(2023) 35 SAcLJ 191
(Published on e-First 7 November 2022)

Case Note

TRUST AND CONFIDENCE IN EMPLOYMENT CONTRACTS

Fact or Myth?

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

At common law, the implied duty of mutual trust and confidence has been thought to apply to all employment contracts. The implied duty has been rejected in Australia but continues to be applied in the UK, Hong Kong and, until recently, has been thought to apply in Singapore. In *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318, the Appellate Division of the High Court cast doubt on the existence of the implied duty under Singapore law. This case note discusses the court's reasoning and arguments for and against the implied duty.

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1 The authors are grateful to Chan Jia Fen of ADTLaw LLC who provided invaluable assistance. The views and opinions expressed in this case note are the authors' own and do not reflect the views of ADTLaw LLC.

I. Introduction

1 The implied duty of mutual trust and confidence ("Duty" or "Term") has been thought to apply to all employment contracts at common law. However, the common law does not speak with one voice on this issue. In the UK[2] and Hong Kong,[3] the Duty requires the employer not to, "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".[4] In contrast, the implication of the Duty was rejected in Australia on the basis that to do so would be a "step beyond the legitimate law-making function of the courts".[5]

2 In *Dong Wei v Shell Eastern Trading (Pte) Ltd*,[6] the Appellate Division of the High Court ("High Court (Appellate Division)") made important comments on whether the Duty exists in employment contracts, and to what extent an employer's right to terminate the employment in accordance with the employment contract may be qualified.

II. Facts

3 Dong Wei was employed by Shell Eastern Trading (Pte) Ltd ("Shell Eastern") from 2006 until his employment was terminated on 10 January 2018.

4 The events that eventually led to Dong Wei's dismissal started with his telephone call in September 2017 to a trader with Vitol Asia Pte Ltd ("Vitol") regarding the use of a "cheap ship", that is, a third-party vessel allegedly owned by Dong Wei's friend. Dong Wei's query was a departure from industry practice and came to the attention of his line manager, Lim Ming Way.

5 Dong Wei was previously investigated by Shell Eastern in relation to two separate allegations and was subjected to disciplinary action.

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2 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45F, *per* Lord Steyn.

3 See *Ko Hon Yue v Liu Ching Leung* [2008] HKCU 1215 at [163]–[171] for a discussion on the implied Term in the context of dismissal, citing the Hong Kong Court of Appeal case of *Semana Bachicha v Poon Shiu Man* [2000] 2 HKLRD 833 which held that the employer's conduct amounted to both a constructive dismissal and a breach of the implied Term.

4 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, also cited in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [32].

5 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [1] and [26].

6 [2022] 1 SLR 1318.

After Shell Eastern learned of Dong Wei's call to Vitol, it suspended Dong Wei with full salary. The suspension notice stated that he would be told the outcome of the investigation. While the investigation found that the allegations were "inconclusive", Dong Wei was not informed of the outcome.

6 In November 2017, an editor from S&P Global Platts ("Platts") contacted Shell Eastern regarding market "chatter" that members of Shell Eastern's chartering team were being investigated. Shell Eastern declined to comment.

7 Shortly after, Platts published an article regarding the investigation (the "Platts Article").[7] Although Dong Wei was not named, the Platts Article identified the chartering team.

8 In January 2018, Dong Wei was told that Shell Eastern had decided to exercise its contractual right to dismiss him with three months' notice. It was explained that the decision was not a direct consequence of the outcome of the latest investigation but rather the events over the last few years such that Shell Eastern was unable to continue working with Dong Wei.

9 Subsequently, Dong Wei was unable to find re-employment. He commenced proceedings against Shell Eastern and Lim, claiming that this was caused by the events leading to his dismissal.

