BONUSES (AND OTHER PAYMENTS) IN EMPLOYMENT

The issue of bonuses paid to some, such as bankers and chief executive officers, has attracted much attention in recent times. The aim of this paper is to examine the details relating to bonuses, both guaranteed and discretionary. Some drafting perspectives with respect to bonuses are also considered with the view of the employer in mind. However, while the main focus of the paper is on bonuses, many issues which are discussed may be equally applicable to other payments such as commissions and severance benefits.

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I. Guaranteed bonus

1 It is not uncommon for a contract[1] to provide for a guaranteed bonus[2] as this helps to attract employees to the job and to retain them. Sometimes, no conditions may be attached to the guaranteed bonus as is often the case with annual wage supplements. However, conditions may sometimes be attached. Such conditions may either be positive in nature, such as stating that a certain sales target must be attained, or negative in nature, such as stating that there must not be any gross misconduct or negligence. Many issues arise in relation to guaranteed bonuses and these are discussed below.

A. Burden of proof

2 Assuming the guaranteed bonus has conditions attached to it, the first question that arises is who has the burden of proving that the stated conditions have or have not been satisfied? In *Chew Nam Fong Ronny v Continental Chemical Corp Pte Ltd*,[3] the plaintiff whose contract was terminated by salary in lieu of notice sued his employer for severance payments allegedly owed to him under his contract of

1 Even if the contract does not provide for a guaranteed bonus, it is possible for the employer to subsequently promise a guaranteed bonus, and assuming this amounts to a lawful variation of the contract, this too can be enforced; see, for instance, the recent UK case of *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB).

2 See, for instance, *Ng Peng Hon Stanley v AAF Pte Ltd* [1977–1978] SLR(R) 460; *Goh Guan Chong v AspenTech, Inc* [2009] 3 SLR(R) 590 and *Hengxin Technology Ltd v Jiang Wei* [2009] SGHC 259.

3 [2011] SGHC 166.

employment. The contract provided: "Should your employment be terminated by the Company for reasons other than poor performance, gross negligence, gross misconduct or criminal conviction in a Court of Law, you shall be paid severance payment of two times annual salary." Lai Siu Chiu J held:[4]

> Where, as in this case, there is a provision in the employment contract stipulating severance payment when employment is terminated except for certain reasons, it is in all likelihood the parties' intention that the employer must prove that the termination of employment was for one of those reasons. This is generally due to the fact that in most cases, it is the employer who has the particular knowledge of why the employment was terminated.

This is indeed correct, but on the facts, the plaintiff had also sued for the annual bonus. In this connection, the contract stated that the employee "will participate" in the bonus, but that the amount would depend on the employee's performance. The bonus clause also went on to set out the formula for the bonus. The bulk of the judgment related to severance payments, but after the employer established that there was indeed poor performance, the court concluded:[5]

> It is the prerogative of the plaintiff's employers to set certain performance targets. In the absence of a convincing justification, the failure to achieve those targets constitutes poor performance. For these reasons, the second defendant has succeeded in proving that the plaintiff's employment was terminated for poor performance. It follows that the plaintiff was entitled to neither severance payment nor performance bonuses under the contract of employment.

It is suggested that since the court had already come to the conclusion that the plaintiff's performance had been poor, the court went on to hold that the plaintiff was not entitled to the bonus. This should not be interpreted to mean that if the contract merely set performance targets to be met, it is for the employer to prove that these have not been met. Going by the court's reasoning highlighted earlier, since this would be something within the knowledge of the employee, and since it is the employee who is bringing the claim, it should be for the employee to prove that the performance criteria set have been met.

4 *Chew Nam Fong Ronny v Continental Chemical Corp Pte Ltd* [2011] SGHC 166 at [22].

5 *Chew Nam Fong Ronny v Continental Chemical Corp Pte Ltd* [2011] SGHC 166 at [35].

B. Considering other factors

3 Assuming the guaranteed bonus has certain conditions attached to it, the question might arise whether the employer can then consider other factors not listed. The issue arose for consideration in *Clark v Nomura International plc*.[6] In this case, Clark was a senior proprietary trader in equities and he sued in respect of a bonus. The contract provided that the bonus was dependent on "individual performance". Appendix A to the contract provided that "individual bonus" was dependent on "corporate contribution, team-working, capital usage and due regard to risk". The English High Court held that in considering "individual performance", it was legitimate to take into account the factors listed in Appendix A, though Appendix A was in reference to a different time period and not the time period in question. The court also held that "individual performance" referred to performance of the contract by the individual in question and thus, for instance, if a senior trader was involved, his individual performance must be judged against his contractual obligations as a senior trader. However, the court held that it was not possible to take into account other conditions which did not relate to "individual performance", such as the company's legitimate business needs and need to delay bonus payments in order to retain employees. In relation to the company's legitimate business needs, if, for instance, the company is not doing well, it may be argued that it could not been envisaged by parties that the company would nonetheless pay a bonus. On the other hand, it may be argued that "precisely because of the uncertainty, it might be that the bank was keen to confer a real incentive to a trader … The point is neutral".[7]

4 Thus if specific conditions are attached, these may be viewed as being exhaustive. Therefore, great care must be employed in drafting the conditions. One way out for employers might be to state that the conditions stated are not meant to be exhaustive, though that might make the guaranteed bonus more like a discretionary bonus and that may not be acceptable to high level employees who have some bargaining power.

C. Varying the factors

5 If the employer does have some specific conditions, it would also not be possible to unilaterally vary those conditions, unless the contract has an express clause clearly allowing such variations or unless

6 [2000] IRLR 766.

7 *Kharti v Cooperative Centrale Raiffeisen-Boerenleenbank BA* [2010] IRLR 715 at [25].

some other exception, such as estoppel, applies.[8] However, in relation to an express clause allowing a variation, in *Bateman v Asda Stores Ltd*,[9] the UK Employment Appeal Tribunal held that a variation pursuant to a variation clause should be exercised in a way that does not breach the implied term of trust and confidence,[10] although the case related to a variation of a salary structure and not a bonus scheme. Similarly, in *Riverwood International Australia Pty Ltd v McCormick*,[11] the Federal Court of Australia stated that "[i]ts power to change its policies, or to introduce new policies, from time to time would be constrained by an implied term that it would act with due regard for the purposes of the contract of employment … so it could not act capriciously", though again the variation in question did not relate to the payment of a bonus as such.

6 That possible hurdle aside, much depends on the construction of the clause in question and thus again much thought is needed in drafting the variation clause. In *Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA*,[12] Khatri was employed by the defendant bank as a derivatives trader and he sued for non-payment of bonus when he was eventually dismissed by the bank on grounds of redundancy. There was a formula attached to the payment of the bonus, but the contract contained a clause which stated: "The above table is applicable to your 2008 bonus. The bank maintains the right to review or remove this formula-linked bonus arrangement at any time." The English Court of Appeal, construing the contract against the factual matrix, held that the clause meant that while the formula could be changed, it did not mean that the bank could decide not to pay any bonus at all.

D. Pro-rating

7 Another issue relates to pro-rating. For instance, if the employee goes on maternity leave, sick leave, reservist leave or is placed on garden leave, can the guaranteed bonus be pro-rated? Since, in all of the above situations, the employee would still be an employee, it is suggested that he would be entitled to the full bonus, notwithstanding that he has not been employed for the whole period. It is also unlikely that there is an implied term (in fact) to the contrary effect, as it would not be necessary for the business efficacy of the contract and it is not so obvious that it

8 See, for instance, *Lim Suat Hua v Singapore Health Partners Pte Ltd* [2012] 2 SLR 805, although the case related to a variation of salary rather than a bonus.

9 [2010] IRLR 370. See also *Paragon Finance plc v Staunton* [2002] 1 WLR 685; [2002] 2 All ER 248.

