(2019) 31 SAcLJ 316
(Published on e-First 15 March 2019)

Comment

EMPLOYMENT ACT CHANGES

Implications and Uncertainties

Since its introduction in 1968, the Employment Act (Cap 91, 2009 Rev Ed) has had a steady stream of changes made to it over the years. However, the latest introduced in November 2018 are probably the most significant in many ways. While the latest amendments have brought about significant changes, the focus of this comment will be on issues relating to the termination of the employment contract, particularly wrongful dismissal.

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I. Introduction

1 The Employment (Amendment) Bill[1] ("the Bill") seeks to make significant changes to the Employment Act,[2] and it has been announced that these changes will come into force on 1 April 2019.[3] While various changes have been introduced, the aim of this comment is to focus on those which directly or indirectly relate to termination of employment. On the whole, the changes are to be welcomed as they further advance the rights of employees, but there are some implications and uncertainties relating to termination which this comment hopes to highlight. All sections referred to are with reference to the Employment Act as amended by the Bill[4] unless otherwise stated.

1 Bill 47 of 2018.
2 Cap 91, 2009 Rev Ed.
3 See Ministry of Manpower, "Changes to the Employment Act from 1 April 2019 to Cover All Employees and Enhance Dispute Resolution and Provide Business Flexibility", press release (20 November 2018) https://www.mom.gov.sg/newsroom/press-releases/2018/1120-changes-to-the-employment-act-from-1-april-2019-to-cover-all-employees-and-enhance-dispute-resolution-and-provide-business-flexibility (accessed December 2018).
4 Likewise, all references to the Employment Claims Act 2016 (Act 21 of 2016) are with reference to that statute as amended by the Employment (Amendment) Bill 2018 (Bill 47 of 2018).

II. Summary of key changes

2 Though the Bill has introduced various changes, three are most pertinent to the issue of termination. The first is the definition of the term "employee". Prior to the amendments, persons employed in a managerial or executive position were not covered unless they were earning $4,500 or less a month.[5] As part of the amendments, all employees in managerial or executive positions are covered, regardless of salary,[6] other than those working for the Government or statutory boards.[7] The second is the definition of the term "dismiss". Prior to the changes, "dismiss" meant "the termination of the contract of service of an employee by his employer, with or without notice and whether on the grounds of misconduct or otherwise".[8] Following the amendments, "dismiss" has been defined to mean the termination of the:[9]

> … contract of service between an employer and an employee at the initiative of the employer, with or without notice and for cause or otherwise, and includes the resignation of an employee if the employee can show, on a balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of any conduct or omission, or course of conduct or omissions, engaged in by the employer.

While the wording is slightly different from what it was previously, the real significant change is the inclusion of constructive dismissal.[10] Prior to the amendments, it was not clear if constructive dismissals were covered. However, now they clearly are. Third, formerly, if the employee considered that his or her dismissal was without just cause or excuse, the employee could make representations to the minister in writing. However, now, such claims have to be brought to the Employment Claims Tribunal.[11]

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5 Employment Act (Cap 91, 2009 Rev Ed) ss 2(1) and 2(2).

6 However, some provisions still do not apply or apply differently to executives and managers: see ss 14(2A), 33(1)(*b*), 35(*b*), 88(4A) and 88A(6) of the Employment Act (Cap 91, 2009 Rev Ed).

7 Employees working for the Government or statutory boards were not covered even prior to the 2018 amendments and the position has not changed. In relation to statutory board employees, see s 2(1) of the Employment Act (Cap 91, 2009 Rev Ed) and the Declaration that Persons Employed by Statutory Boards are not Employees for the Purposes of the Act (Cap 91, N 1, 2000 Rev Ed).

8 Employment Act (Cap 91, 2009 Rev Ed) s 2(1).

9 Employment Act (Cap 91, 2009 Rev Ed) s 2.

10 As to some possible scenarios where constructive dismissal may arise, see, for instance, *Cheah Peng Hong v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 ("*Cheah*"). As provided for in the definition above and as illustrated by *Cheah*, a series of omissions or conduct can also result in constructive dismissal.

11 Employment Act (Cap 91, 2009 Rev Ed) s 14(2).

III. Due inquiry

3 The first section that will be referred to is s 14(1) of the Employment Act which provides that "an employer may after due inquiry dismiss without notice an employee employed by him on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service".

4 As the section refers to dismissal without notice, it is likely to refer to summary dismissal.[12] In common law, there is no necessity for a due inquiry when summarily dismissing an employee unless the contract provides for it.[13] While this provision has not undergone change as part of the 2018 amendments, now that executives and managers are not an excluded category, there has to be a due inquiry in so far as such employees are summarily dismissed for misconduct without notice.

5 However, in addition to s 14(1), s 11(2) provides that "either party to a contract of service may terminate the contract of service without notice in the event of any wilful breach by the other party of a condition of the contract". Unlike s 14(1), s 11(2) does not require an employer to hold a due inquiry before summarily dismissing an employee. It is possible for the employee to be guilty of misconduct without there being a wilful breach. For instance, if the employee is grossly careless in not observing safety procedures, there could be misconduct without there being a wilful breach, as wilful breach requires intention.[14] However, it is difficult to envisage a situation where there could be a wilful breach without there being misconduct. Whatever the case, in so far as the wilful breach can amount to misconduct, it is likely that the employer who wants to summarily

12 As s 10 of the Employment Act (Cap 91, 2009 Rev Ed) refers to the right to "terminate" by notice, s 11(1) refers to the right to "terminate" by salary in lieu of notice, and the heading of s 14 refers to "dismissal", it is likely that "dismissal without notice" means dismissal without notice "or salary in lieu of notice". It is also difficult to see why termination by notice does not entail a due inquiry but termination by salary in lieu of notice should. On the other hand, it makes sense that summary dismissal should entail a due inquiry as the employee does not receive any salary or salary in lieu of notice and hence may face immediate hardship. See also *Noor Mohamed bin Mumtaz Shah v Apollo Enterprises Ltd* [2000] 1 SLR(R) 670 at [7].