III. Decision of the General Division of the High Court

10 Dong Wei's claims against Shell Eastern and Lim were dismissed.[8] The court accepted that Singapore law recognised an implied Duty in employment contracts but found no breach on the facts.[9]

11 The General Division of the High Court ("High Court (General Division)") examined the seminal decision of *Malik v Bank of Credit and Commerce International SA*[10] where it was stated that the impact of the employer's behaviour must not be trivial (since the court does not

7 Sameer C Mohindru & Wanda Wang, "Tankers: Shell Probing Claims of Unethical Freight Dealings in Singapore, Say Sources" *S&P Global* (12 December 2017) <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/shipping/121217-tankers-shell-probing-claims-of-unethical-freight-dealings-in-singapore-say-sources> (accessed 28 October 2022).

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

9 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [31] and [32].

10 [1998] AC 20.

generally manage the employment relationship in detail) and that the employee may rely on a series of actions on the part of the employer which can cumulatively amount to a breach of the Term even if each individual incident is insufficient to amount to a breach.[11]

12 From a survey of case law,[12] the court accepted the implied Duty applied in Singapore law as a term implied by law in employment contracts. Even though the implied Term can apply to anything that affects the continuation of the employment relationship, it may be excluded or modified by express terms in the contract.[13] The court also held that a breach of the implied Term is independently actionable.[14]

13 While the implied Term extends to stigma and analogous situations to some extent, regulating the employer's conduct in suspending and investigating employees within bounds,[15] it does not import all the obligations of implied justice or due process obligations that should instead primarily be imported through legislation.[16] The High Court (General Division) also found that broad obligations, if undefined, may unduly constrain the employer's interest in managing the business.[17] The High Court (General Division) found that there was no breach of the implied Term since Dong Wei was suspended for proper and reasonable causes, and there was no misconduct in the investigation process on the facts.[18] Dong Wei appealed.

IV. Decision of the Appellate Division of the High Court

14 The High Court (Appellate Division) dismissed the appeal. As the various causes of action overlapped, the High Court (Appellate Division) focused on the losses which Dong Wei sought to recover:[19]

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11 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [39].

12 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [40]–[42], discussing *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 (where the High Court held that unless there are express terms to the contrary, or the context implies otherwise, an implied term of mutual trust and confidence is implied by law into a contract of employment under Singapore law) and *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 (where, although not explicitly stated, the Court of Appeal proceeded on the assumption that the implied Duty was part of Singapore law).

13 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [43].

14 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [44]. The reasons for this, however, were not clearly stated.

15 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [45] and [56].

16 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [45] and [59].

17 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [59].

18 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [131].

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

(a) damages flowing from Dong Wei's allegedly wrongful suspension and Shell Eastern's mismanagement of the investigation (the "First Head of Loss");

(b) cash bonuses and share options Dong Wei would have received or retained had his employment not been wrongfully terminated, or the termination not been wrongfully brought about (the "Second Head of Loss"); and

(c) damages flowing from stigmatisation Dong Wei faced in the industry which prevented him from securing new, comparable employment (the "Third Head of Loss").

15 Dong Wei failed to establish the various causes of actions.[20] Further, none of the Heads of Loss were established. It is well established that employers may terminate employment without cause in accordance with an express right of termination, so long as sufficient written notice or salary in lieu of notice is given – this essentially imposes a limit on a claim for damages for wrongful termination by way of the "minimum legal obligation rule".[21] Dong Wei was paid his full salary for the entire period of his suspension and received salary in lieu of notice in accordance with the express right of termination in his contract of employment.[22]

V. Key observations by the Appellate Division of the High Court

16 Although the appeal was dismissed, the High Court (Appellate Division) made notable observations, albeit in *obiter*, that likely will influence the future development of employment law in Singapore.

A. Disclosure of the investigation outcome to Dong Wei

17 While the notice given to Dong Wei expressly provided that he would be informed of the outcome of the investigation, this was never done, and he only obtained the investigation report through discovery in the High Court proceedings.[23] Before the High Court (Appellate Division), counsel for Shell Eastern maintained that it was not obligated to make disclosure to Dong Wei, and it was neither meaningful nor

20 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [25]–[47].

21 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [21], citing examples of *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [13] and *Wong Sung Boon v Fuji Xerox Singapore Pte Ltd* [2021] SGHC 24 at [120]–[121].

