DEALING WITH EMPLOYEE CRIMES

This article essentially examines the question of how an employer can go about dealing with an employee who has been charged with a criminal offence. In particular, it looks at the ways in which the employer may be able to terminate the contract of employment. It also looks at the alternatives to termination.

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I. Employee commits a crime and pleads guilty or is convicted

A. Repudiatory breach by reason of criminal misconduct

1 In common law, where the conduct of the employee is such as to show that the employee is repudiating the contract or one of its essential terms[1] or is so serious that it strikes at the root of the contract,[2] the employer can summarily dismiss the employee. If the crime takes place in the course of employment and the crime is such as to show that the employee is repudiating the contract or one of its essential terms, or is so serious that it strikes at the root of the contract, the employee can be summarily dismissed. For instance, where the employee commits the offence of theft at the employer's premises, it is likely that the employer has the power to summarily dismiss the employee.[3]

2 However, not all crimes committed in the course of work would justify summary dismissal. For instance, the crime may not be sufficiently serious looked at in context.[4] Alternatively, the crime may be

1 *Laws v London Chronicle Ltd* [1959] 1 WLR 698, [1959] 2 All ER 285.

2 *Cowie v Berger International Pte Ltd* [1999] 3 SLR 491.

3 See, for instance, *Scottish Special Housing Association v Linnen* [1979] IRLR 265; *Trust House Forte Hotels Ltd v DJ Murphy* [1977] IRLR 186; *British Leyland UK Ltd v Swift* [1981] IRLR 91. It would appear that the amount stolen is irrelevant; see, for instance, *KA Sanduran Nehru a/l Ratnam v I-Berhad* [2007] 2 MLJ 430 and *Trust House Forte Hotels Ltd v DJ Murphy* [1977] IRLR 186.

4 For instance, if while driving in the course of employment to make a delivery, the employee is charged for talking on a mobile phone while so driving (Road Traffic Act (Cap 276, 2004 Rev Ed) s 65B) and there has been no accident, then, that event taken by itself arguably may not justify summary dismissal. On the other hand, if the employee had been previously warned not to do so or an accident had resulted, then the result may well be different.

committed at the insistence of the employer. In such a situation, it is likely to be deemed that the employer has waived the breach on the part of the employee.[5] Thus, for instance, if the employer requests the employee in charge not to pay the skills development levy in breach of the Skills Development Fund Act,[6] and, as a result, among others, the employee[7] in question is convicted of an offence, the employer may not be able to subsequently summarily dismiss the employee on the ground of the criminal offence.

3 If the crime is not committed in the course of employment, then the question is whether there is a sufficient nexus between the crime and the job so as come to the same conclusion that the employee is repudiating the contract or one of its essential terms, or the criminal misconduct is so serious that it strikes at the root of the contract. In this regard, in the New Zealand case of *Smith v The Christchurch Press Co Ltd*,[8] it was stated:

> To justify dismissal, there had to have been a clear relationship between the conduct and the employment. It was the impact or the potential impact of the conduct on the employer's business, including the question of bringing the employer into disrepute, the incompatibility of the conduct with the proper discharge of the employee's duties, the impact upon the employer's obligations to other employees or the undermining of the trust and confidence between the employer and employee.

4 On the facts, sexual misconduct on the part of an employee in relation to another, but outside the office, during the lunch hour, was held to have a sufficient nexus justifying summary dismissal, as it was an issue concerning two employees; it arose out of the work situation and had the potential to adversely affect the working environment.[9] Similarly in *Mathewson v RB Wilson Dental Laboratory Ltd*[10] where a dental

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5 As to waiver in the employment context, see *Mui Bank Bhd Johor v Tee Puat Kuay* [1993] 3 MLJ 239; *The Manager, Scudai Estate v Narayanan* [1960] MLJ 162; and *Oceanic Universal Garment Manufacturers Co Ltd v Keung Man Lan* [1987] 1 HKC 27.

6 Cap 306, 1998 Rev Ed.

7 See Skills Development Levy Act (Cap 306, 1998 Rev Ed) s 14.

8 [2001] 1 NZLR 407.

9 See also *Nottinghamshire County Council v Bowly* [1978] IRLR 252 (offence of gross indecency outside a school on the part of a teacher was held to have a sufficient nexus to his job as a teacher) and *P (Peet) v Nottinghamshire Country Council* [1992] IRLR 362 (indecent assault by an assistant groundsman working in a school on his daughter was held to have had a sufficient nexus to his employment at the school where there were girls). See also *Creffield v British Broadcasting Corp* [1975] IRLR 23.