13 See *Vasudevan Pillai v The City Council of Singapore* [1968–1970] SLR(R) 100; *Lim Tow Peng v Singapore Bus Services Ltd* [1974–1976] SLR(R) 673 at [23]; *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR(R) 233 at [52]; *Hui Cheng Wan Agnes v Nippon SP Tech (S) Pte Ltd* [2001] SGHC 271 at [81]; *Wee Lye Seng v Dr Ee Peng Liang* [1993] SGHC 24; and *Lai Swee Lin Linda v Attorney-General* [2010] SGHC 345 at [41].

14 *Othman Bin Ali v Telekom Malaysia Bhd* [2004] 4 MLJ 18 at [45]; *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [48].

dismiss the employee would have to hold a due inquiry. On the other hand, in so far as the breach does not amount to misconduct and the employer is trying to summarily dismiss the employee on some other ground (such as perhaps incompetence),[15] the Employment Act does not impose an obligation to hold a due inquiry.

6 Further, s 10(1) of the Employment Act allows the contract of employment to be terminated by notice, and s 11(1) allows the contract of employment to be terminated by giving salary in lieu of notice. If there is misconduct, the question may arise whether the employer can, instead of holding a due inquiry, terminate the services of the employee by means of notice or salary in lieu of notice. *Noor Mohamed bin Mumtaz Shah v Apollo Enterprises Ltd*[16] suggests that the Employment Act does confer on the employer a choice. Thus, if there is misconduct, it would not be mandatory for the employer to carry out a due inquiry under s 14(1), and if the employer wants to, the employer can terminate the services of the employee by giving notice or salary in lieu of notice.

7 However, having said that, if the employer decides to terminate the contract pursuant to some other section[17] and does not follow any procedure to ascertain whether there are sufficient grounds for the termination, an employee who feels that the dismissal has been without just cause or excuse may lodge a claim pursuant to s 14(2) of the Employment Act. Thus, generally, to prevent such problems from arising, it might be good practice to have a due inquiry even in such circumstances.

8 What will amount to a "due inquiry" was elaborated in recent case of *Long Kim Wing v LTX-Credence Singapore Pte Ltd*[18] ("*Long*"). The case did not relate to the Employment Act as such. Nonetheless, the principles stated are quite general in nature and likely to be equally applicable. Woo Bih Li J delivering the judgment of the court stated:[19]

15 See also s 27(2)(*b*) of the Employment Claims Act 2016 (Act 21 of 2016), inserted by cl 26(13) of the Employment (Amendment) Bill 2018 (Bill 47 of 2018) which seems to make a distinction between poor performance and misconduct.

16 [2000] 1 SLR(R) 670 at [7]–[10]. See also *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR(R) 233 at [30]. See further s 27(2)(*b*) of the Employment Claims Act 2016 (Act 21 of 2016), which refers to "misconduct", but not to s 14(1) of the Employment Act (Cap 91, 2009 Rev Ed), unlike s 27(2)(*a*).

17 Such as s 10(1), 11(1) or 11(2) of the Employment Act (Cap 91, 2009 Rev Ed). Another section that could be relevant is s 13 of the Employment Act which relates to summary termination for absence without leave on the part of the employee and non-payment of salary on the part of the employer. See also *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR 233.

18 [2017] SGHC 151.

19 *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 at [161]–[162].

> It seems to me that the phrase 'due inquiry' means something more than just the making of inquiries and the conduct of an investigation. Otherwise the word "inquiry" alone would suffice. The phrase suggests some sort of process in which the employee concerned is informed about the allegation(s) and the evidence against him so that he has an opportunity to defend himself by presenting his position, with or without other evidence. …
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> However, in order for an employee to be given an opportunity to present his case effectively, he must first be informed[20] clearly what the case against him is. As mentioned above, this includes the allegation(s) and the evidence against him. While 'due inquiry' does not mandate any formal procedure to be undertaken, the more the informality the greater the danger that 'due inquiry' was not undertaken. …

As indirectly alluded to above, if an inquiry is rushed through,[21] that may not amount to a due inquiry. A due inquiry may also involve giving the employee a right to make arguments in mitigation.[22] The question might also arise as to what happens if an employee demands legal representation during the inquiry in the absence of an express right in the contract. In the UK, there is no such right unless the matter falls within the purview of the European Convention on the Protection of Human Rights and Fundamental Freedoms[23] or the contract provides for it, though there is recent authority to the effect that this could possibly also be governed by the implied term of trust and confidence.[24] In the context of the Employment Act, it is suggested that there is unlikely to be any such accompanying right. This is because the general framework of the Employment Act is not to allow such representation at least at the lower levels of dispute resolution, probably so as not to protract the settlement of disputes involving small claims. For instance,

20 In some countries such as the UK, there is a specific requirement that the reasons must be stated in writing: Employment Rights Act 1996 (c 18) (UK) s 92. Given that there is no such express requirement under the Employment Act (Cap 91, 2009 Rev Ed), it is likely that there is no compulsion for the reasons to be stated in writing.

21 *Johnson Matthey Metals v Harding* [1978] IRLR 248.

22 *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 at [172]; *Said Dharmalingam v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352, though if the outcome is unlikely to have been different, the non-observance of this is unlikely to pose a problem.

23 Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953) Art 6(3). See, for instance, *Kulkarni v Milton Keynes Hospitals NHS Trust* [2010] ICR 101 and *R v Governors of X School* [2011] IRLR 756.