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

23 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [66].

productive for the disclosure to be made given that Shell Eastern had terminated Dong Wei's employment without cause and with salary in lieu of notice.[24]

18 In the High Court (Appellate Division)'s view, regardless of any legal obligation, Shell Eastern should have paused to think about what Dong Wei might have found meaningful, productive or cathartic to be told.[25] It would only have been fair for Dong Wei to be informed since he was the subject of the investigation, all the more so when Shell Eastern's own notice stated that he would be informed.[26]

B. (Non-)existence of the implied duty of mutual trust and confidence

19 The High Court (Appellate Division) clarified that it was not settled by the Court of Appeal that the implied Term forms a part of Singapore law,[27] despite a number of previous Singapore High Court cases that implicitly accepted the Term.[28] In particular, there was no endorsement of the implied Term in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd*[29] ("*Wee Kim San*") as the Court of Appeal's discussion of the implied Term was "limited substantially by the factual and procedural context of the case before it".[30]

20 The High Court (Appellate Division) also referenced the Australian decision of *Commonwealth Bank of Australia v Barker*,[31] where the High Court of Australia held that the implied Term did not form a part of Australian employment law.[32] The High Court (Appellate Division), like the High Court of Australia, was mindful of the specific context in which the implied Term was developed both through legislation[33] and English case law.[34] In particular, the High Court (Appellate Division) noted that

24 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [66].
25 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].
26 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].
27 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [69]. See the Court of Appeal case of *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357, discussed in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [73]–[82].
28 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [71]–[72], where the High Court (Appellate Division) referenced multiple High Court cases that have implicitly accepted the implied Term.
29 [2014] 4 SLR 357.
30 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [73].
31 (2014) 253 CLR 169.
32 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [75].
33 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [76].
34 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [77].

the implied Term "operates to secure the *continued functioning* of the employment relationship" and the "wide range of specific obligations" imposed by the Term must "go towards that purpose, and cannot extend past the subsistence of the employment relationship"[35] [emphasis in original].

21 The High Court (Appellate Division) held that whether the implied Term exists under Singapore law remains an "open question" that will have to be resolved by the Court of Appeal in an appropriate case.[36] At that time, the Court of Appeal would have to: (a) precisely delineate the scope of the implied Term; and (b) elucidate the appropriate remedial consequences which should follow from a breach of the implied Term.[37]

C. Contractual discretions not limited

22 The High Court (Appellate Division) stated that there is no prohibition against arbitrariness, capriciousness and bad faith that can restrict an employer's exercise of the express contractual right to terminate employment without cause, either with notice or salary in lieu of notice.[38]

23 First, the implied Term (if accepted in Singapore), is not a non-derogable norm superimposed by law on employment contracts.[39] Parties will be able to exclude or modify the implied term to limit its content through express terms.[40]

24 Second, there is no independent limitation on contractual discretions developed through case law. The High Court (Appellate Division) examined a line of cases where a party's contractual discretion had been restricted[41] and held that the restrictions on the exercise of contractual discretion in those cases related to rights subsisting within the contract, and did not limit the right to bring a contract to an end.[42] Distinctly, where the termination of a contract is concerned, considerations of the parties' freedom to enter and exit contracts arise. The High Court (Appellate Division) did not find sufficient reasons to

35 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [77].
36 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [82].
37 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [79].
38 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [84].
39 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [85].
40 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [85].
41 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [87]–[90].
42 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [91].

limit such freedoms, which it deemed "so fundamental a premise of contract law in Singapore".[43]

VI. Commentary

A. Unique nature of the employment relationship

25 The employment relationship is unique in being unlike commercial contracts. In modern life, it has assumed a central role. In the words of Lord Hoffmann, "it gives not only a livelihood but an occupation, an identity and a sense of self-esteem".[44] More than a means of financial support, it also provides meaning and confers a certain status. The courts have thus recognised that a contract of employment is a special kind of agreement with special attributes[45] that is different from a commercial contract.[46]

26 The High Court (Appellate Division) implicitly acknowledged this when it observed that employment is a two-way relationship.[47] Citing the classic formulation of the implied Term,[48] the court reasoned that the implied Term:[49]