10 [1988] IRLR 512. *Cf*, *Norfolk County Council v Bernard* [1979] IRLR 220 (summary dismissal of a trainer of teachers with limited contact with children, who was arrested for possession of drugs, was not justified. It was suggested that the

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technician was arrested outside work for possessing drugs, his summary dismissal was upheld. The fact that the employee had to do skilled work and the fact that the young members of staff might be adversely influenced by the presence of someone who is taking illegal drugs, justified the summary dismissal. Likewise, in *Moore v C & A Modes*,[11] where a section leader in a store was caught shoplifting in another nearby store, summary dismissal was justified as there was a sufficient nexus, given the nature of her duties as a store leader.

5 On the other hand, if there is no sufficient nexus, then summary dismissal would not be justified. In *Bradshaw v Rugby Portland Cement Co Ltd*,[12] the employee in question had been convicted on an isolated act of incest with his daughter and was summarily dismissed. However, the court held that summary dismissal was not justified as "it had nothing to do with the applicant's work, his work did not bring him into contact with female staff, he was working with a gang of men, it did not, apparently, upset his relationship with his workmates in any way, it did not expose anyone to a moral danger from his presence in the works".[13] Similarly, in *Port of Singapore Authority v Wallace*,[14] it was held that negligent driving of a motor vehicle by a harbour pilot did not justify summary dismissal as:[15]

> It was misconduct outside the course of the respondent's employment as a harbour pilot. It was misconduct in no way connected with the business of the appellants who are the authority responsible for the safe navigation of vessels entering or leaving the port of Singapore. It is not misconduct incompatible with the due or faithful discharge of the respondent's duty qua his employment as a harbour pilot. It was not the kind of misconduct which could reasonably be said to seriously prejudice or interfere with or affect the interests of the appellants to its detriment.

6 However, ultimately, too much cannot be read into these decisions and much depends on the actual facts of each case.

7 It must also be mentioned that in so far as it is in the course of employment, or not in the course of employment but sufficiently related, the fact that the employee has already been punished for his crime does not have a bearing on the issue. As stated in *Gardiner v Newport County, Borough Council*:[16]

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reputation and the credibility of the employers would be affected if they continued employing him, but no evidence was tendered to that effect).

11 [1981] IRLR 71.

12 [1972] IRLR 46.

13 [1972] IRLR 46 at 46.

14 [1980–1981] SLR 138.

15 [1980–1981] SLR 138 at [8].

16 [1974] IRLR 262 at 266.

> The dismissal was characterized as double punishment … the tendency of such a rule would be to restrict the employer's power of dismissal … In fact 'double punishment' is a mere distraction. The Courts are regularly reminded in the course of mitigation that whatever penalty is imposed, will only be a part of the punishment which will fall on the defendant in his social relations, his employment and ultimately in terms of money, and they are well aware that no sentence of theirs carries exemption from further social consequences. The argument would tend to make employers waive consequences which the Court anticipated and allowed for, in fixing its penalty.

8 In addition, it must be pointed out that it is not for the employer to find out the reasons behind why the employee had pleaded guilty. As stated in *British Gas plc v McCarrick*:[17] "The suggestion that a reasonable employer would have made inquiries of the respondent's legal adviser regarding the circumstances in which he was unwilling to plead guilty … that was to impose far too high a burden on the employers … In my judgement it is perverse to suggest that where an employee is given full facilities himself to bring forward information which is under his control, the employer has failed to make proper inquiries in not pursuing such inquiries himself." On the facts, the employee had been told that if he pleaded guilty he would only be fined as opposed to being sent to prison, and, hence, the employee pleaded guilty. Similarly, in *P (Peet) v Nottinghamshire County Council*,[18] it was held that: "When an employee has pleaded guilty to an offence or has been found guilty by the decision of the court …, it is reasonable for an employer to believe that the offence has been committed by the employee. Any other conclusion would be ridiculous."[19]

9 In so far as it is in the course of employment, or not in the course of employment but sufficiently related, and the employer seeks to summarily dismiss the employee, the question of what procedure the employer must follow may also arise. In this regard, in common law generally,[20] there is no particular procedure that has to be followed when summarily dismissing the employee, unless the contract provides otherwise.[21] Thus, for instance, it is not necessary to give the employee a right of hearing[22] before he is dismissed.

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17 [1991] IRLR 305 at 308.