24 *Stevens v University of Birmingham* [2015] EWHC 2300, though the case itself did not relate to legal representation but just a right to be accompanied by another person with the technical knowledge related to the field in question.

hearings before the Commissioner[25] and the Employment Claims Tribunal[26] prohibit legal representation. If these venues exclude such a right, it may be argued that such a right can be expected within the employer's organisation as that too could result in protracting the process. The employee is also unlikely to be prejudiced, since if there is no due inquiry, that in itself can subsequently be challenged. Nonetheless, to make the position clearer, the employer may wish to expressly exclude such a right in the contract of employment. Also, in line with what was stated in *Long* above, there is no specific formal procedure to be undertaken. Thus, the inquiry does not have to be conducted like a quasi-judicial proceeding, with opportunity to cross-examine witnesses, for instance.[27] Similarly, generally speaking, the employee need not be given access to witnesses' statements, if any.[28]

9 With high-level employees now being covered by the Employment Act, it is likely that there will be more challenges as to whether there was indeed a due inquiry. Hence, needless to say, it would be good for employers to maintain good documentation, for instance, as to the process and what transpired during the hearing.[29]

IV. Unfair dismissal – General

10 Following the 2018 amendments, s 14(2) of the Employment Act provides that "where a relevant employee considers that he has been dismissed without just cause or excuse by his employer, the employee may lodge a claim under section 13" of the Employment Claims Act 2016[30] "for one of the following remedies", namely, reinstatement in his former employment or compensation. The term "relevant employee" is set out in s 14(2A) and effectively includes all employees covered by the Employment Act, other than managers or executives who are terminated by notice or salary in lieu of notice, in which case they would have to be employed with the employer for at least six months to be eligible to bring a claim.[31] The time limit is set out in the Employment Claims Act; basically, a claim cannot be brought later than one month

25 Employment Act (Cap 91, 2009 Rev Ed) s 120.
26 Employment Claims Act 2016 (Act 21 of 2016) s 19(1).
27 *Santemera v Express Cargo Forwarding* [2003] IRLR 273.
28 *Hussain v Elonex plc* [1999] IRLR 420. However, there can be exceptions: see, for instance, *Louies v Coventry Hood and Seating Co Ltd* [1990] IRLR 324.
29 See also *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 at [165] and [174] and *Bumiputra Commerce Bank Bhd v Makkamah Perusahaan* [2004] 7 MLJ 441 at [21].
30 Act 21 of 2016. However, as with all claims under the Employment Claims Act 2016 (Act 21 of 2016), the claim has to be preceded by a mediation request: see ss 2(1) and 12(5) of the Employment Claims Act.
31 Employment Act (Cap 91, 2009 Rev Ed) s 14(2A).

after the date of the dismissal.[32] Claims are also subject to a prescribed limit.[33]

11 As for the phrase "just cause or excuse", that has not been defined in the Employment Act. However, s 20(6A) of the Employment Claims Act indicates that tripartite guidelines will be issued as to what amounts to such dismissal. Strangely, while s 20(6A) provides that the tribunal "*is* to have regard" [emphasis added], s 34A of the Employment Claims Act provides that "upon publication of those guidelines in the Gazette, regard *may* be had to those guidelines for the purpose of [s 20(6A)]" [emphasis added]. Thus, it is not clear if the guidelines are compulsory. However, this may just be a theoretical point for as stated in Parliament, the guidelines will only give some illustrations and lay down some parameters. They will not define all scenarios.[34] Thus, it is unlikely for the guidelines to be conclusive, and ultimately much may turn on the actual facts. It is also likely that reference may still be made to common law cases (for instance, as to when summary dismissal is justified) though ultimately the exact words of the statute must be adhered to. In this regard, in common law the leading authority on what constitutes a repudiatory breach is *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*[35] ("*RDC*"), which essentially sets out several grounds. Out of the grounds stated in *RDC*, perhaps the two which may less easily fit into the statutory scheme are the first and the third, namely, where the contract clearly and unambiguously allows for termination on the happening of certain events and termination based on the nature of the term breached. It is suggested that if the contract states that there can be termination if a certain thing happens or if the contract states that the employee should not do a certain thing, and that is stated to be or construed as a condition, while that can be a relevant consideration in determining whether there is a "just cause and excuse" for the dismissal, it may not be conclusive of the matter unlike in common law.[36] It is suggested that the reasonableness of the provision, the relative bargaining powers of the parties and the degree to which the provision has been brought to the attention of the parties may all possibly be relevant in determining whether there is indeed a "just cause or excuse" for the dismissal.

12 In relation to the phrase "just cause or excuse", several other complications arise. First, if there is a "just cause or excuse" *per se*, but

32 Employment Claims Act 2016 (Act 21 of 2016) s 3(2)(*ca*).
33 Employment Claims Act 2016 (Act 21 of 2016) s 12(7)(*b*).
34 *Singapore Parliamentary Debates, Official Report* (20 November 2018) vol 94 "Employment (Amendment) Bill" (Josephine Teo, Minister for Manpower and Second Minister for Home Affairs).
35 [2007] 4 SLR(R) 502 at [91]–[99].
36 See, for instance, *Ladbroke Racing Ltd v Arnott* [1983] IRLR 154.

the employee has had a long service with the employer or an exemplary service prior to the alleged event that triggered the dismissal, could the dismissal nonetheless be considered without "just cause or excuse" if some other lesser penalty such as demotion or suspension would have been more appropriate? It is suggested this would be permissible since this still relates to the substantive merits of the dismissal,[37] though it is likely that the Employment Claims Tribunal will the give the employer a lot of leeway in this regard.[38] Second, if there is a "just cause or excuse" *per se*, but a due inquiry has not been conducted, would that allow the employee to successfully lodge a claim under s 14(2)? Given that s 14(2) reads, "where a relevant employee considers that he has been dismissed without just cause or excuse", it is suggested the emphasis is on the phrase "just cause or excuse", that is, on the substantive reasons and not on procedural matters. Further, in some countries the relevant statutes in question expressly allow such matters to be taken into consideration,[39] which is not the case here. In addition, allowing such a claim would amount to introducing a due inquiry requirement through the back door to the other sections such as ss 10, 11(1) and 11(2), even though the Employment Act only imposes such a requirement in respect of s 14(1). Thus, it is suggested that this cannot be done.[40] However, that will also mean that if there is no due inquiry as required, that particular issue cannot be deliberated upon by the Employment Claims Tribunal as there will be no "specified employment dispute" as such.[41]