> … operates to secure the *continued functioning* of the employment relationship, and though the Term entails the potential imposition of a wide range of specific obligations, those obligations must go towards that purpose, and cannot extend past the subsistence of the employment relationship. [emphasis in original]

27 In the authors' view, it would be difficult to argue against this. This is not to say that the *manner* of terminating the employment of an employee is unimportant, a sentiment which was expressed by the court when it stated that, even when the relationship is coming to a close, the employer would "do well to consider" how to treat their employees with "dignity and respect".[50] Nonetheless, in the authors' view, the court rightly

43 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [92].
44 *Johnson v Unisys Ltd* [2001] 2 WLR 1076 at [35]–[36].
45 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [41], citing *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [54].
46 *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [54].
47 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].
48 As formulated by Lord Nicholls in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 35A, *viz*, that the Term 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". This was cited in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [77].
49 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [77].
50 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [68].

decided against limiting Shell Eastern's right to terminate Dong Wei's employment without cause.

28 More fundamentally, ought the courts to import into the employment contract the implied Duty, whether by means of a term implied by law or through the statutory wrongful dismissal regime? And, more importantly, should that duty limit the right of termination of employment on the part of both employers *and* employees?

B. Termination of the employment relationship – Breach of the implied duty of mutual trust and confidence or wrongful dismissal?

29 The unique nature of the employment relationship gives rise to conceptual difficulties when considering whether the Duty ought to be implied as a term as a matter of *law*.[51] If so, the term would be implied "in a *general* way for *all* specific contracts that come within the purview of a broader umbrella category of contracts"[52] [emphasis in original].

30 The category of "terms implied in law" is firmly woven into the tapestry of Singapore contract law.[53] These are terms implied into:[54]

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51 In the recent decision of *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2022] SGHC 261 (released after this article was written), Kwek Mean Luck J expressed concerns with implying the Duty as a matter of *law*: see [50]–[54]. In this case, the plaintiff (the employee) contended that his employment contract with the defendant (the employer) included an implied term of mutual trust and confidence, the content of which included an obligation on the part of *both* the employee and the employer to comply with all of the employer's policies. The judge expressed concern that the question of the "wider impact on other companies" which would flow from the plaintiff's pleaded case and submission is not one which is "best arrived at through the process of a private employment dispute between two parties" (at [52]). In the judge's view, if accepted, the plaintiff's submission would have "implications for other companies in the private sector, public sector and charity sector, and not just GSK. There will be a precedent for companies to be contractually bound by their own policies pursuant to an [implied term of mutual trust and confidence]" (at [54]). The judge went on to note that there was no evidence before the court as to "what constitutes policies for these companies or what part of their policies should be binding". In the authors' view, with respect, the concerns aptly express the conceptual and practical problems with the implication of the Duty as a matter of law – *viz*, the *content* of the Duty, and the *consequences* of implying the Duty – which would extend it to all such contracts of a similar kind.

52 *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [42].

53 *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [91].

54 *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) at para 16-005.

> … a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it.

Although the courts have stated that the law is "concerned with considerations of *fairness* and *policy* rather than the intention of the parties *per se*" [emphasis in original] in cases involving implication of terms in law,[55] it is uncontroversial that the relevant "standard for the implication of terms" generally, whether in fact or in law, is *necessity*, as the implication of terms is a legal device that operates as "*ad hoc* gap fillers".[56] This category of implied terms is broader than "terms implied in fact", and the courts ought to be more careful in implying these terms.[57]

31 There are good reasons for adopting such a cautious approach. As Andrew Phang Boon Leong J explained in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* ("*Forefront*"):[58]

> The *rationale as well as test* for this broader category of implied terms is … quite *different* from that which obtains for terms implied under the 'business efficacy' and 'officious bystander' tests. In the first instance, the category is much broader inasmuch … the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a contract 'in law' in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, … Hence, … courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the 'business efficacy' and 'officious bystander' tests which relate to the *particular contract and parties only*. [emphasis in original]