10 As to the implied term of trust and confidence, see para 10 below.

11 (2000) 177 ALR 193 at 223.

12 [2010] IRLR 715.

goes without saying.[13] This is because one of the reasons for a bonus is to help retain employees and even if an employee is on maternity leave,[14] sick leave or reservist leave, paying the employee a bonus which has not been pro-rated would act as a further incentive for the employee to stay. In relation to garden leave, the employee would not be working during the period of leave and during such period, the employee is likely to be deprived of an opportunity to practice his skills and a bonus which is not pro-rated is likely to have been one of incentives which made him agree to the garden leave provision in the first place. Nonetheless, having said that, since implied terms (in fact) ultimately turn on the intention of the parties, much depends on the actual facts including the reasons (if any) for the bonus as stated in the bonus clause.

8 Whatever it is, from the employer's perspective, it is best to have an express clause which allows pro-rating and it should list all the situations whereby such pro-rating may be carried out. If there is a general pro-rating clause according to the period of time worked without listing the specific situations, this may give rise to some uncertainty. In addition, if there is such a general clause, the relationship between such a general clause and the other clauses relating to the bonus, in particular, a clause which states that the employee must be employed as at a particular date (such as 31 December) to get the guaranteed bonus, should also be worked out carefully, so as to avoid contradictions.

E. Notice and termination

9 Another issue that can arise in relation to a guaranteed bonus is as follows. If a date is specified for the payment of a bonus (such as 31 December), will the employee still be entitled to that bonus if he has given notice to resign, or should the employer have terminated the contract by notice, assuming in either case the employee is still in employment at the said date. A similar issue can arise in relation to the situation where the contract has been wrongfully terminated by the

13 In Singapore, the two tests are complementary, see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 and *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518.

14 What is being considered here is the situation where the employee is at work when the guaranteed bonus is due, but *prior* to that was on maternity leave. If the employee is on maternity leave *when* the guaranteed bonus is due, the position is less clear in so far as the employee is statutorily entitled to maternity leave. This is because under the Employment Act (Cap 91, 2009 Rev Ed) and the Child Development Co-Savings Act (Cap 38A, 2002 Rev Ed), payment during maternity leave is based on the gross rate of pay which excludes bonus payments (see s 2(1) of the respective statutes). Nonetheless, it is suggested that the said statutes only reflect the statutory position and that it is possible for the employer to incur greater obligations by virtue of his contract with the employee.

employer without notice, assuming that had the employer terminated the contract with notice, the employee would still have been in employment as at the said date. The issue arose for consideration in *Rutherford v Seymour Pierce Ltd*.[15] On the facts, Rutherford had been employed by Seymour Pierce Ltd which was an investment bank. Rutherford was later wrongfully dismissed without notice and he sued for his bonus entitlement. The bank argued that it was an implied term (in fact) that "in order to be entitled to be considered for an award under the bonus scheme, an eligible participant has to be employed by and/or not under notice of termination of their employment (howsoever given) as at the date of payment of their award". The English High Court refused to imply such a term on the grounds that it was not necessary to imply such a term to give business efficacy and/or the term was not so obvious that it went without saying.[16] The court also held that it would be manifestly unreasonable to imply such a term as it would give the bank an unfettered right to sack an employee before the bonus was distributed solely in order to avoid paying that bonus. The court also rejected the bank's argument that there was a well-established custom to that effect in the industry in question, on the basis that there was no evidence to support that.[17]

10 It is suggested that such a result could also have been reached on the basis of the implied term of trust and confidence,[18] in that it would be in breach of this term for the employer not to pay the bonus in such a situation for a large part (if not the whole) of the bonus would relate to services already rendered. The implied term of trust and confidence, was established in the House of Lords decision of *Malik v Bank of Credit and Commerce International SA*,[19] where Lord Steyn stated:[20]

> The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties … The reason for this development is part of the history of the development of employment law in this century. The notion of 'master and servant' relation became obsolete. Lord Slynn of Hadley recently noted in *Spring v Guardian Assurance plc* [1994] 3 All ER 129 at 161, [1995] 2 AC 296 at 335, 'the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether

15 [2010] IRLR 606.

16 In Singapore, the tests are complementary, see n 13 above. An argument that it may not make "commercial sense" to pay the bonus in such circumstances is also unlikely to be accepted: see *Alain Monié v APRIL Management Pte Ltd* [2012] SGHC 160.

17 *Rutherford v Seymour Pierce Ltd* [2010] IRLR 606 at [20]–[25].

18 See also David Cabrelli, "Discretion, Power and Rationalisation of Implied Terms" (2007) 36 ILJ 194.

19 [1997] 3 WLR 95.

20 *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95 at 109.

> by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee' … An implied obligation as stipulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. The evolution of the implied term of trust and confidence is a fact. It has not yet been indorsed by your Lordship's House. It has proved a workable principle in practice. It has not been a subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.

11 While this implied term (in law) is well established in the UK, thus far the references to it in Singapore have been in the form of *obiter dictum*,[21] though in the recent case of *Chan Miu Yin v Philip Morris Singapore Pte Ltd*,[22] the High Court held that the implied term of trust and confidence has been "accepted in local jurisprudence".[23] Hence, it can be said with some confidence that the implied term of trust and confidence applies in Singapore. Further, although the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd*[24] has held that there is no implied duty of good faith in contracts generally, employment contracts are likely to be *sui generis*.[25]

12 Thus far, we have proceeded on the assumption that there was no express clause governing the matter. If there was indeed an express clause to the effect that the guaranteed bonus would not be payable should the employee or employer have given notice, the question may arise whether the position would have been different. In *Andrew Locke v Candy and Candy Ltd*,[26] clause 7.5 of the contract allowed the contract to be terminated by payment of salary in lieu of notice. Clause 4.1 provided for a guaranteed bonus, but clause 4.2 provided that in order to receive the bonus, the employee had to be still employed by the company. Subsequently, the employer terminated the employment by making payment in lieu of notice before the due date for the payment of the bonus, and the question arose whether the employee was entitled to the bonus. The English Court of Appeal, by a majority, held that though clause 7.5 did not define what "payment" referred to, it was subject to the limitation in clause 4.2 and hence the bonus did not have to be paid.

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21 See, for instance, *Arul Chandran v Gartshore* [2000] 1 SLR(R) 436; *Tullet Prebon (Singapore) v Chuan Leong Chuan Simon* [2005] 4 SLR(R) 344 and *Wong Leong Wei Edward v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352.

22 [2011] SGHC 161.

23 *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 at [25].

24 [2009] 3 SLR(R) 518.

25 See *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 at [58].

26 [2010] EWCA Civ 1350.

In *Commerzbank AG v Keen*,[27] Mr Keen was employed by a bank as a manager of a trading desk and the contract provided that the employee had to remain in employment in order to participate in the bonus scheme. Mr Keen was subsequently made redundant before the payment of the bonus and he brought a claim in respect of the bonus. One of the arguments raised on behalf of Mr Keen was that the limitation on the bonus clause was against s 3 of the English Unfair Contract Terms Act.[28] However, the English Court of Appeal held that an employee would not be dealing with his employers "as a consumer"[29] in contracting with it in respect of pay for work. The court also held that the employee would not be dealing on the bank's "written standard terms of business" as the terms relating to the bonus were not terms relating to the business of banking. A similar result was arrived at in *Peninsula Business Services Ltd v Sweeney*[30] ("*Peninsula*"), though the case related to commissions rather than bonuses. Notably, the UK Employment Appeal Tribunal in *Peninsula* also rejected the argument that such a clause was an unreasonable restraint of trade clause in that it operated as a disincentive for the employee to resign. *Peninsula* was approved in the recent Singapore Court of Appeal decision of *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd*[31] ("*Mano*"). *Mano* involved a deferred incentive award, which award was vested in the employee and was to be forfeited if a post-termination restraint was breached. Reversing the judgment of the High Court, the Court of Appeal held that the whole provision was in effect a restraint of trade clause. However, the court distinguished pure "payment for loyalty" clauses and stated "[f]or example, schemes involving straightforward loyalty payments would not constitute a *restraint* as such. Neither would loyalty payments which constitute a percentage of, and are in addition to, bonus payments, nor a deferred bonus scheme which is not tied to a non-compete clause" [emphasis in original.[32]

13 Assuming there is such an express limitation, the question might arise whether the result would be the same if the employer terminates the contract wrongfully,[33] such as without notice or salary in

27 [2007] IRLR 132.