37 See, for instance, *Taylor v Parsons Peebles Nei Bruce Peebles* [1981] IRLR 119 and *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605, though in both UK and Malaysia, the discretion given to the courts under the relevant legislation seems wider (see s 98(4) of the UK Employment Rights Act 1996 (c 18) and s 30(5) of the Malaysian Industrial Relations Act 1967 (No 177 of 1967)).

38 See *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 at [11], discussed at para 14 below.

39 See, for instance, the former s 98A of the UK Employment Rights Act 1996 (c 18). However, the said s 98 has since been repealed and in its place, the failure to follow prescribed procedures can have an impact on compensation awarded: see s 124A of the UK Employment Rights Act 1996 (c 18). See also s 387 of the Australian Fair Work Act 2009.

40 See also *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 at [34].

41 Basically, for the Employment Claims Tribunal to have jurisdiction, there must be a "specified employment dispute" (Employment Claims Act 2016 (Act 21 of 2016) s 12(4)), and the phrase "specified employment dispute" includes a "wrongful dismissal dispute": Employment Claims Act s 2(1). The phrase "wrongful dismissal dispute" is defined in the Third Schedule to the Employment Claims Act and refers to the situation where the employee is bringing a claim pursuant to s 14(2) of the Employment Act (Cap 91, 2009 Rev Ed) alleging that there has been a dismissal "without just cause or excuse". Thus, if the phrase "just cause or excuse" does not include procedural fairness (as suggested above), the Employment Claims Tribunal will not have jurisdiction to deliberate upon that particular issue.

13 As for the onus of proof in relation to a s 14(2) claim, under s 27(2)(*a*) of the Employment Claims Act 2016, where the employee has been dismissed without notice under s 14(1) of the Employment Act,[42] the onus is on the employer to prove that the employee was dismissed for a just cause or excuse. Under s 27(2)(*b*) of the Employment Claims Act 2016, where the employee is dismissed with notice and the notice of dismissal is or purports to be given on the ground that there has been poor performance or misconduct, the employer bears the burden of proving that ground. There are a couple of issues with these sections. The first is, it is not clear where termination by salary in lieu fits in. It is suggested that it could fall under either section in that s 27(2)(*a*) is probably with reference to dismissal without notice "or salary in lieu of notice"[43] and s 27(2)(*b*) is with reference to dismissal with notice "or salary in lieu of notice". Second, it is not clear who has the burden of proof in constructive dismissal cases, though the logical outcome would be to place the burden of proof on the employee in such a situation.[44] Third, it is unclear why the said s 27(2)(*b*), unlike s 27(2)(*a*), does not refer to s 14(2) of the Employment Act, since that is the only way the employee can challenge the dismissal anyway. Fourth, though the said s 27(2)(*b*) merely states that the employer has to prove the ground stated, it is likely to mean that the employer has to go further and prove that that ground actually presents a just cause or excuse. Fifth, in common law, even if one reason is stated, it may be possible to raise other reasons subsequently to justify a termination.[45] It is suggested that ss 27(2)(*a*) and 27(2)(*b*) relate to burden of proof and do not directly address this issue; hence, it should still be possible to have regard to those common law rules.[46] Sixth, the employer may wish to terminate by giving notice, but without stating a reason; the said

42 However, it is likely that notice of the summary dismissal must still be given: see *Surteco Pte Ltd v Siebke Detlev Kurt* [2011] SGHC 74 at [35] and *Gisda Cyf v Barratt* [2010] UKSC 41.

43 See also n 12 above.

44 See also the definition of the term "dismiss" in s 2(1) of the Employment Act (Cap 91, 2009 Rev Ed) which places the burden on the employee. See further the unreported UK Employment Tribunal decision of *Daniel O'Gorman v Glen Tyre Co Ltd* [2013] UD 2314/10, where the court held that the burden of proof on the employee was a high one.

45 See, for instance, *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339; *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 at [8]; *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739 at [39]; *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145 at [122]; *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241 at [31]; *Wong Leong Wei Edward v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352 at [44]; *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [45]; *Walton International Group (Singapore) Pte Ltd v Loh Pui-Pui Sharon* [2011] SGHC 145; and *Chew Nam Fong Ronny v Continental Chemical Corp Pte Ltd* [2011] SGHC 166 at [21].

46 In *W Devis & Sons Ltd v Atkins* [1977] AC 931 ("*Devis*"), the court held that the employer could not rely on other reasons not mentioned as the statutory scheme in

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s 27(2)(*a*) or 27(2)(*b*) would then not be triggered. In this case, it is not clear who then will have the burden of proof, but it is suggested that given the protective aims of the statute, it should still be on the employer.

14 It is also likely that in arriving at a decision, so long as the dismissal is within a reasonable range of responses an employer could have possibly invoked, the Employment Claims Tribunal is unlikely to interfere and substitute its own decision. As stated by Lord Denning MR in *British Leyland (UK) Ltd v Swift*:[47]

> The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.

Though this was clearly not stated in the context of the Employment Act, it is suggested that it is eminently sensible.