18 [1992] IRLR 362.

19 [1992] IRLR 362 at 365.

20 However, where "public officers" or "police officers" are concerned, the position is different. See Constitution of the Republic of Singapore (1999 Rev Ed) Art 110(3) and Police Force Act (Cap 235, 2006 Rev Ed) s 40(2), respectively.

21 However, see para 22 of this article.

22 *Vasudevan Pillai v The City Council of Singapore* [1968] 2 MLJ 16 at 20; *Lim Tow Peng v Singapore Bus Services Ltd* [1975–1977] 1 SLR 180; *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR 233; *Hui Cheng Wan Agnes v*

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10 Thus far, the position of employees not falling under the Employment Act[23] has been considered. In relation to employees falling under the Employment Act, the position is largely similar. Section 14(1) of the Employment Act allows summary dismissal after a "due inquiry", where there has been "misconduct" inconsistent with the fulfilment of the express or implied conditions of the contract of employment. Committing a crime can amount to "misconduct" inconsistent with fulfilment of the express or implied conditions of the contract of employment, though, as said earlier, this will not always be the case.[24] As for "due inquiry", a case in which the issue arose was *Lim Tow Peng v Singapore Bus Services Ltd*.[25] In this case, the appellants were summarily dismissed on the ground that they had assaulted a fellow employee. The court found that, in effect, no inquiry was ever held on the alleged misconduct. Further, the appellants were not told of their misconduct nor were they given a chance to be heard. In the circumstances, the court held that there was no "due inquiry" and, as a result, the dismissal was wrongful. However, it is clear that in some circumstances, there can be a "due inquiry" even if the employee is not given a chance to be heard by the employer. In *Velayutham v Port Authority of Singapore*,[26] the employee was arrested and charged with a crime. However, he was later acquitted as the Prosecution could not produce a key witness who was out of town. Nonetheless, based on the information they received from the police, the defendants decided to dismiss the plaintiff. The plaintiff brought an action stating that there was a breach of s 14(1). However, the court rejected the claim. This was because full investigations had been carried out by the police during the course of which the employee was given a chance to be heard and the employee concerned was fully aware of the alleged misconduct. Further, since the police had passed them the relevant information, there was sufficient evidence based on which alone the defendants could reach a decision.

11 Thus, even for employees covered under the Employment Act, where the employee pleads guilty and is convicted by the court, it is

Nippon SP Tech (S) Pte Ltd [2001] SGHC 271; *Wee Lye Seng v Dr Ee Peng Liang* [1993] SGHC 24.

23 Cap 91, 1996 Rev Ed. As to employees not covered by the Employment Act, see Employment Act s 2.

24 See para 2 of this article.

25 [1976] 1 MLJ 254. The court also held that if there had been no "due inquiry", while the dismissal would be wrongful, it would not be null and void; the effect being that while the employee may be entitled to damages, the court would not order reinstatement. If the employee wants to be reinstated, the proper procedure would be to make a representation to the Minister under s 14(2).

26 [1976] 1 MLJ 210.

most unlikely that the employer has a further obligation to conduct a "due inquiry"[27] and give the employee an opportunity to be heard.

B. Repudiatory breach by reason of imprisonment

12 Quite apart from dismissal on grounds of criminal misconduct, conviction may result in imprisonment. This may also have a bearing on the employer's right to summarily dismiss. If the employee is imprisoned, he would not be able to turn up for work. If this is for a short period of time, it may be possible for the employee to apply for leave. However, if the employee does not apply for leave or applies for leave but does not have a sufficient number of days and the employer is not willing to grant no-pay leave, then the employee is likely to be in repudiatory breach in not turning up for work and the employer who accepts the repudiatory breach would be able to summarily dismiss the employee on this ground.[28] Being able to terminate the contract on this ground could especially be important in a case where the criminal conduct takes place outside the course of employment and does not have a sufficient nexus to the job.

13 This is the position of employees not covered by the Employment Act.[29] For employees covered by the Employment Act, reference must also be made to s 13(2) of the Employment Act. Section 13(2) provides that an employee is deemed to have broken his contract if he is continuously absent for more than two days:

> (a) without prior leave[30] from his employer or without reasonable excuse or
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> (b) without informing or attempting to inform his employer of the excuse for such absence.

14 In *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd*,[31] the plaintiff was an employee of Singapore Airlines. He was charged with an offence and remanded to prison pending his trial. While he was in remand, he received a letter informing him that his contract with

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27 See *British Gas plc v McCarrick* [1991] IRLR 305 at 308 and *P (Peet) v Nottinghamshire County Council* [1992] IRLR 362 at 362 and 365.