28 c 50. In Singapore, the equivalent would be s 3 of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

29 *Cf Brigden v American Express Bank* [2000] IRLR 94, though it is suggested that *Commerzbank AG v Keen* [2007] IRLR 132 is to be preferred as it is highly artificial to suggest that an employee is dealing as a consumer *vis-à-vis* his employer.

30 [2004] IRLR 49.

31 [2012] SGCA 42.

32 *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [48].

33 If there is such an express clause and a contract is terminated in accordance with the contract of employment, but the *sole* reason for the termination is to avoid paying the bonus, see *Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877, discussed at para 29 below.

lieu of notice as required by the contract. It is suggested that in so far as the employer wrongfully terminates the contract of employment, and the express clause states the employee must still be employed, the position is likely to be different, since had the employer not wrongfully dismissed the employee, the employee would have received the bonus. In this regard, in the Canadian case of *Szczypiorkowski v Coast Capital Savings Credit Union*,[34] the Supreme Court of British Columbia held:[35]

> Turning to the defendant's first argument, I find this position without merit for the simple reason that had CCS not wrongfully dismissed the plaintiff, Mr Szczypiorkowski would have been employed and entitled to his bonus … In *Ferguson v Kodak Canada Inc* [1992] BCJ No 2545 (SC), when considering a similar argument with regard to the award of dividends to a wrongfully dismissed employee, the court stated: In my view the clause was not designed to meet the situation of a wrongfully dismissed employee who was deprived of the opportunity to work. He is entitled to be compensated by an award of damages that puts him in the position he would have been in had reasonable notice been provided.

14 In this regard, "wrongful termination" can cover the situation where the contract does not expressly provide for termination by payment in lieu of notice, but the employer tries to do so in circumstances where he does not have an implied (or statutory) right to that effect either. Thus, in *Hengxin Technology Ltd v Jiang Wei*,[36] where the employer wrongfully terminated the contract with salary in lieu of notice when it did not have the implied right to do so, it was held that the employees in question were entitled to receive their guaranteed bonus.

15 The question might also arise on what if the contract provided that the employee would not receive the bonus if he was not in employment on the payment date, *even if* the employment was wrongfully terminated by the employer. As stated above, s 3 of the English Unfair Contract Terms Act[37] is unlikely to apply in the employment context and at the same time, it would be difficult to classify such a clause as being against public policy,[38] although the categories of clauses against public policy may not be closed.

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34 2011 BCC LEXIS 8064.

35 *Szczypiorkowski v Coast Capital Savings Credit Union* 2011 BCC LEXIS 8064 at [65].

36 [2009] SGHC 259.

37 c 50.

38 On the other hand, if a restraint of trade clause was involved and the contract provided that it would apply even if the employee is wrongfully dismissed, the position would be different: see *Rock Refrigeration Ltd v Jones* [1996] IRLR 675.

F. Repudiatory or fundamental breach by employee

16 Another issue that may arise is what happens when the conditions are satisfied and payment is due, but the employee has committed a repudiatory or fundamental breach of the contract? In this regard, if the breach occurs *after* the date when payment is due, clearly the employee would have a right to recover,[39] subject to a contractual term to the contrary or the doctrine of equitable set-off, which may arise via a counterclaim. However, what if the breach takes places *before* the date when payment is due, but the payment is otherwise earned?

17 In *Hengxin Technology Ltd v Jiang Wei*,[40] Hengixn Technology Ltd sued its directors for breaches of their respective service agreements with the company. The directors counterclaimed for guaranteed bonuses. Dismissing the claim by the company, Lai Siu Chiu J held:[41]

> No proviso to the bonus clause or to any other clause in the Service Agreement qualified and/or denied the defandants' right to annual and incentive bonus (prorated in this case) once earned. For completeness I would add that the defence of equitable set off is not available to the Company as it has not put up any valid cross claims.

Similarly, in *Shepherd Andrew v BIL International Ltd*,[42] Lai Siu Chiu J again stated[43] that "[i]t would appear from the authorities referred to above, that the defendant cannot rely retrospectively on the plaintiff's misconduct as a defence to his prior claim for severance payments, which debt … arose earlier". Reference may also be made to the recent English Court of Appeal decision of *Cavenagh v William Evans Ltd*,[44] which came to the same conclusion. Thus, the position is essentially the same whether the breach occurs before or after the due date for payment.

18 Nonetheless, in relation to fiduciaries, reference should also be made to the recent Canadian case of *Mady Development Corp v*

39 See, for instance, *Horcal Ltd v Gatland* [1984] IRLR 288, discussed at para 21 below.

40 [2009] SGHC 259.

41 *Hengxin Technology Ltd v Jiang Wei* [2009] SGHC 259 at [168]. In this regard, it is important to note that besides the actual breach, the failure to disclose that breach may itself amount to a breach in the case of a fiduciary (further discussed at para 21 below), thereby allowing the employer to raise a counterclaim to offset the employee's claim, see *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, although on the facts, this did not materialise as it was not pleaded as such.

42 [2003] SGHC 145.

43 *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145 at [129].

44 [2012] EWCA Civ 697. See also *Brandeux (Advisers) UK Ltd v Chadwick* [2010] EWHC 3241.

Rossetto.[45] On the facts, Rossetto was an executive at Mady Development and he diverted labour and materials belonging to the company towards the renovation of his house. Mady Development discovered his wrongdoing and terminated his employment. Mady Development subsequently sued Rossetto for damages and Rosseto counterclaimed in respect of his bonuses for 2007 and 2008. It was argued on behalf of Mady Development that since Rossetto was a fiduciary, he should not be allowed to profit from his wrong and hence he should not be allowed to claim the bonus. The Ontario Court of Appeal rejected this argument and upheld Rossetto's counterclaim. The court held:[46]

> Fiduciary relief is equitable in nature. The remedies for breach of fiduciary duty are discretionary. They are 'dependent on all the facts before the court, and designed to address not only fairness between the parties, but also the public concern about the maintenance of the integrity of fiduciary relationships': McBride, at para 30. Fiduciary relief is aimed at two goals: restitution and deterrence. Restitution is aimed at returning a beneficiary to the position he would have been in but for the fiduciary's breach. The goal of deterrence, or as it is sometimes referred to, the prophylactic purpose, is to prevent fiduciaries from benefitting from their wrongdoing and maintain the integrity of the fiduciary relationship … Deterrence is of particular importance where the beneficiary suffers no identifiable loss.

19 On the facts, the court held that Mady Development had suffered an identifiable loss and that would be compensated by Rossetto. Further, the breaches took place only over a short period of time. Thus, on the whole, the court held that Rossetto was entitled to the bonus, notwithstanding the fact that he was a fiduciary. Thus, unlike the local cases discussed earlier and even the UK position, this recent Canadian case went on to consider underlying policy issues like restitution and deterrence. It is suggested the more nuanced approach adopted in *Mady Development Corp v Rossetto* is worth considering and may achieve a better balance.