15 In relation to the time limit, as stated earlier, the claim must be brought "not later than one month after the date of the dismissal of the employee". The term "month" is not defined in the Employment Claims Act. However, under s 2(1) of the Interpretation Act,[48] "month" means a calendar month. Thus if the employee is dismissed and the last working day is on 15 June, one month from there would be 15 July in the same year on the assumption that the day on which the notice is given is not counted.[49] It is likely that the one month begins to run from the time the employee knows or has reasonable grounds of knowing of the dismissal, given the protective intention behind the legislation and the already

question in UK required the fairness of the dismissal to be determined by looking at the "reason shown" to the employee (which is not the case in Singapore under s 14(2) of the Employment Act (Cap 91, 2009 Rev Ed)). However, in *Devis*, the court was also uncomfortable with the fact that an employee could profit from his own wrong, but in this regard, the same statutory scheme in question allowed the court to award nominal or nil compensation in such circumstances; hence, this concern was taken care of.

47 [1981] IRLR 91 at [11].

48 Cap 1, 2002 Rev Ed.

49 *General Ceramics Manufacturers Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1988] 3 MLJ 474 at 377; *Wang v University of Keele* [2011] IRLR 542 at [38]. However, if the termination is by notice pursuant to s 10(5) of the Employment Act (Cap 91, 2009 Rev Ed), then the day on which it is given is clearly counted.

very short time frame.[50] Correspondingly, in relation to constructive dismissal, it is likely that the one month begins to run when the employee informs the employer of his or her decision to resign.[51] However, on the whole, the one-month time bar is indeed extremely short and many employees may not have figured out the existence of s 14(2) within that time frame.

16 In terms of remedies, as stated earlier, the employee can "lodge a claim" asking for *either* reinstatement[52] or compensation.[53] If the employee seeks reinstatement, pursuant to s 14(3) of the Employment Act, the tribunal can direct the employer to reinstate the employee "and" to pay the employee an amount equivalent to wages that the employee would have earned if the employee had not been dismissed. Thus, for instance, if the employee has been out of a job for four months, the employee may be able to get back pay (subject to the prescribed limits)[54] as well as reinstatement. However, what if the court does not order reinstatement? Does the use of the word "and", as opposed to words such as "either or both", mean that the court cannot order compensation alone? Given the protective aims of the legislation, it is suggested that "and" refers to the all the powers of the tribunal and as such, the tribunal should be able to order compensation alone in the example above.

17 Factors the tribunal may possibly consider in deciding whether or not to consider reinstatement could include practicalities on the ground, such as the size of the employing organisation,[55] the current relationship between the parties[56] and the actual ability of the employer to reinstate. The onus of proof is likely to be on the employer to show that reinstatement is not practical on the facts.[57] Where reinstatement is ordered, since the stated aim of the wages is to put the employee in a

50 See *Surteco Pte Ltd v Siebke Detlev Kurt* [2011] SGHC 74 at [35]; *Gisda Cyf v Barratt* [2010] UKSC 41.

51 *Edwards v Surrey Police* [1999] IRLR 456, though, as stated in judgement, the communication can be by words or conduct.

52 The reinstatement has to be in the "former employment" as provided in s 14(2) of the Employment Act (Cap 91, 2009 Rev Ed). It is not clear whether this refers to the exact same position. However, given that in some countries (see, for instance, s 113 of the UK Employment Rights Act 1996 (c 18)) the statute gives the court the express power to either award reinstatement or "re-engagement", and the Employment Act does not, the suggestion might be that it has to be in the exact position. See also *Kumpulan Jerai Sdn Bhd, Rengam v National Union of Plantation Workers* [1996] 3 MLJ 221.

53 Employment Act (Cap 91, 2009 Rev Ed) s 14(3).

54 Employment Claims Act 2016 (Act 21 of 2016) s 12(7)(*b*).

55 See, for instance, *Enessy Co SA v Minoprio* [1978] IRLR 489.

56 See, for instance, *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680.

57 See, for instance, *Cold Drawn Tubes Ltd v Middleton* [1992] IRLR 160.

position as if he had not been dismissed,[58] it is likely that it would be deemed that there is no break in the contract of employment for the purposes of determining various rights under the contract or the Employment Act, which may be dependent on the length of service.

18 If the claim is for compensation, the tribunal may determine the amount of compensation payable,[59] but again, subject to the prescribed limit as stated earlier.[60] It is not clear if this is subject to the mitigation but, as will be emphasised later, common law rules which are not inconsistent with the Employment Act should not be taken as having been abrogated unless the statute clearly states so, which is not the case here.[61] However, in relation to both forms of compensation, the Employment Claims Tribunal has to calculate the compensation in accordance with the regulations to be issued.[62] An appeal may also be lodged to the High Court[63] but, again, the same regulations have to be adhered to.[64]

19 The question might also arise, if the employee is not successful at the Employment Claims Tribunal but does not appeal to the High Court[65] or has pursued that avenue too and is again unsuccessful, as to whether the matter can be heard afresh in another court. In this regard, s 16(2) of the Employment Claims Act provides that if a "claim relating to a specified employment dispute" has been lodged with the tribunal, no proceedings "relating to that claim can be commenced in any other court". The phrase "specified employment dispute" includes a "wrongful dismissal dispute" which is in turn defined to include any dispute relating to "section 14(2) of the Employment Act".[66] Thus, if the employee is not basing the claim on s 14(2) of the Employment Act, it may seem possible to have the matter heard in another court. For instance, if the employee made a claim for reinstatement under s 14(2) of the Employment Act and that has not been granted, the employee may be able to sue for damages for wrongful dismissal (such as where the employee was summarily dismissed without there being a repudiatory breach on the part of the employee). Similarly, if it is accepted, as suggested earlier, that the lack of a due inquiry does not fall