28 *Norris v Southampton City Council* [1982] IRLR 141. See also *Wong Mook v Wong Yin* [1948] MLJ 41.

29 Cap 91, 1996 Rev Ed. As to employees not covered by the Employment Act, see Employment Act s 2.

30 Like in relation to employees not covered by the Employment Act, if leave is applied for, then there may not be a breach. For instance, an employee who has been granted bail may apply to use the leave that he has to cover the period of trial and a short period thereafter with the hope that he would only be sentenced to a fine or be imprisoned for a very short period of time.

31 [2004] 2 SLR 233.

Singapore Airlines had been terminated by reason of unauthorised absence. The plaintiff was subsequently acquitted and brought an action for wrongful dismissal against Singapore Airlines. In relation to s 13(2), the court had to grapple with the question of what was meant by the term "deemed to have broken". The court stated that if "deemed to have broken" just meant that there was a breach, that would be stating the obvious. Hence, that could not have been the intention of the Legislature. Thus, the court went on to hold that "deemed to have broken" must mean that it is deemed that the employee has repudiated the contract by his unauthorised absence. Based on this, since the employee did not inform or attempt to inform the employer, part (*b*) was applicable and, hence, there was a repudiation of the contract on the part of the employee. This gave the employer a choice of whether or not to accept the repudiation. On the facts, Singapore Airlines had accepted the repudiation and, as such, the contract had come to an end.[32] Similarly, where an employee pleads guilty and is convicted, but fails to inform or does not attempt to inform the employer,[33] s 13(2)(*b*) can kick in as well. If he does inform his employer but does not get prior leave, the question would be whether the employee would have a "reasonable excuse" for being absent. If he does not, s 13(2)(*a*) may still be applicable, giving the employer the right to summarily dismiss the employee by reason of his absence. Since the reason for the absence is the conviction in respect of a crime, it is difficult to see how that can amount to a reasonable excuse.[34] This is especially so when one considers that the period of imprisonment (and, hence, absence) may be for a long time.

C. Frustration by reason of imprisonment

15 If the employee receives a custodial sentence, the issue of frustration can also arise. In *Hare v Murphy Brothers Ltd*,[35] the employee in question was sentenced to 12 months' imprisonment. Lord Denning held that, considering the length of the sentence, the position which the applicant held and the importance to the employers of getting someone

32 *Cf*, *Poh Loy Earthworks Sdn Bhd v Mohd Nasurdin Taib* [1997] 3 ILR 608; *Hongkong Bank Malaysia Bhd v Joseph Stephen* [1998] 3 ILR 1001. See also Gary Chan, "Statutory Repudiation, Natural Justice and S 13(2) of the Employment Act" [2004] 16 SAcLJ 447.

33 The employee has to inform his employer or attempt to inform or he has to ask someone to do so on his behalf. A mere newspaper report about the employee being in custody would not suffice; see *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR 233 at [45].

34 In *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR 233 at [37], it was held that the employee in remand had a reasonable excuse. However, in that case, the employee was in remand before trial and not in prison upon conviction.

35 [1974] IRLR 342.

else to do his job,[36] the contract was frustrated. Similarly, in *FC Shepherd & Co Ltd v Jerrom*,[37] the apprentice in question was sentenced to 39 weeks of Borstal training and this was held to have frustrated the contract.[38] However, the question may arise whether frustration can be considered to be "self-induced" in such circumstances. The position in the UK[39] is that it is not, as it is the act of the court in sentencing that results in the frustration and not the criminal conduct of the employee. Further, the rule that frustration cannot be self-induced only applies when the party who is relying on it has brought about the event by his default. In the case of imprisonment, it is the action of the employee as opposed to that of the employer which has brought about the frustration. Hence, too, the concept of self-induced frustration, it has been held, does not apply.[40]

16 However, in the UK, it would appear that the real reason for taking such a position is that if the court were to hold that frustration is self-induced, the employee might be able to profit from his own crime due to certain statutory provisions.[41] This is so as if there is no frustration, the termination could be classified as a "dismissal" under the relevant unfair dismissal legislation and this would bring about the *possibility* of the employee receiving some compensation. In Singapore, there are no similar statutory provisions and it is difficult to see how the employee would be able to profit from his own crime since, even if it is held that there is no frustration, there is likely to be a repudiatory breach on the part of the employee (for instance, in not turning up for work as stated in the preceding section) and, hence, the employee would not be able to receive any compensation in any event. Thus, it is suggested that the position in Singapore may be different in this regard.