20 Thus far, the situation where an employee is suing for the bonus or other payment has been considered. What if the employer has already made payment and there is a prior breach? In such a situation, the question might arise whether the employer can seek to recover the payment based on the doctrine of unilateral mistake. In *Bell v Lever Bros*,[47] Lever Brothers employed Bell to be the chairman of its subsidiary, the Niger company. In the course of his appointment, Bell committed a breach of duty which would have warranted his immediate dismissal. Subsequently, the Niger company merged with another company,

45 2012 ONCA 31.

46 *Mady Development Corp v Rossetto* 2012 ONCA 31 at [19]–[20].

47 [1932] AC 161.

making Bell's appointment redundant. In ignorance of his previous breach of duty, Lever Brothers paid him a large sum to compensate him for the redundancy. When they found out the truth, they sued to recover the amount so paid to him. The House of Lords by a majority found in favour of Bell. Lord Atkin stated:[48]

> The servant owes a duty not to steal, but when he has stolen is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years previously he received a secret commission from the wine merchant; and if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase of salary and recover back the extra wages paid? If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering tea and sugar, claim the return of the month's wages? I think not.

21 However, the position could be different if the employee was a fiduciary and knows or ought to know that he has committed a breach. In such circumstances, the employee may have a duty to disclose the breach.[49] For instance, in *Horcal Ltd v Gatland*,[50] where the employer in question sought to recover the payment made to the employee who was a managing director, the English High Court held:[51]

> If, in the present case, the facts were that before the agreement of 24.7.78 the defendant had acted in breach of his duty to the plaintiff company, I would hold that he was under a further duty to disclose that breach before the agreement was made, and that his failure to make such disclosure rendered that agreement void on the ground of unilateral mistake.

However, on the facts, the actual breach took place after that date. On appeal, the Court of Appeal dismissed the employer's appeal and approved the statement quoted above. Aside from the doctrine of unilateral mistake, it is also possible that the failure to disclose a breach itself amounts to a breach which in turn causes a loss to the employer (that is, the unnecessary payment). On such a basis too, it may be possible for the employer to recover the payment.[52]

48 *Bell v Lever Bros* [1932] AC 161 at 228.

49 See *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540.

50 [1984] IRLR 288 (CA). See also *Cavenagh v Willam Evans Ltd* [2012] EWCA Civ 697 at [19].

51 *Horcal Ltd v Gatland* [1983] IRLR 459 (HC) at 463.

52 See, for instance, *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, although on the facts, this did not materialise as it was not pleaded as such.

22 Aside from all as already alluded, the position might be different if there was an express clause stating that should the bonus payment be due, but it is discovered there have been breaches either prior or subsequent to the date when the payment was due, the employer reserves the right to not pay the bonus. In *Chew Nam Fong Ronny v Continental Chemical Corp Pte Ltd*,[53] the contract in question provided: "[s]hould your employment be terminated by the Company for reasons other than poor performance, gross negligence, gross misconduct or criminal conviction in a Court of Law, you shall be paid severance payment of two times annual salary", and the question arose whether Ronny was entitled to the severance payment. The court held that since it was established that Ronny's performance was poor, he was not entitled to severance payments. This is also in line with Lai Siu Chiu J's statement in *Hengxin Technology Ltd v Jiang Wei*[54] that "*[n]o proviso to the bonus clause or to any other clause in the Service Agreement qualified and/or denied the defandants' right to annual and incentive bonus (prorated in this case) once earned*" [emphasis added]. Thus, from the employer's perspective, it is extremely important to have such an express clause allowing the employer not to make payment if certain events, such as serious misconduct, take place.

23 The question might also arise whether it is possible for such a clause to go further and state that should payment have already been made, the employer reserves the right to recover those payments. Such a clause would in essence be a liquidated damages clause and the general validity of such a type of clause is discussed below.[55]

G. Avoidance by the employer

24 Another issue in relation to a guaranteed bonus is whether the employer can terminate the employee's contract *merely* with the intention of not paying the bonus guaranteed by the contract. It is suggested there are two ways to approach this issue. One is to focus on the bonus clause and the other is to focus on the termination or termination clause. However, one common question that can arise, whichever point one focuses on, is whether an express term in a contract which is ambiguous can be subject to an implied limitation. If the express term is unambiguous, this will not be possible as courts will not imply a term which is in conflict with an express term.[56] However, what if the term is ambiguous?

53 [2011] SGHC 166.
54 [2009] SGHC 259 at [168].
55 See para 34 below.
56 See, for instance, *Loh Siok Wah v American International Assurance Co Ltd* [1998] 2 SLR(R) 245 and *Reda v Flag Ltd* [2002] IRLR 747.

25 In this regard in the UK, there have been many cases in the employment context that have held that an implied term may supplement an express term which is ambiguous. In *United Bank v Akhtar*,[57] for instance, the contract of employment contained a clause which allowed the bank to transfer employees to other locations and pay relocation allowances at its discretion. Mr Akhtar received a written notice on Friday, 5 June, from the bank requiring him to move to the bank's Birmingham branch on Monday, 8 June. He was also not offered any financial assistance. Mr Akhtar asked for the transfer to be postponed in view of his wife's ill health and the impending sale of his house. The bank refused. Mr Akhtar then considered himself constructively dismissed under a relevant UK statute and sued the bank. The UK Employment Appeal Tribunal held that the mobility clause in the contract was limited by an implied duty of co-operation placed upon the bank and a duty not to frustrate the other party's attempt to perform the contract. Hence, it was held that reasonable notice and financial assistance had to be given before the transfer could take place. Knox J justified the finding by stating:[58]

> [T]here is a clear distinction between implying a term which negatives a provision which is expressly stated in the contract, and implying a term which controls the exercise of a discretion, which is expressly conferred in a contract. The first is, of course, impermissible … The second, in our judgment, is not impermissible because there may well be circumstances where discretions are conferred but, nevertheless they are not unfettered discretions, which can be exercised in a capricious way.

26 Another case which illustrates the point is *Johnstone v Bloomsbury Health Authority.*[59] In this case, the contract of employment of the plaintiff doctor provided that, in addition to his usual hours of work, he could be called upon to do additional work up to 48 hours per week. The plaintiff doctor, who alleged that in some weeks he had to work more than 100 hours, brought an action against the authority alleging a breach of duty to take reasonable care of his safety and well-being. The English Court of Appeal upheld the claim. Sir Nicholas Browne-Wilkinson VC, who was one of the judges, stated that if the contract imposed an absolute obligation to work an extra 48 hours, that would preclude any argument that the employer was requiring the employee to work in breach of an implied duty of care. However, on the facts, the contract merely conferred a discretion on the employer to call the employee and this was subject to an implied duty not to injure the health of the employee. Although it may often be arguable whether a

57 [1989] IRLR 507.

58 *United Bank v Akhtar* [1989] IRLR 507 at [44].

59 [1992] QB 333; [1991] 2 All ER 293. See also *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 525.

term is indeed ambiguous or not,[60] the principle appears to be quite well established[61] and, in fact, there have been cases in the non-employment context as well in which it has been invoked.[62] The principle also appears to have been applied in Australia,[63] New Zealand[64] and Canada.[65]

27 In Singapore, on the other hand, it is not clear to what extent such a principle is applicable. In the Court of Appeal decision of *Latham Scott v Credit Suisse First Boston*[66] ("*Latham*"), the contract provided for a bonus, which the court described as being "discretionary". In relation to an employee's claim for the bonus, the court did not allow it, thereby suggesting that an express discretion cannot be subject to an implied limitation.[67] However, another issue which arose in *Latham* was whether the termination was motivated by bad faith. Since there was an express termination clause, that should have been the end of the matter, but the court went on to consider at length whether the termination was motivated by "bad faith" and came to the conclusion that the termination was not motivated by bad faith. This suggests that it may be possible for an express discretion to be controlled by an implied limitation.[68] *Latham* aside, reference should also be made to the *obiter dictum* in the recent case of *Tan Ging Hoon v MMI Holdings Ltd*.[69] On the facts, the contract conferred a discretion in relation to share options and this discretion rested on the employers. The plaintiffs were former employees and brought a claim in relation to the share options. Lai Siu Chiu J accepted the principle laid down in the English Court of Appeal decision of *Mallone v BPB Industries plc*[70] ("*Mallone*") and stated:[71]

> The options granted to Mr Mallone had a three year vesting period … The options had already vested in the plaintiff when he attempted to exercise them not knowing that the defendants' directors had cancelled them. Under the rules of the option scheme, grantees'

60 See, for instance, the dissenting judgment of Leggatt LJ in *Johnstone v Bloomsbury Health Authority* [1992] QB 333; [1991] 2 All ER 293.