58 Employment Act (Cap 91, 2009 Rev Ed) s 14(3)(*a*).
59 Employment Act (Cap 91, 2009 Rev Ed) s 14(3)(*b*).
60 Employment Claims Act 2016 (Act 21 of 2016) s 12(7)(*b*).
61 It is not clear if the regulations to be issued (s 34(1) read with s 20(6A) of the Employment Claims Act 2016 (Act 21 of 2016)) will clarify the matter.
62 Employment Claims Act 2016 (Act 21 of 2016) s 20(6A).
63 Employment Claims Act 2016 (Act 21 of 2016) s 23.
64 Employment Claims Act 2016 (Act 21 of 2016) s 25(4).
65 Employment Claims Act 2016 (Act 21 of 2016) s 23.
66 Section 2(1) read with the Third Schedule to the Employment Claims Act 2016 (Act 21 of 2016).

under the purview of the Employment Claims Tribunal, the employee may be able to bring a separate claim for that in another court since that too is not based on s 14(2) of the Employment Act.

20 It should also be mentioned that for unionised employees, they have a right to make representations to the minister through their union under the Industrial Relations Act[67] where they are of the opinion that their dismissal is without just cause or reason.[68] This right has not been taken away by 2018 changes to the Employment Act and the Employment Claims Act, though there cannot be a duality of proceedings.[69] However, there does not seem to be a similar prohibition in relation to an unfair dismissal claim under the Retirement and Re-employment Act[70] for dismissals relating to age.[71]

V. Unfair dismissal – Pregnancy

21 Thus far, the general unfair dismissal provision under the Employment Act was considered. There is another specific provision relating to unfair dismissal during pregnancy, namely s 84(2) of the Employment Act.[72] Section 84(2) provides that, subject to s 3 of the Employment Claims Act, where a female employee considers that a notice of dismissal given to her was not given for sufficient cause, the female may lodge a claim with the Employment Claims Tribunal "for one of the following remedies", namely, reinstatement in her former employment or compensation. This is provided the female employee has been employed for at least three months with the employer, that being the minimum qualifying period for maternity benefits to be applicable.[73] The time limit is set out in the Employment Claims Act; basically, a claim has to be brought not later than two months after the date of the

67 Cap 136, 2004 Rev Ed.
68 Industrial Relations Act (Cap 136, 2004 Rev Ed) s 35(3).
69 Employment Claims Act 2016 (Act 21 of 2016) s 16.
70 Cap. 274A, 2012 Rev Ed.
71 While s 16(3)(*a*)(ii) of the Employment Claims Act 2016 (Act 21 of 2016) prohibits a concurrent claim under the Retirement and Re-employment Act (Cap 274A, 2012 Rev Ed), it is only with reference to the items specified therein, which does not include a general wrongful dismissal claim. See also ss 8B and 8C of the Retirement and Re-employment Act as amended. However, ss 8(6) and 8B(11) of the Retirement and Re-employment Act, while not barring concurrent proceedings at the outset, bar dual proceedings *after* a decision has been made by the minister.
72 Employees who are entitled to maternity leave pursuant to the Child Development Co-Savings Act (Cap 38A, 2002 Rev Ed) are entitled to this protection as well: see s 12(1) of the Child Development Co-Savings Act, and the Third Schedule to the Employment Claims Act 2016 (Act 21 of 2016).
73 Employment Act (Cap 91, 2009 Rev Ed) s 84(1)(*b*).

employee's confinement.[74] The claims are subject to a prescribed limit as well.[75]

22 Some of the issues discussed earlier in relation to s 14(2), such as the relevance of common law cases, the issue about procedural unfairness[76] and the choice of remedies, are equally relevant in this context as well. However, two particular differences will be highlighted.

23 First, as said earlier,[77] the term "dismissal" includes constructive dismissal. However, s 84(1) refers to the giving of notice and s 84(2) refers to "notice of dismissal given to her". When the employee is constructively dismissed, since she would be the one resigning, it is difficult to see how the words mentioned above can be triggered. It should also be mentioned that the burden of proof is on the employer to show that there was a sufficient cause[78] and, clearly, it would be odd for such a burden to be on the employer when the employee alleges constructive dismissal. Nonetheless, it is difficult to fathom why Parliament would have wanted to cover constructive dismissal for all other parts of the Act, other than for s 84.

24 Second, unlike s 14(2), s 84(2) uses "sufficient cause", a phrase that has also not been defined in the Employment Act. Though on the face of it, "sufficient cause" seems like a lower standard as compared to "just cause", it is difficult to see why there should be two different standards in the two different circumstances. It is also difficult to fathom why Parliament would have wanted to make it easier for employers to terminate pregnant employees as compared to ordinary employees. Hence, it is suggested that there should be no difference between the standards despite the difference in wording. It is also likely that the tripartite guidelines to be issued will not make any distinction.

25 Finally, if there is a genuine need to retrench a pregnant employee, while that may amount to a sufficient cause, the employer still has to pay the maternity benefits pursuant to s 84A. However, s 84A is not referred to as a "specified employment dispute" under the schedules to the Employment Claims Act. It is also not covered under s 115 of the Employment Act which relates to claims brought to the Commissioner.

74 Employment Claims Act 2016 (Act 21 of 2016) s 3(2)(*cb*).
75 Employment Claims Act 2016 (Act 21 of 2016) ss 7(1)(*ba*) and 12(7)(*b*).
76 Further, there is no express requirement to hold a due inquiry under s 84(1) of the Employment Act (Cap 91, 2009 Rev Ed), unlike s 14(1).
77 See para 2 above.
78 Employment Claims Act 2016 (Act 21 of 2016) s 27(2)(*c*).

VI. Suspension

26 Before deciding to terminate or dismiss an employee, the employer may wish to carry out an investigation. During that time, the employer may wish to suspend the employee. Under the Employment Act, formerly, the limit was one week, and the employer had to pay at least half the salary during the period of suspension.[79] Following the amendments, the employer can apply to the Commissioner of Labour to request for a longer period of suspension.