32 Arguably, the touchstone of *necessity* ought to apply with even greater force in considering whether a term should be implied in law. Although mentioned only in passing in *Forefront* in the context of the "business efficacy" test,[59] this appears to have found support in an earlier decision of the Court of Appeal.[60] As far as the authors are aware, what would amount to necessity in relation to terms implied by law does not appear to have been expressly considered in Singapore. However, given

55 *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [68].
56 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [81]–[82].
57 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [38], citing *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [44].
58 [2006] 1 SLR(R) 927 at [44].
59 *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [29].
60 *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court* [1991] 2 SLR(R) 992 at [5].

the difficulty inherent in the application of such a term to the termination (as opposed to continuation) of employment, the Term would likely not satisfy the necessity test. Necessity would have the same conceptual meaning as in the context of terms implied in fact, whether according to the "business efficacy" or "officious bystander" tests.

33 That said, the historical origin of the Term is neither a "fundamental" nor "insurmountable objection"[61] to its acceptance, as long as the court is able to "precisely delineate the scope of the implied term; and elucidate the appropriate remedial consequences which should follow from a breach of such term".[62] These could potentially be where, as the Court of Appeal recognised,[63] the facts gave rise to a claim for "premature termination losses" (that is, losses that were causally connected to the premature termination of the employment contract) or the consequence of the breach was something other than the premature termination of the employment contract (such as the impairment of future employment prospects or other types of continuing financial losses). In the authors' view, it would be difficult to show losses of the first kind where the contract had been terminated by giving the required notice (or paying salary in lieu of notice). As to the second, these would be subject to proof of causation and the usual limiting principles of remoteness and mitigation, as *Wee Kim San* recognised. This would necessarily involve a fact-specific and sensitive inquiry.

34 Notwithstanding that the High Court (Appellate Division) declined to endorse the existence of the implied Term, employers should be mindful that termination of employment with notice in accordance with the terms of the contract can still amount to wrongful dismissal under the Tripartite Guidelines on Wrongful Dismissal.[64] This could be the case where, for example, the termination was held to be discriminatory in nature or was done based on a reason that was subsequently found to be false. This last consideration is particularly germane since employers are typically advised not to give reasons when terminating an employee's employment. In this light, the High Court (Appellate Division)'s advice for the employer to think about what the employee might find meaningful,

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

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

63 *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 at [24]–[35].

64 29 April 2022. Under the Employment Claims Act 2016 (2020 Rev Ed), an employee is entitled to bring a statutory wrongful dismissal claim against the employer in the employment claims tribunal ("ECT"). In such a statutory claim, the ECT is empowered to "have regard to" the Tripartite Guidelines on Wrongful Dismissal. Further, it is open to the employee to commence a common law action for wrongful dismissal in the Singapore courts instead of the ECT. See further nn 72–74 below.

productive or cathartic to be told may have to be approached with caution in practice. Aside from the fact that dismissal with notice without reasons is presumed not to constitute wrongful termination under the Tripartite Guidelines on Wrongful Dismissal,[65] it may still be advisable for employers not to give reasons, particularly where an employer has taken into consideration matters which were not strictly within the scope of the investigation.[66]

35 Further, although not considered by the High Court (Appellate Division), an employee whose employment is terminated contractually may have grounds to allege that the termination was "without just cause or excuse" under s 14(2) of the Employment Act 1968[67] ("EA") and hence was wrongful. As far as the authors are aware, the term "without just cause or excuse" has not been considered by the courts.[68] Nevertheless, where dismissal is with notice, it is difficult to see how it could be said that the dismissal was "without just cause or excuse"; in this regard, the non-exhaustive illustrations under the Tripartite Guidelines on Wrongful Dismissal are likely to be instructive.[69]

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65 Tripartite Guidelines on Wrongful Dismissal (29 April 2022) at para 7.