61 See also, for instance, Stephen Kos, "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17.

62 See, for instance, *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* [1993] Lloyd's Rep 397; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] 2 All ER (Comm) 299 and *Paragon Finance plc v Nash* [2002] 1 WLR 685.

63 Stephen Kos, "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17.

64 Stephen Kos, "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17.

65 See, for instance, *Greenberg v Meffert* (1985) 18 DLR (4th) 548.

66 [2000] 2 SLR(R) 30.

67 This aspect of the case is discussed at para 42 below.

68 See also *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161, which suggests that the point remains open.

69 [2008] 3 SLR(R) 807.

70 [2002] IRLR 452.

71 *Tan Ging Hoon v MMI Holdings Ltd* [2008] 3 SLR(R) 807 at [84].

> exercise of their options differed depending on the manner of termination of their employment. For termination due to performance reasons as in Mr Mallone's case, he could exercise the options in a certain proportion based on a formula. The directors however purported to cancel all of the plaintiff's share options in full by determining the fraction that could be exercised to be zero. *Not surprisingly*, the English Court of Appeal held that no reasonable employer would have exercised his discretion in a manner that the directors had done. [emphasis added]

28 However, on the facts, the court distinguished *Mallone* as the share options in question had not vested in the plaintiffs as yet, unlike in *Mallone*. Employment cases aside, in Singapore, there have also been some non-employment cases which have held that an express clause can be subject to an implied limitation.[72] Nonetheless, on the whole, the position in Singapore remains unclear.

29 However, assuming in Singapore an ambiguous express clause can also be subject to an implied term, the question would then arise of what such an implied term would be. In this regard, in *Takacs v Barclays Services Jersey Ltd*,[73] the employee in question was a city banker specialising in the sale of complex credit structures, and pursuant to his contract, was entitled to a guaranteed bonus. The contract also provided that the bonus was subject to the employee being in the company's employment and not working out a period of notice at the time the bonus was due. The employer then sought to terminate the contract before the payment of the said bonus. The employee brought an action against the employer for the bonus and the employer sought to strike out the action. The English High Court refused to strike out the action and held that there was a real prospect of success in that there was an implied term of the contract that the employer would not terminate his employment in order to avoid the obligation to pay bonus. Similarly, in *Jenvey v Australian Broadcasting Corp*,[74] in relation to redundancy payments, the English High Court held that the employer could not dismiss an employee for another reason simply in order to avoid paying the employee his contractual entitlement to the enhanced redundancy benefit. In the UK, there have also been several cases which have held that it is an implied term that the employer would not terminate the

72 See, for instance, *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp* [2003] 3 SLR(R) 217 (lender invoking contractual right cannot act in bad faith) and *Peh Kwee Yong v Sinar Co Pte Ltd* [1987] SLR(R) 405 (buyer's contractual right to annul cannot be exercised capriciously).

73 [2006] IRLR 877. See also *Commerzbank AG v Keen* [2007] IRLR 132 at [75].

74 [2002] EWHC 927.

contract solely for the purpose of not paying some sickness or disability-related benefit guaranteed by the contract.[75]

30 As stated earlier, although it is not clearly established in Singapore whether an express term can be subject to an implied limitation, there have been some judicial pronouncements which suggest that this may be permissible, at least in the circumstances described above. For instance, in *Noor Mohamed bin Mumtaz Shah v Apollo Enterprises Ltd*,[76] where the contract was terminated by notice on some other ground in order to avoid paying retrenchment benefits, the High Court stated:[77]

> It is after all a matter of balancing the unequal positions of the parties. It would otherwise be all too easy for employers to escape their legal obligation to pay the redundancy benefits to which the employee is entitled. The CA, which contains the redundancy payment provision, is an agreement between the parties that must be upheld not just in letter but, for the sake of industrial harmony, also in spirit.

Similarly, in the recent case of *Ng Giap Hon v Westcomb Securities Pte Ltd*,[78] the Court of Appeal held that "[i]ndeed it would appear that the clearest example in this regard would be one where the agent has done all that is has undertaken to do pursuant to the commission contract, but the principal nevertheless indulges in conduct in order (and solely) to avoid paying commission to the agent".[79]

31 This specific implied term (in fact) aside, another more general implied term (in law) which could be invoked is the implied term of trust and confidence. It has been argued that the implied term that the employer would not terminate the contract solely to avoid paying a benefit is but a subset or illustration of the implied term of trust and confidence and it might provide more simplicity and logical coherency if this implied term is invoked instead.[80] As stated earlier, it is likely that the implied term of trust and confidence applies in Singapore, although the extent to which it can control an express term has not been clearly established here.

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75 See, for instance, *Hill v General Accident Fire & Life Assurance Corp plc* [1998] IRLR 64 and *Briscoe v Lubrizol Ltd* [2002] IRLR 607.

76 [2000] 1 SLR(R) 670.

77 *Noor Mohamed bin Mumtaz Shah v Apollo Enterprises Ltd* [2000] 1 SLR(R) 670 at [17].

78 [2009] 3 SLR(R) 518.

79 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [85].

80 See David Cabrelli, "Discretion, Power and Rationalisation of Implied Terms" (2007) 36 ILJ 194.

32 Thus far, the focus has been on the bonus clause. As said previously, another way to approach the issue would be to focus on the termination or termination clause. In this regard, as stated in the Malaysian case of *D'Cruz v Seafield Amalgamated Rubber Co Ltd*[81] ("*D'Cruz*"):

> Where a contract provides for the services of an employee to be terminated on a month's notice, the employer can dismiss the servant by giving him a month's notice without stating any reason for doing so, without having any reason for doing so or indeed for the most disreputable and wicked reasons.

33 However, there are some statutory exceptions to this rule. For instance, provided the Employment Act[82] or the Industrial Relations Act[83] applies, the employee who feels that his dismissal is without just cause or excuse may have an avenue for appeal.[84] Assuming none of the statutory exceptions apply in a given set of facts, the question might also arise as to whether the rule in *D'Cruz* should be re-evaluated based on the implied term of trust and confidence. However, in the UK, it has been held that the implied term of trust and confidence does not apply to termination.[85] As to whether this position is correct and even assuming this position is correct, whether it should be followed in Singapore, has been discussed elsewhere.[86] The Court of Appeal's decision in *Latham*, which has somewhat left the position open, has also been examined.[87] Hence, nothing more will be said of these issues in this article.

H. Clawing back

34 Another issue in relation to a guaranteed bonus (or for that matter a discretionary bonus) is the question of whether the employer can claw back what was paid, for instance, if the employee resigns shortly after receiving it. Once paid, clearly, the bonus cannot be claimed back unless there has been some form of mistake in law.[88]

81 [1963] MLJ 154 at 156. See also *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 at 1581; [1971] 2 All ER 1278 at 1282.

82 Cap 91, 2009 Rev Ed.

83 Cap 136, 2004 Rev Ed.

84 See s 14(2) of the Employment Act (Cap 91, 2009 Rev Ed) and s 35(3) of the Industrial Relations Act (Cap 136, 2004 Rev Ed).