27 In common law, the employer cannot suspend the employee without pay unless the contract provides for it.[80] However, even if the contract is silent, the employer can suspend the employee without pay where the employee is unable to perform the work (for instance, where the employee is in remand)[81] as payment is conditional upon doing work. In addition, since the employer does not generally have an obligation to provide work,[82] the employer can always suspend *with* full pay.

28 It is not clear if these common law rules apply to the Employment Act. It is suggested that (as emphasised below)[83] common law rules which are not clearly inconsistent with the Act should not be treated as having been abrogated. The exceptions stated above seem perfectly reasonable and clearly balance the interests of both the employer and employee. Such an interpretation may also lower what could otherwise be a heavy burden on the Commissioner of Labour.

VII. Termination by notice/salary in lieu of notice

29 Thus far, primarily, the unfair dismissal provisions were considered. However, even if there is no unfair dismissal, there could still be a claim for wrongful termination if the relevant provisions in the Employment Act have not been observed.

30 In this regard, the first such provision that will be considered is s 10(1) of the Employment Act. Section 10(1) provides that either party

79 Employment Act (Cap 91, 2009 Rev Ed) s 14(8).
80 *Hanley v Pease & Partners Ltd* [1915] 1 KB 698.
81 See, for instance, *Henthorn and Taylor v Central Electricity Generating Board* [1980] IRLR 361 and *Burns v Santander UK plc* [2011] IRLR 639.
82 See, for instance, *Turner v Sawdon & Co* [1901] 2 KB 653 and *KV Pillai v Power Foam Rubber Products (MFG) Co Ltd* [1963] MLJ 268. However, there can be exceptions to this rule, such as where the occupation requires constant practice: see, for instance, *William Hill Organisation Ltd v Tucker* [1998] IRLR 313.
83 See para 39 below.

to a contract of service may "at any time" give to the other party notice of his intention to terminate the contract of service. Under s 10(2), the amount of notice to be given can be specified in the contract of service, in the absence of which, s 10(3) provides for certain periods of notice, varying from one day to four weeks, depending on the employee's length of employment with the employer. However, s 10(2) provides that the notice has to be the same for both the employer and employee, and s 10(5) provides that notice has to also be in writing.

31 The term "at any time" was considered in the recent Hong Kong case of *Cantor Fitzgerald Europe v Boyer*.[84] On the facts, the contract was for an initial period of two years; thereafter, it could be automatically renewed for successive periods of one year each time, provided it was not terminated earlier by notice. However, such notice could only be given during the last two weeks of each renewal period. The employee challenged the validity of the notice clause and the court upheld it, stating that it was unenforceable, given that s 6(1) of the Hong Kong Employment Ordinance[85] gave the right to terminate the contract of employment "at any time". Thus, for employees covered by the Employment Act, any sort of curtailment of this right to terminate "at any time" may not be valid. Employers may wish to reassess their employment contracts as to this.

32 In common law, even if the contract does not expressly allow for termination by notice, there is an implied right to terminate the contract by notice.[86] However, to this common law rule there are two exceptions. The first is where genuine fixed term contracts are concerned,[87] and the second is where as a matter of construction of the contract, it is not possible to imply such a term.[88] The question may arise as to whether these common law exceptions apply to s 10. In this connection, reference has also been made to s 9(1) which provides that:

> … a contract of service for a specified piece of work or for a specified period of time shall, *unless otherwise terminated in accordance with the provisions of this Part*, terminate when the work specified in the contract is completed or the period of time for which the contract was made has expired. [emphasis added]

84 [2012] HKCU 478.

85 Cap 57.

86 *Richardson v Koefod* [1969] 1 WLR 1812; [1969] 3 All ER 1264; *D'Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154; *KV Pillai v Power Foam Rubber Products (MFG) Co Ltd* [1963] 1 MLJ 268.

87 See, for instance, *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189.

88 See, for instance, *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594; [1957] 2 All ER 129.

While s 9(1) clearly allows a contract which is specified to last a particular period of time to be terminated before its expiry under s 10, does it indirectly prohibit having a genuine fixed term contract which cannot be terminated earlier? In *Rodney Antony Brown v Interactive Enterprises Pte Ltd*,[89] the question seemed to have been answered in the negative, and the policy behind the statute in wanting to confer protection on employees seems to have been key to the overall decision. Nonetheless, having a fixed term contract can be a boon or bane to employees. For instance, if an employee does not like the job, the employee will be forced to stay on till the stated period expires. More importantly, allowing fixed term contracts may run afoul of the right to terminate the contract "at any time" as provided for in s 10(1) and as discussed above.[90] Thus, it is suggested that the better view is that the common law exceptions do not apply in the statutory context.

33 Also, as stated above, unlike in common law, the notice has to be the same for the employer and employee as provided in s 10(2). In *Rodney Antony Brown v Interactive Enterprises Pte Ltd*, a termination clause in the contract which provided for a different period of notice for the employer and employee was held to be null and void pursuant to s 8. This is indeed correct. On the facts, the employee was on his second two-year contract when the employer sought to terminate the contract earlier by giving notice. However, as a result of s 10(2), it was held that the purported termination was ineffective. Counsel for the employer then argued that s 10(3) was applicable and on the facts, the employer had given more notice than required by s 10(3). However, the court rejected the argument, again considering the policy behind the statute. As stated, the length of notice may be a boon or bane to the employee depending on the facts. Since the court found that s 10(3) was inapplicable, it then came to the conclusion that it was, as a result, a fixed term contract (something both parties to the contract did not envisage at the time of making the contract); hence, the employee was entitled to the balance of payment for the rest of the contract. It is suggested that while Parliament would have clearly wanted to protect employees, it is unlikely that it had intended to give them a windfall. Though s 10(2) provides that only "in the absence of" of a notification provision would s 10(3) apply, using the purposive approach, it is suggested that "in the absence of" should include the absence of a valid and enforceable provision. Whatever it is, it would be good for employers to reassess their employment contracts to ensure that both the employer and employee have the same notice periods.