66 Equally, the courts have reinforced that employment is a two-way relationship. There may be conduct on the part of an employee which is:

> … contrary to the interests of the employer and serious enough to have the effect that the employer could not reasonably be expected to have confidence in the employee. … While trust and confidence is maintained, the relationship endures. In that sense, the employee's duty may be said to be directed to the maintenance of the relationship. Yet the law recognised that, where a point of no confidence is reached, it would be intolerable for the employer to continue with the relationship. In such circumstances, termination of the employment is justified

See *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [66], *per* Kiefel J.

67 2020 Rev Ed.

68 The repealed English Industrial Relations Act 1971 (c 72), on which the Employment Act 1968 (2020 Rev Ed) was based (see *Lim Tow Peng v Singapore Bus Services Ltd* [1974–1976] SLR(R) 673 at [16]–[17]), does not use the term "without just cause or excuse". Instead, the English legislation considers whether a dismissal "was fair or unfair" and required the employer to show: (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and (b) that it was a reason (i) relating to the capability or qualifications of the employee for performing work of the kind which he was employed to do; (ii) relating to the conduct of the employee; (iii) that the employee was redundant; or (iv) that the continued employment of the employee contravened "an enactment", or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

69 See n 63 above. See Singapore Parl Debates; Vol 94; [20 November 2018], where the Minister for Manpower, Ms Josephine Teo, stated that the Ministry of Manpower would publish the Tripartite Guidelines on Wrongful Dismissal (29 April 2022), which states at para 7 that dismissals with notice are *presumed* not to be wrongful.

36 As far as the authors are aware, the interplay between the implied Term and the provisions of s 14 of the EA has not been pronounced upon by the courts, and it would certainly conduce to clarity if the courts were to do so in the future if such a Term is to be implied in law. This question has been considered in both the UK[70] and Hong Kong,[71] where it is clear that the implied Term does not apply in connection with the manner of dismissal.[72]

37 Until the issue is clarified by the Singapore courts, the authors submit that there is much to commend in the approach taken by the English and Hong Kong courts. The implied Term and the protection against wrongful dismissal under s 14 of the EA are conceptually related but distinct – the implied Term relates to the preservation of the *continuing* employer–employee relationship[73] while s 14 of the EA governs the *termination* of the relationship. On a plain reading of the legislative provisions, an employee would not be able to bring a claim under s 14 of the EA unless that employee "has been *dismissed* without just cause or

70 In *Johnson v Unisys Ltd* [2001] 2 WLR 1076 at [46], Lord Hoffmann held that, given that how the implied Term has been formulated, it is "concerned with preserving the continuing relationship which should subsist between the employer and employee" and so is not appropriate when the relationship is terminated. See also Lord Nicholls's comment (at [2]) that "a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed".

71 The Hong Kong Court of First Instance in *Lam Siu Wai v Equal Opportunities Commission* [2021] HKCFI 3092 at [27]–[29] and [32] recently confirmed that the implied Term cannot be applied to water down an employer's right to terminate the employment of a worker without cause by invoking the notice provisions (citing *Tadjudin Sunny v Bank of America, National Association* [2016] HKEC 1128). Further, the contractual right to terminate an employment (on the part of either employer or employee) *can* be exercised unreasonably or capriciously so long as the right is exercised in accordance with the contract. As implying a duty of good faith in the termination of employment without cause would have far-reaching effects on the law of employment, such changes in the law should be dealt with by the Legislature.

72 Until *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 ("*Dong Wei*"), it was widely thought that *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("*Wee Kim San*") stood as authority (tacitly) endorsing the implied Term under Singapore law (see *Wee Kim San* at [31]–[33]). However, the High Court (Appellate Division) was of the view that *Wee Kim San* was not a formal endorsement of the implied Term and ought to be considered on the facts of that case (see *Dong Wei* at [73]–[80]). *Wee Kim San* involved an appeal to the Court of Appeal in respect of an interlocutory application to summarily strike out the employee's claim for breach of the implied Term under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Further, although the Court of Appeal is Singapore's apex court, *Wee Kim San* and *Dong Wei* were each decided by a *coram* of three judges.