17 The Employment Act does not address the issue of frustration and it is likely that the common law position as described above (though unsettled) would still be applicable to employees covered by the Employment Act.[42]

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36 In relation to the issue of getting someone else to do the job in the meantime, in *Chakki v United Yeast Co Ltd* [1982] ICR 140, [1982] 2 All ER 446, it was stated that it must also be considered whether it was reasonable for the employer to hire someone else on a permanent as opposed to a temporary basis.

37 [1987] 1 QB 301.

38 See also *Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd* [1998] 1 MLJ 740.

39 *Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301. This case has been followed in Malaysia, though without much argument; see *Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd* [1998] 1 MLJ 740.

40 See *Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301 at 319.

41 *Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301 at 319 and 325. See also Simon Deakin & Gillian S Morris, *Labour Law* (Hart Publishers, 4th Ed) at 463.

42 See *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1984] 1 MLJ 104 at 106. "There is a presumption against changes in common law. It is

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D. Termination by notice or salary in lieu of notice

18 In common law it is generally possible for the employer to terminate the contract by giving notice[43] or salary in lieu of notice.[44] The position is the same in respect of employees falling under the Employment Act.[45] Thus, for instance, if the employee has been imprisoned for a considerable period of time, the employer could also, if he wanted to, terminate the contract by notice or salary in lieu of notice. However, for employees not covered by the Employment Act, it is likely to be more advantageous for the employer to terminate by giving notice. This is because, since the employee is unable to present himself at work, he does not fulfil the precondition to receiving payment, and, hence, it is likely that the employer does not have to pay the employee his salary.[46] For employees covered by the Employment Act, the position is not entirely clear, but this might be just a theoretical point since the employers can rely on s 13(2) of the Employment Act in such an instance as discussed earlier.

19 As alluded to, the above discussion may be theoretical. However, what if the crime is not related to the job and the employee has just been sentenced to a fine or is imprisoned for a very short period of time such that the employee can and does apply for leave? In such a situation, the question may arise whether the employer can nonetheless terminate the contract of employment by notice or salary in lieu of notice. This issue is considered a little later.[47]

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presumed that the legislation does not intend to make a substantial alteration in law beyond which it expressly declares." "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. Quoting from *National Assistance Board v Wilkinson* [1952] 2 QB 648 in both instances. See also *Home Office v Ayres* [1992] IRLR 59.

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

44 *Konski v Peet* [1915] 1 Ch 530. *Cf*, *Morrish v NTL Group Ltd* [2007] CSIH 56.

45 See Employment Act (Cap 91, 1996 Rev Ed) ss 10 and 11.

46 See *Henthorn and Taylor v CEGB* [1980] IRLR 361; *Mercantile Bank Ltd v The Singapore Bank Employees' Union* [1967] MLJ xli. These cases relate to the issue of whether employees on strike can continue to receive their pay during the strike and have unanimously held that the employees would not be so entitled.

47 See paras 28–32 of this article.

II. Interim period before pleading guilty or before conviction

A. Repudiatory breach by reason of criminal misconduct

20 Thus far, the discussion has proceeded on the assumption that the employee has pleaded guilty or has been convicted. If the employee does not plead guilty immediately or never pleads guilty, and there is an interim period before he eventually does so or if he never does so, the question may also arise whether the employer can summarily dismiss the employee at that stage before the court determines him to be guilty, on the ground of the criminal misconduct.

21 If the criminal conduct takes place in the course of employment, then it may be possible for the employer to make an independent assessment whether there has been a repudiatory breach of the contract; and if he comes to the conclusion that there has indeed been such a breach, the employer may summarily dismiss the employee. On the other hand, if the criminal conduct takes place outside the course of employment, but is sufficiently related, it may be much more difficult for the employer to make an independent assessment. Nonetheless, in both instances, the essential question is whether the employer has reasonable grounds for believing that the employee has indeed committed a repudiatory breach of the contract. As stated in *British Home Stores Ltd v Burchell*:[48]

> First of all, there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief.[49] And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case. [footnote added]

22 Since the employee has not pleaded guilty, the question may arise whether the employer has to give the employee a chance to be heard. As stated earlier, in common law, generally, it is not necessary to do so.[50] However, in relation to employees falling under the Employment

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48 [1978] IRLR 379 at 380. See also *W Weddel & Co Ltd v Tepper* [1980] ICR 286.