85 *Johnson v Unisys Ltd* [2003] 1 AC 518; [2001] 2 All ER 801.

86 Ravi Chandran, *Employment Law in Singapore* (LexisNexis, 3rd Ed, 2011) at p 313. See also the very recent Australian Court of Appeal decision of *Shaw v State of New South Wales* [2012] NSWCA 102.

87 See also *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 and the cases cited therein.

88 See, for instance, *TRA Global Pty Ltd v Vesna Kebakoska* [2011] VSC 480 (a case involving redundancy payments), although this is subject to the defence of change

(*cont'd on the next page*)

However, the question might arise whether the position could be different if there was an express clause allowing the clawing back of the bonus in such a situation. Even though such a clause may provide some disincentive for the employee to resign, it is unlikely to amount to an invalid restraint of trade clause.[89] However, since in essence the effect of the clause is that the employee is breaching the contract by resigning before the stated time, such a claw back clause would appear to be a liquidated damages clause. Whether such a liquidated damages clause is valid or not depends on various factors, such as whether the amount stated is extravagant or unconscionable in comparison with the greatest loss that could conceivably result (as judged at the time of making the contract), and whether it is a single sum or varying sum.[90] Since employers would get another employee to replace the departing employee, it may be argued that recovering the bonus paid is indeed extravagant compared to the greatest loss that could conceivably result. Against this, it may be argued that a payment of bonus is not only a past recognition but also serves as future incentive and hence to some extent the employer has suffered a loss. However, even then, the future incentive component may not represent the whole of the bonus payment. That aside, if the whole bonus is repayable without any variation, depending on the amount of time that has expired after the payment of the bonus, then again, that may point towards the clause being unenforceable. Nonetheless, for what it is worth, it is better for the contract in such circumstances to provide that the amount would vary depending on the period of service after the date of payment.

I. Annual wage supplement

35 Finally, before moving on to consider discretionary bonuses, the topic of annual wage supplements will be examined. In Singapore, annual wage supplements are not guaranteed, even for employees falling under the Employment Act, unless the contract provides for it. In this regard, the question might arise whether it could be an implied term of the contract that an annual wage supplement should be paid or whether it is the custom and practice in Singapore that an annual wage supplement should be paid.

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of position and in this regard, see also *Avon v County Council v Howlett* [1983] 1 AC 605; [1983] 1 All ER 1073.

89 *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49. See also para 12 above.

90 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79; *Strathclyde Regional Council v Neil* [1984] IRLR 11; *Government of Malaysia v Thelma Fernandez* [1967] 1 MLJ 194; *Claas Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386.

36 In *Albion Automative v Walker*,[91] the employees in question were made redundant and sued for retrenchment benefits. Albion had, in the past four years, paid redundancy benefits based on a particular formula to some 75% of the workforce who had been retrenched before the employees in question. The retrenchment benefit policies were also drawn to the attention of the employees of Albion. The English Court of Appeal held that the four-year period was a substantial period and hence a term was implied on the basis of custom and practice. In *Small v The Boots Co plc*,[92] the UK Employment Appeal Tribunal held that the employment judge was wrong in not considering the issue of whether a 40-year practice of paying bonuses had culminated into a contractual term to that effect.

37 On the other hand, in Singapore, in *Loh Siok Wah v American Assurance Co Ltd*,[93] the question of whether retrenchment payments were payable as a result of past practice arose and the court held:[94]

> It will be extraordinary and it will also cause much concern to all employers in Singapore if I were to hold that employers who had paid retrenchment benefits previously will be legally bound to pay retrenchment benefits at the same rates or at reasonable rates for all subsequent retrenchments. Unless contractually or statutorily provided for, there is no legal obligation for any employer in Singapore to provide retrenchment benefits. Retrenchment benefits are usually given on an *ex gratia* basis. No matter how many times an employer may have given *ex-gratia* retrenchment benefits in previous retrenchment exercises, that *per se* does not give rise to any legal obligation to pay retrenchment benefits for the next exercise. Payment of *ex-gratia* retrenchment benefits is absolutely at the discretion of the employer and it depends entirely on the goodwill and perhaps also on the financial position of the employer concerned.

38 The court also rejected the argument based on custom and practice as there was no evidence adduced to that effect. In *Tan Hup Thye v Refco (Singapore) Pte Ltd*,[95] an argument was raised that based on past practice of paying bonuses based on a certain formula, the plaintiff in question was entitled to receive such a bonus. Judith Prakash J, after examining all the evidence, came to the conclusion that there was no such practice.

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91 [2002] EWCA Civ 946. See also Douglas Brodie, "Reflecting Dynamics of Employment Relations: Terms Implied by Custom and Practice and the *Albion* case" (2004) 33 ILR 159.

92 [2009] IRLR 328; [2009] UKEAT 0248_08_2301.

93 [1998] 2 SLR(R) 245. See also *Bethleham Singapore Pte Ltd v Ler Hock Seng* [1994] 3 SLR(R) 938.

94 *Loh Siok Wah v American Assurance Co Ltd* [1998] 2 SLR(R) 245 at [43].

95 [2010] 3 SLR 1069.

39 Thus, compared to the English courts, the local courts seem more hesitant to find that past practice can result in an implied term to that effect. Nonetheless, it is suggested that whether such a term can be implied by past practice ultimately turns on the facts of each case.[96] In addition, in relation to retrenchment benefits, whether the employer wants to and the amount may depend on many factors and it might seem inequitable to make the employer bound by past practice. On the other hand, in relation to annual wage supplements, it does seem less inequitable to make the employer liable especially if a particular amount (such as one month's salary) has been given over many years other than for years in which the company did not do well financially.

II. Discretionary bonus

A. When a "discretionary" bonus amounts to a contractual right – The UK position

40 In *Kharti v Cooperative Centrale Raifeisen-Boerenleenbank BA*,[97] the English Court of Appeal opined that whether a bonus, which is termed as being "discretionary", could nonetheless become a contractual entitlement "is purely one of construction. It falls to be decided by how the words would be understood by a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract".[98] In *Small v The Boots Co plc*,[99] the UK Employment Appeal Tribunal stressed that it was important to examine which aspect of the bonus was discretionary and stated that "the use of the term discretionary in a bonus scheme may be attached to the decision whether to pay a bonus at all, its calculation or its amount. No doubt there are other factors to which discretion may be attached",[100] suggesting that if the discretion related to the question of whether to pay a bonus at all, it is less likely for such a bonus to be a contractual entitlement. On the other hand, if the bonus is discretionary depending on certain factors such as individual performance[101] or there is discretion in relation to the calculation of the amount,[102] it is more likely for the bonus to be a contractual entitlement. However, as observed in *Small v The Boots Co plc*, many other factors

96 See also *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen* [2011] SGHC 201, where a seven-year practice or so was held to have created an implied term to the effect that the defendant was obliged to indemnify.

97 [2010] IRLR 715.

98 *Kharti v Cooperative Centrale Raifeisen-Boerenleenbank BA* [2010] IRLR 715 at [22].

99 [2009] IRLR 328; [2009] UKEAT 0248_08_2301.

100 *Small v The Boots Co plc* [2009] IRLR 328; [2009] UKEAT 0248_08_2301 at [19].