73 *Johnson v Unisys Ltd* [2001] 2 WLR 1076.

excuse"[74] [emphasis added]. Further, although the issue is not necessarily foreclosed,[75] the Legislature has introduced s 14 of the EA to govern matters relating to the dismissal of eligible "relevant employees", a cause of action (that is, dismissal without just cause or excuse) and applicable remedies (reinstatement or compensation), even if for various reasons some employees may take the view that a statutory wrongful dismissal claim may not be a meaningful "deterrent" against errant employers.

38 Nevertheless, there is potentially scope for legislative amendment or clarification, given that in practice the facts and grounds on which an individual may allege a breach of the implied Term, constructive dismissal and a breach of s 14(2) of the EA (that is, wrongful dismissal) often overlap.[76] The common thread which appears to run through each of these claims is an employee who feels that he or she has not been treated with "dignity and respect".

VII. The implied duty of mutual trust and confidence – What next?

39 Arguments against or in favour of the implied Duty are finely balanced, although it would appear that the case against such a Duty is

74 Employment Act 1968 (2020 Rev Ed) s 14(2). This provision states:

> Despite subsection (1), but subject to section 3 of the Employment Claims Act 2016, where a relevant employee considers that he or she has been dismissed without just cause or excuse by his or her employer, the employee may lodge a claim, under section 13 of that Act, for either of the following remedies:
>
> (*a*) reinstatement in the employee's former employment;
>
> (*b*) compensation.

75 Under the statutory framework, an individual who wishes to bring a claim under s 14 of the Employment Act 1968 (2020 Rev Ed) ("EA") must first mediate certain prescribed disputes in accordance with the Employment Claims Act 2016 (2020 Rev Ed) ("ECA") before lodging the claim with the ECT. While the EA does not use the term "wrongful dismissal", the Third Schedule to the ECA is headed "Wrongful dismissal disputes" and expressly includes a claim made under s 14(2) of the EA. Notably, s 16 of the EA expressly envisages the possibility that "a claim relating to a specified employment dispute" may be brought in "any other court".

76 Paragraph 1 of the Tripartite Guidelines on Wrongful Dismissal (29 April 2022) expressly states that a dismissal "includes involuntary resignation", which is commonly regarded as constructive dismissal in practice. As Lord Nicholls astutely observed in *Eastwood v Magnox Electric plc* [2004] 3 WLR 322 (at [27]–[33]), a strict delineation of statutory and common law rights and remedies has "awkward and unfortunate consequences". These include cases involving a continuing course of conduct, typically involving disciplinary process leading to dismissal, which may "may have to be chopped artificially into separate pieces". The authors have highlighted some of these "unfortunate consequences"; however, a thorough discussion of these issues is beyond the scope of this article.

more compelling considering the Singapore employment law landscape and the difficulties in practice.

40 Just as the High Court (Appellate Division) was at pains to protect the rights of both parties when deciding against limiting Shell Eastern's express right to terminate Dong Wei's employment without cause, so too there was an implicit recognition that there was insuperable difficulty in limiting Dong Wei's right to terminate his employment, if he so desired:[77]

> Where the termination of a contract is concerned, especially where there is an express clause permitting termination by way of notice, considerations of the parties' freedom of contract (and conversely, to exit contracts) come into play. … Furthermore, in the case of employment contracts, the right to terminate with notice or pay in lieu of notice tends to cut both ways. This was, in fact, the case here. Clause 5 of the Appellant's contract of employment read, 'You, or the Company [Shell Eastern], shall have the right to terminate your employment herein by giving the other party three months' notice in writing'. … it is difficult to see why the employee's contractual discretion to quit would not likewise be limited. That, however, would seem to be a particularly unpalatable proposition in the field of employment law, where it is trite that *employers cannot be compelled to hire or retain, but more importantly, that employees cannot be forced to work*. [emphasis added]

41 Certainly, an employee does not need to have "good reason" to terminate his employment, and the legislative framework expressly enshrines that right: an employee can terminate his employment at any time by complying with the agreed terms of termination, and to disallow an employee to leave his job is an offence.[78]

42 As noted by the High Court, the Duty has been applied in a wide range of contexts.[79] On one view, the scope of the implied Term is too broad and there is a need to delineate with specificity the circumstances in which the implied Term would be applicable. However, one must

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77 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [92].

