GSK unreasonably ran the risk of error by proceeding with payment without first ascertaining if the No Claims Form had, in fact, been signed.[22]

---

18 Examples of the content of an ITMTC include: (a) a duty not to act in a corrupt manner which would clearly undermine the employee's future job prospects; (b) a duty not to unilaterally and unreasonably vary terms; (c) a duty to redress complaints of discrimination or provide a grievance procedure; (d) a duty not to suspend an employee for disciplinary purposes without proper and reasonable cause; (e) a duty to enquire into complaints of sexual harassment; (f) a duty to behave with civility and respect; (g) a duty not to reprimand without merit in a humiliating manner; and (h) a duty not to behave in an intolerable or wholly unacceptable way: *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [32].

19 [2013] 4 SLR 193.

20 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [162].

21 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [170].

22 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [168].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

III. Key observations and practical lessons

A. Clarity of obligations in employment agreements

16 In determining whether GSK was bound by the Policies, the High Court considered the plain and express wording of the employment agreement between Praveen and GSK and found that only Praveen (and not GSK) was to comply with Policies that were applicable to him, and that the Policies were incorporated only to the extent that they imposed obligations on Praveen. In particular, the High Court noted that:

> (a) Clause 5.2 stated that "You [*ie*, Praveen] shall comply with all existing policies of the Company [*ie*, GSK] … which are applicable to you".
>
> (b) In cl 11.1, the documents "expressly referenced herein", that constituted the "entire agreement" between Praveen and GSK included the policies expressly defined in cl 5.2.

17 To ensure clarity on both the employer's and employee's duties and obligations, employment agreements must be carefully worded. If an obligation is only intended to apply to one party and not the other, this should be expressly mentioned. Drawing from the High Court's decision in *Kallivalap*, employers should consider reviewing their employment agreements as well as their policies to ascertain that the ambit of obligations that apply to each party accurately reflects the commercial intention. This will help to avoid potential misinterpretation of the parties' obligations in the employment relationship.

B. Only terms that are sufficiently definite and certain will be implied

18 The High Court's decision in *Kallivalap* underscores the Singapore court's circumspection in implying terms in fact or law, especially where the content of the ITMTC sought to be ascribed introduced uncertainty.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

19 The High Court observed that there was not only uncertainty as to which documents within GSK constituted "policies" for the purposes of the ITMTC,[23] but also that there was uncertainty regarding the parts of such "policies" which should be regarded as contractually binding against GSK, given that such "policies" included terms couched in aspirational language.

20 In our view, the High Court also correctly rejected Praveen's submission that these aspirational statements should be treated as obligations for GSK to use reasonable endeavours to achieve those standards. Practically, what might constitute a breach of aspirational statement would be highly uncertain and subjective.

21 Further, the High Court was also astutely aware of wider policy implications of a court being the correct modality to decide whether internal policies of all companies should be part of employers' contractual obligations and rightly observed that such a ruling would have "widespread implications on the employer–employee dynamic in Singapore"[24] given that "once a term has been implied [in law], such a term will be implied in all future contracts of that particular type".[25]

22 It is therefore clear from the decision in *Kallivalap* that:

(a) The threshold for implication of terms in law remains high. Employers and employees who wish to argue that a term should be implied in law should thus carefully consider whether the term is sufficiently definite and the degree of uncertainty that it might introduce.

(b) Aspirational statements found in internal policies will likely not be viewed as binding contractual obligations, even if phrased in mandatory language. Nevertheless,

23 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [40].
24 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [54].
25 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [49].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

employers can continue their good practice of stipulating their goals, values and aspirations that provide higher standards for everyone to strive towards, even if these standards do not always necessarily translate into directly enforceable legal obligations.

C. Handling employee redundancy and severance payments

23 The facts in *Kallivalap* also brought to the fore the importance of employers handling employee redundancies properly.

24 In *Kallivalap*, the High Court observed that *even if* GSK was required to comply with its Policies, there was no breach of the Policies on the facts. In coming to this view, the High Court made reference to contemporaneous correspondence which showed that GSK took steps to put Praveen in touch with Unilever for consideration for a role at Unilever,[26] and that GSK had analysed in detail Praveen's competencies and feedback and found him unsuitable for other roles in GSK.[27]

25 This observation highlights the importance of keeping contemporaneous records of internal steps when an employee is being considered for redundancy. Such contemporaneous records would include meeting minutes, e-mail discussions, assessments and evaluation forms. These records would be crucial evidence in the event an employee alleges that a redundancy exercise was conducted without due process, or that the employee was deliberately disadvantaged in the redundancy process.

26 Turning to the issue of severance payments, the High Court in *Kallivalap* helpfully clarified that the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (the "Advisory") is only meant to "assist and guide" employers and not meant to compel employers to adopt the Advisory or

26 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [66].
27 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [119].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

pay retrenchment benefits to employees.[28] This preserves the employers' discretion to compute and manage severance payments and redundancy exercises, if any, in line with their internal policies or with reference to any other relevant factors (*eg*, the financial position of the employer and the industry norm). That said, the privilege of such flexibility should not be abused, and employers should consider the guidelines in the Advisory, where possible, as a guide for redundancy exercises.

27 Further, the High Court's determination that GSK could not recover the excess payment made to Praveen because it unreasonably ran the risk of error by processing payments without conducting proper checks,[29] should be a reminder to employers that utmost care should be taken when processing payments to any employee leaving the organisation. When managing the exit of an employee, employers should be careful to ensure that the different arms of the organisation are aligned and payments to the employee are not made before the necessary exit documents (including any mutual separation agreement or redundancy agreement) are completed by the employee.

IV. Conclusion

28 It is apparent from *Kallivalap* that the courts in Singapore remain slow to impute content to the ITMTC where similar content did not previously exist. Certainty in contractual relations, including employment relationships, should rightfully continue to be prioritised.

29 At a broader level, the Singapore court's circumspection in introducing new content of the ITMTC is welcome, especially since it remains unclear if ITMTC forms a part of Singapore law, and since a wide range of duties could potentially fall under the umbrella of "mutual trust and confidence".

28 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [154].
29 *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 at [169].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

30 While we await the Court of Appeal's guidance, in an appropriate future case, on the existence, status and breadth of the ITMTC in employment contracts in Singapore, employers and employees should bear in mind the lessons learnt from *Kallivalap*.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.