101 See, for instance, *Clark v Nomura International plc* [2000] IRLR 766.

102 See, for instance, *Clark v Bet plc* [1997] IRLR 348 and *Mallone v BPB Industries Ltd* [2002] IRLR 452.

could also be relevant. In *Cantor Fitzgerald International v Horkulak*,[103] the contract in question provided that "[i]n addition [CFI] may in its discretion, pay you an annual discretionary bonus which will be paid within 90 days of the financial year-end (30 September) the amount of which shall be mutually agreed by yourself, the chief executive of the company and the president of Cantor Fitzgerald Ltd Partnership, however, the final decision shall be in the sole discretion of the president of Cantor Fitzgerald Ltd Partnership". The English Court of Appeal was of the view that the discretion on the facts did not merely relate to assessment of the amount payable and the discretion was not dependent on specific criteria which had been set out in the contract. Even then, the court came to the conclusion that the bonus was a contractual element and Potter LJ stated:[104]

> None the less, the clause is one contained in a contract of employment in a high-earning and competitive activity in which the payment of discretionary bonus is part of the remuneration structure of employers. In this case, the objective purpose of the bonus clause on the evidence … was plainly to motivate and reward the employee in respect of his endeavours to 'maximise the commission revenue of the global interest rate derivatives business' of CFI. Further, the condition precedent that the employee should still be working for CFI and should not have given notice or attempted to procure his release, demonstrates that the bonus was to be paid in anticipation of future loyalty. In such a case, as it seems to me, the provision is necessarily read as intended to have some contractual content, *ie* it is to be read as a contractual benefit to the employee, as opposed to being a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of the contract.

41 Thus, much depends on the details, but it is clear that even in the UK, some types of bonuses may be truly discretionary and cannot be challenged. Also, as stated at the beginning of this article, although the focus in this part is on discretionary bonuses, the same principles can apply in relation to other payments such as discretionary commissions.[105]

B. The Singapore position

42 In *Latham*, the contract provided: "In addition to your salary, a bonus may be paid to you at the end of each calendar year based on Company profitability and your performance during the year. The first bonus payment for which you will be eligible for consideration will be

103 [2004] IRLR 942.

104 *Cantor Fitzgerald International v Horkulak* [2004] IRLR 942 at [46].

105 See, for instance, *Greenberg v Meffert* (1985) 18 DLR (4th) 548 and *GX Networks Ltd v Greenland* [2010] EWCA Civ 784.

for calendar year 1997." When Latham's contract was terminated, Latham brought a claim, alleging among other things, that he would have received a bonus had his contract not been terminated. The Court of Appeal held that "A proper construction of the contract indicated that the decision to grant a bonus was entirely at the discretion of CSFB. Even if Latham had continued to be employed at CSFB, he would not have a legal right to claim a bonus from them".[106] The court relied heavily on *Lavarack v Woods of Colchester Ltd*,[107] in particular, the judgment of Diplock LJ:[108]

> The general rule as stated by Scrutton LJ in *Abrahams v Reiach (Herbert) Ltd*, that in an action for breach of contract a defendant is not liable for not doing that which he is not bound to do, has been generally accepted as correct … The law is concerned with legal obligations and the law of contract with legal obligations created by mutual agreement between the contractors – not with expectations, however reasonable, of one contractor that the other will do something that he assumed no legal obligation to do. And so if the contract is broken or wrongly repudiated, the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligations and had done no more.

43 *Latham* was followed in a whole series of cases in Singapore. In *Shepherd Andrew v BIL International Ltd*,[109] the contract provided:

> In respect of the subsequent years of your employment the company, in its discretion fairly exercised, will pay you a bonus of up to 50% of your annual salary (adjusted pro rata in respect of the year commencing 1 July 2000 for the period from that date for which you will receive a bonus under (i). In determining the amount of the bonus the company will have regard to your performance during the year and the level of achievement of your key performance achievement targets).

The High Court followed *Latham* and stated "where bonus payment is stated to be discretionary … an employee is not entitled to it as of right".[110] In *Ko Yan-Sau Andrew v Standard Charted Bank*,[111] the contract provided:

> The Bank pays a variable Local Performance Incentive Payment (LPIP) based on the financial performance of the Group and individual business units, as well as on your performance … The variable bonus is paid only to employees who have more than 6 months' service as at

106 *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [57].
107 [1967] 1 QB 278.
108 *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 294.
109 [2003] SGHC 145.
110 *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145 at [130].
111 Suit No 32 of 2004 (unreported).

> 31 December of the financial period in which the variable bonus is calculated, and who are in service at the time of payment which is usually around June each year. Employees who have resigned and who are serving out their notice periods at the time of payment are also ineligible.

The High Court followed *Latham* again and came to a similar conclusion. In neither of these two cases was *Clark v Nomura International plc*,[112] decided a few months after *Latham* (or the other related UK cases), considered. However, in any case, the High Court in these decisions was bound by the Court of Appeal decision in *Latham*. A case in which *Clark v Nomura International plc* and the other related UK cases were considered was *Tan Hup Thye v Refco (Singapore) Pte Ltd*,[113] although the High Court in this situation did not delve into the said cases in great detail as it was bound by the Court of Appeal decision in *Latham*.

C. Should the Singapore position be changed?

44 First, as already mentioned, *Latham* was to a large extent based on *Lavarack v Woods of Colchester Ltd*[114] ("*Lavarack*"). In that case, the contract was for a five-year period and it provided for salary and "such bonus (if any) as the directors of the company shall from time to time determine". The plaintiff employee was wrongfully dismissed before the five-year period. In the meantime, the company discontinued the bonus scheme and instead introduced new (higher) fixed salaries. The question arose whether the plaintiff's damages for the period included the increased salaries. The English Court of Appeal, by a majority, held that he was not so entitled as it was an extraneous event and it was not part of the original contract. Thus, the case itself did not directly relate to the payment of bonus as such. In addition, Diplock LJ stated:[115]

> In the present case if the defendants had continued their bonus scheme, it may well be that on the true construction of this contract of employment the plaintiff would have been entitled to be recompensed for the loss of the bonus to which he would likely to be legally entitled under his service agreement until its expiry. But it is unnecessary to decide this.

Lavarack was also referred to in *Cantor Fitzgerald International v Horkulak*,[116] in respect of which Potter LJ opined:[117]

112 [2000] IRLR 766.
113 [2010] 3 SLR 1069.
114 [1967] 1 QB 278.
115 *Lavarack v Woods of ColchesterLtd* [1967] 1 QB 278 at 297.
116 [2004] IRLR 942.
117 *Cantor Fitzgerald International v Horkulak* [2004] IRLR 942 at [48].

> The judge was correct to find that application of the principle in *Lavarack v Woods* provided no rule of thumb applicable to discretionary bonus cases … Nothing was said in *Lavarack v Woods* to suggest that, in respect of a claim for damages put upon the basis that the claimant would have received payments under a discretionary bonus scheme of which he was already a potential beneficiary, the court should assume that the employer's discretion would be exercised against him in a case where such a decision would be irrational or arbitrary or one which no reasonable employer would make. The broad principle that a defendant in an action for breach of contract is not liable for doing that which he is not bound to do will not be applicable willy-nilly in a case where the employer is contractually obliged to exercise his discretion rationally and in good faith in awarding or withholding a benefit provided for under the contract of employment.

45 Potter LJ also explained the basis of why this was viewed as a contractual obligation:[118]

> It is pertinent to observe that, in cases of this kind, the implication of the term is not application of a 'good faith' doctrine, which does not exist in English contract law; rather it is as a requirement necessary to give genuine value, rather than nominal force or mere lip-service, to the obligation of the party required or empowered to exercise the relevant discretion. While, in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion, Thus the courts impose an implied term of the nature and to the extent described.