78 See "Can an Employer Reject an Employee's Resignation?" *Ministry of Manpower Singapore* <https://www.mom.gov.sg/faq/termination/can-an-employer-reject-an-employees-resignation#:~:text=No.,employees%20to%20leave%20their%20job> (accessed 10 June 2022). See also s 19 of the Employment Act 1968 (2020 Rev Ed).

79 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [56]. The court listed a non-exhaustive list of how the implied Duty has been applied to 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 an humiliating circumstance"; and (h) "a duty not to behave in an intolerable or wholly unacceptable way".

consider if leaving it to the courts to imply a duty of mutual trust and confidence is indeed the best approach, noting that parties may agree that an implied Term would be excluded from the contract. In the context of employment contracts, the employer and employee do not necessarily deal with each other on an equal footing as commercial parties do. Further, one must take into account that the existing cases in Singapore, the UK and Hong Kong were decided in the context of their respective prevailing legislative frameworks, which reflect the various normative considerations inherent therein.

43 For example, many jurisdictions have extensive rules governing workplace conduct. In those jurisdictions, there are additional statutory protections regulating the employment landscape.[80] In comparison, the Singapore government has adopted an incremental approach towards legislating workplace conduct rules – it set up the Tripartite Alliance for Fair and Progressive Employment Practices ("TAFEP") in 2006[81] and, aside from s 14 of the EA, recently announced that the TAFEP guidelines would be enshrined in law.[82]

44 The Singapore employment landscape has arguably received more attention and substantive legislative changes in the last decade than the aggregate of the preceding three decades. Further, it has also been announced[83] that additional changes are currently being studied and considered. Considering how the Singapore government is taking

80 In Australia, employees are afforded legislative protection under the Age Discrimination Act 2004 (No 68 of 2004), Disability Discrimination Act 1992 (No 135 of 1992), Racial Discrimination Act 1975 (No 52 of 1975), Sex Discrimination Act 1984 (No 4 of 1984), Modern Slavery Act 2018 (No 153 of 2018), Fair Work Act 2009 (No 28 of 2009) and other relevant legislations.

81 "About TAFEP" *Tripartite Alliance for Fair and Progressive Employment Practices* <https://www.tal.sg/tafep/about-us> (accessed 10 June 22).

82 Prime Minister Lee Hsien Loong, speech at the National Day Rally 2021 (29 August 2021) <https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2021-English> (accessed 10 June 2022). See also Singapore Parl Debates; Vol 95; [14 September 2021], where it has been further explained that "rather than rush to legislate, the tripartite partners recognised that education to cultivate the right workplace norms and values was the foremost and more fundamental task. We did not want the process to become legalistic or confrontational. It is better if disputes can be resolved amicably".

83 Chew Hui Min, "MOM to Set up Committee to Examine if Laws against Workplace Discrimination Should Be Introduced" *Channel NewsAsia* (26 July 2021) <https://www.channelnewsasia.com/singapore/mom-committee-laws-against-workplace-discrimination-tan-see-leng-2063591> (accessed 20 October 2022) and Gan Siow Huang, Minister of State for Manpower, speech at Committee of Supply 2022 (7 March 2022) <https://www.mom.gov.sg/newsroom/speeches/2022/0307-speech-by-minister-of-state-for-manpower-ms-gan-siow-huang-at-committee-of-supply-2022> (accessed 20 October 2022).

considered steps to shape the employment landscape, importing the implied Term in *all* contracts may indeed be a "step beyond the legitimate law-making function of the [Singapore] courts".[84]

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84 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 ("*Barker*") at [1]. The High Court in *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2022] SGHC 261 expressed agreement with the observation of the High Court of Australia in *Barker* (at [118]) that the Duty would "intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity": at [51]. The High Court went on to concur with the statement made in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77] that it "is impermissible for the courts to arrogate to themselves legislative powers" or become "mini-legislatures".