89 [2016] SGMC 61.
90 See paras 30–31 above.

34 Aside from s 10(1), s 11(1) allows either party to terminate by giving salary in lieu of notice. Thus, even if the contract does not provide for it, or only one party is allowed that right under the contract, for employees covered by the Employment Act, both parties have that right. As stated in s 11(1), salary has to be calculated at the "gross rate of pay", a phrase which has been defined in s 2(1) to basically mean the total amount of money the employee is entitled to under the contract of service, including allowances *but* excluding overtime payments, bonus payments, annual wage supplements, reimbursements, productivity incentive payments and travelling, food, or housing allowances. Thus, for instance, other allowances or commissions, if any, would be included. If these are not fixed and instead vary on a monthly basis, perhaps a reasonable approach would be to take an average. This again could be different from the common law position where the contract is likely to have a separate salary clause and a separate commissions or allowances clause and hence salary in lieu of notice will typically not include those. Again, employers should be mindful of this.

VIII. Deductions and other matters

35 As part of the 2018 amendments, s 27 of the Employment Act which deals with permitted deductions from salary has also been amended. Breach of s 27 results in a commission of offence under s 34. In particular, the question might arise as to whether the employer can deduct certain matters such as the cost of training or professional indemnity insurance when the employee resigns.

36 Formerly, for employees not covered under the Employment Act, such matters would essentially be determined by the contract of employment. However, now such matters would fall under the purview of s 27. Section 27(1)(*i*) provides that the employer is permitted to make other deductions not mentioned in certain subsections of s 27(1), provided the employee gives written consent. However, s 27(1A) provides that such written consent may be withdrawn at any time before the deduction is made and that the employee cannot be penalised for so withdrawing consent. Though this section was probably introduced with the intention of protecting low wage foreign workers against exploitative employers, it equally applies to everyone covered by the Employment Act. Hence, even if the contract provides for it, if the employee withdraws consent, the employer will not be able to make a deduction from the employee's salary for matters such as training costs and would instead have to bring a separate claim to enforce the provision, which may prove to be a hassle.

37 In addition, as part of the 2018 amendments, annual leave, which was in Pt IV of the Employment Act, has been taken out of Pt IV

and placed under Pt X. As a result, it now applies to all employees covered by the Employment Act. Section 88A(1) guarantees a certain minimum amount of annual leave. Employees who are managers or executives are likely to be already entitled to more leave than that provided for by s 88A(1); hence, this should not be a great concern to employers. However, while the Employment Act allows for terms to be more favourable, it does not allow terms to be less favourable.[91] Thus, in relation to statutorily entitled leave,[92] it may not be possible for the employer to state that such leave would be forfeited upon the employee giving notice to resign. Again, employers should reassess their employment contracts to see if this is the case.

IX. Common law principles

38 Perhaps the one issue which is likely to resurface time and again with the 2018 amendments is the interaction between common law rules and the Employment Act, now that most employees are covered by the Employment Act, including senior ones. Some such instances have been identified earlier in this comment. Another example could be the issue of whether the doctrine of estoppel or waiver applies to dismissals or constructive dismissals under the Employment Act as such. Yet another example could be s 16 which essentially provides that subject "to anything in the contract of service to the contrary, the party who breaks the contract of service shall be liable to pay to the other party" salary in lieu of notice. Does this mean that if the employee is dismissed for breach of confidentiality and the employer sues the employee for damages, salary in lieu of notice is all the employer can get?

39 In this regard, it should be highlighted that it was accepted by the Court of Appeal in *Ying Tai Plastics & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu*[93] that "[i]t is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point

91 Employment Act (Cap 91, 2009 Rev Ed) s 90.

92 If an employer confers more leave on an employee than what is required by the Employment Act, it is not entirely clear whether that leave can be forfeited. However, it is suggested that, since that is not a statutory entitlement, the contract can provide for that excess part to be forfeited. Also, in so far as the employee takes any leave in excess of the statutory entitlement (for instance, takes seven days of leave immediately after three months of service without prorating as required by s 88A(2) of the Employment Act (Cap 91, 2009 Rev Ed)) and subsequently resigns before fully qualifying, the employer may be able to make a deduction from his salary pursuant to s 27(1)(*f*) read with s 27(3) of the Employment Act.

93 [1983–1984] SLR(R) 212 at [19]. See also *Goldring Timothy Nicholas v Public Prosecutor* [2013] 3 SLR 487 at [51]–[54].

unmistakably to that conclusion",[94] though this was not stated with reference to the Employment Act.

X. Conclusion

40 As mentioned at the start, the changes are certainly to be welcomed, including from the viewpoint of termination. While employees may have greater rights now, the fact that there are prescribed limits clearly takes into consideration the legitimate interests of employers too. The only shortcoming, if any, is the time limit for bringing such actions in relation to a s 14(2) claim. In this regard, the time limit in many other jurisdictions is longer.[95] Hopefully, in the subsequent amendments, this and some of the other highlighted concerns will be re-evaluated or addressed.

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94 *National Assistant Board v Wilkinson* [1952] 2 QB 648 at 661, *per* Lord Devlin.

95 For instance, in Hong Kong under s 32I of the Employment Ordinance 1968 (Cap 57), it is three months. In UK, under s 111 of the Employment Rights Act 1996 (c 18), it is also three months. In Malaysia, under s 20(1) of the Industrial Relations Act 1967 (No 177 of 1967), it is two months. In addition, in Hong Kong and UK, there is power to extend the time limit as well.