46 It should also be noted that in *Latham*, the court accepted the principles laid down in *Abrahams v Reiach*[119] (where the publishers in breach were held to be liable for damages, on the basis that a reasonable number of books would have been published) and *Lee Paula v Robert Zehil & Co Ltd*[120] (where the distributors in breach were held to be liable for damages, on the basis that they would have performed the contract using a reasonable method), but distinguished them on the ground that those cases involved situations where there was a breach of contractual obligations to publish books and order garments, respectively. Thus, the essential point was that on the facts, the payment of bonus was not part of the contractual obligation. In this regard, it is suggested that the mere use of the word "discretion" should not mean that the bonus can no longer be a contractual entitlement. Instead, as is the current position in

118 See *Cantor Fitzgerald International v Horkulak* [2004] IRLR 942 at [30].
119 [1922] 1 KB 477.
120 [1983] 2 All ER 390.

the UK, all the relevant circumstances have to be examined to ascertain the *true intention* of the parties.

47 An alternative approach, in which the same result could be arrived at, is to invoke the implied term of trust and confidence which, as stated previously, is likely to be applicable in Singapore, although even in the UK cases, in relation to the discretionary bonus, they were not decided on the basis of the implied term of trust and confidence. However, as stated previously, it has been suggested that the idea that a discretion should not be exercised irrationally is but a subset or illustration of the implied term of trust and confidence, and it might provide more simplicity and logical coherency if this implied term is invoked instead.[121]

48 Having looked the theoretical underpinnings, it should also be emphasised that neither of the approaches is based on reasonableness.[122] As stated by Burton J in *Clark v Nomura International plc*:[123]

> Capriciousness, it seems to me, is not very easy to define: and I have been referred to *Harper v National Coal Board* [1980] IRLR 260 and *Cheall v APEX* [1982] IRLR 362. It can carry with it aspects of arbitrariness or domineeringness, or whimsicality or abstractedness. On the other hand the concept of 'without reasonable or sufficient grounds' seems to me to be too low a test. I do not consider it is right that there be simply a contractual obligation on an employer to act reasonably in the exercise of his discretion, which would suggest that the court could simply substitute its own view for that of the employer. My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness could be a good example) *ie* that no reasonable employer would have exercised his discretion in this way … Such test of perversity or irrationality is not only one which is simple, or at any rate simpler to understand and apply, but it is a familiar one, being regularly applied in the … Administrative Court. In reaching its conclusion, what the court does is thus not to substitute its own view, but to ask the question whether any reasonable employer could have come to such a conclusion.

In addition, such an approach has not opened the floodgates in the UK. Further, it has been held that the standard is a high one[124] and it was not met in some recent cases such as *Commerzbank AG v Keen*[125] and

121 See David Cabrelli, "Discretion, Power and Rationalisation of Implied Terms" (2007) 36 ILJ 194.

122 However, there have been some isolated cases where the standard has been pegged at reasonableness. See, for instance, *Greenberg v Meffert* (1985) 18 DLR (4th) 549.

123 [2000] IRLR 766 at [40].

124 *Commerzbank AG v Keen* [2007] IRLR 132 at [59].

125 *Commerzbank AG v Keen* [2007] IRLR 132 at [59].

Humphreys v Norilsk Nickel International (UK) Ltd.[126] Finally, it should also be highlighted that the principle has been followed in many other jurisdictions such as Canada,[127] Australia[128] and Hong Kong.[129] In light of all this, it is suggested that the point should not be viewed as being closed in Singapore, although the matter may have to go all the way to the Court of Appeal if *Latham* is not to be followed.

D. If the position in Singapore were to change

49 Assuming the position in Singapore will eventually change, one question that might arise is the basis on which the court will calculate the bonus. This was considered in *Cantor Fitzgerald International v Horkulak*[130] and it would follow that some relevant principles in assessing the damages are as follows:

(a) The court has to place itself in the position of the employer and it is implicit that the employer would have considered both his interest[131] and that of the employee.

(b) The court must consider the criteria provided in the contract.

(c) The court can consider the range of bonus payments paid to other employees of the same title and status as the claimant.

(d) The court must look at what the claimant would have probably received assuming that he had remained in the employment and the employer had acted rationally, rather than a minimum sum[132] which the employer might have awarded to meet its contractual obligation under the bonus scheme.

(e) Damages are subject to mitigation.

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126 [2010] IRLR 976. See also the Hong Kong cases of *Wood v Jardine Fleming Holdings Ltd* [2001] 2 HKC 735 and *Post Vanessa Jane v Nomura International (Hong Kong) Ltd* [2001] HKCU 410.

127 See, for instance, *Greenberg v Meffert* (1985) 18 DLR (4th) 549; *Gibara v ABN-Amro Bank* 2003 ONC LEXIS 2925 and *Lippa v Can-cell Industries Inc* 2009 ABC LEXIS 1465.

128 See, for instance, *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 and *Eshuys v St Barbara* (2011) VSC 125.

129 See, for instance, *Wood v Jardine Fleming Holdings Ltd* [2001] 2 HKC 735; *Wong Huey Lan v Colgate-Palmolive (HK) Ltd* [2002] HKCU 296 and *Post Vanessa Jane v Nomura International (Hong Kong) Ltd* [2001] HKCU 410.

130 [2004] IRLR 942.

131 However, it is suggested that this should be subject to what is stated at para 3 above.

132 Such an approach also seems to have been accepted in *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 in so far as a contractual entitlement is concerned; see para 46 above.

50 Another important issue to be considered is, if the position does indeed change, what the employer can do to improve his position besides avoiding phrases like "shall be entitled to"[133] or "will be eligible for". To merely state that the bonus is at the "absolute"[134] or "sole"[135] discretion of the employer or is not "guaranteed"[136] will not be conclusive. In fact, in the Hong Kong case of *Wood v Jardine Fleming Holdings Ltd*,[137] the use of the phrase "no contractual entitlement" in the contract in relation to the bonus did not stop the court from embarking on the question of whether the discretion was exercised irrationally, though it may be argued this is going against the express intention of the parties and hence not permissible. Another possibility that is yet to be explored would be to state that the bonus is not subject to the implied duty of trust and confidence or any other implied terms that fetter the discretion of the employer. Unless it can be argued that it is against public policy[138] to exclude the implied term of trust and confidence, it may be difficult to challenge such a clause. However, if such a limitation is placed, the implications of this on the other clauses in the contract, in particular the termination clause, should also be carefully thought of. Of course, it is also possible to expressly state that the employer's right to terminate is not subject to the implied term of trust and confidence or any other implied limitations. Then again, high level employees, who may have legal advice and some bargaining power, may not readily agree to such clauses. Yet another possibility would be to exclude implied terms through the "entire agreement" clause. However, whether this would work depends on the construction of the clause in question and in particular, the intention to exclude must be "clear and unambiguous".[139] However, in the employment context, if implied terms are excluded, this could have huge implications on the employer as well. For instance, does it mean that the employee is not subject to the duty of good faith and loyalty while he is an employee? Thus, this may not be the wisest of options for the employer.

III. Conclusion

51 In relation to bonuses and other payments in employment, much depends ultimately on the actual construction of the clause in

133 See, for instance, *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 at [63]–[64].

134 *Mallone v BPB Industries plc* [2002] IRLR 452.

135 *Greenberg v Meffert* (1985) 18 DLR (4th) 548; *Cantor Fitzgerald International v Horkulak* [2004] IRLR 942.

136 *Clark v Nomura International plc* [2000] IRLR 766.

137 [2001] 2 HKC 735.

138 In this regard, see Douglas Brodie, "Beyond Exchange: The New Contract of Employment (1998) 27 ILJ 79.

139 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [32].

question. Therefore, great thought needs to be put into designing these clauses. In this connection, various suggestions were made in the course of this article in terms of drafting. However, another point worth highlighting is the question of whether there should be a bonus clause at all in the contract of employment. In practice, it is extremely common to find a "discretionary bonus" clause in the contract of employment even for ordinary employees. If indeed the true intention of the employer is for the bonus to be entirely discretionary and if having an express bonus clause is unlikely to act as a great incentive to the employee, then it might be wise not to have such a clause in the contract in the first place.