49 It is also possible that the employer has reasonable grounds to suspect more than one employee, but it is impossible to identify exactly the employee who has committed the wrong. In such circumstances, it may be reasonable for the employer to dismiss all such employees whom he equally suspects; see *Monie v Coral Racing Ltd* [1980] IRLR 464; *Whitbread & Co plc v Thomas* [1988] ICR 135. In addition, previous disciplinary problems on the part of the employee could be relevant in determining whether the employer had reasonable grounds to suspect; see *London Borough of Harrow v Cunningham* [1996] IRLR 256.

50 See *Vasudevan Pillai v The City Council of Singapore* [1968] 2 MLJ 16 at 20; *Lim Tow Peng v Singapore Bus Services Ltd* [1975–1977] 1 SLR 180; *Arokiasamy Joseph*

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Act, also as stated, an employee may be dismissed for misconduct after a due inquiry. Since the employee's guilt has not been ascertained, it is more likely that the employer would have to give the employee a chance to be heard, or if it is not possible (for instance, he is in remand), then it might be difficult for the employer to summarily dismiss the employee. Nonetheless, even then, there could be some situations where the employer may still be able to summarily dismiss the employee without giving him a chance to be heard.[51] For instance, if the employee has been caught red-handed[52] or has tacitly admitted to having committed the offence,[53] then it may still be possible for the employer to do this.

Clement Louis v Singapore Airlines Ltd [2004] 2 SLR 233; *Hui Cheng Wan Agnes v Nippon SP Tech (S) Pte Ltd* [2001] SGHC 271; *Wee Lye Seng v Dr Ee Peng Liang* [1993] SGHC 24. Nonetheless, in none of the local cases in which this issue was raised, was the implied term of trust and confidence considered. Thus, the question today would be whether, in light of the likely to be present implied term of trust and confidence, an employer should, at least in some circumstances, give the employee a right of hearing before summarily dismissing him? A UK case in which this issue was considered in light of the implied term of trust and confidence was *McClory v Post Office* [1992] ICR 758, [1993] 1 All ER 457, though the court in this case rejected the argument that there was an implied obligation to observe the rules of natural justice in an ordinary contract of employment. Nonetheless, it must be pointed out that this was prior to the House of Lords decision of *Malik v BCCI* [1997] 2 WLR 95 which crystallised the existence of the implied term of trust and confidence in contracts of employment (see also para 25 of this article). Moreover, there have been very recent UK cases which have held that the implied term of trust and confidence can extend to events leading up to the termination (see, for instance, *Eastwood v Magnox Electric plc* [2004] IRLR 733; *Gogay v Hertfordshire County Council* [2000] IRLR 703). It may also be argued that if it is indeed accepted that there is such an implied term of trust and confidence, it would be odd that it should be suspended in relation to the most important issue concerning an employee. Further, very recently in *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802, it has been reconfirmed by the Court of Appeal that the rules of natural justice apply to the removal of a club member from a social club and in light of this it may be argued that, all the more, the rules should extend to the removal of an employee from his job, as an employee is in a far more vulnerable position and his whole livelihood is at stake. In addition, as Warren L H Khoo J stated in *Stansfield Business International Pte Ltd v Minister of Manpower (formerly known as Minister of Labour)* [1999] 3 SLR 742 [26]: "Rules of natural justice are not some arcane doctrine of law. They represent what the ordinary man expects and accepts as fair procedure for the resolution of conflicts and disputes … ." Thus, it may be that the point is not entirely closed. Aside from the issue of whether it can be a legal obligation, as a matter of practice, subject to some exceptions such as those stated in footnotes 51 to 53 below, it might also be good to give the employee a chance to be heard (where it is possible to do so, such as where the employee has been granted bail). This is so as the employer can ensure that he has sufficient grounds for summarily dismissing the employee in the first place and he lessens the risk that the employee may subsequently sue for wrongful dismissal.

51 See also *Velayutham v Port Authority of Singapore* [1976] 1 MLJ 210.

52 See, for instance, *Scottish Special Housing Association v Linnen* [1979] IRLR 265; *Carr v Alexander Russell Ltd* [1976] IRLR 220.

53 See, for instance, *Parker Bakeries Ltd v Palmer* [1977] IRLR 215.

23 Further, so long as the employer has reasonable grounds, it does not matter that, subsequently, the court finds the employee not guilty of the crime. As stated in *Da Costa v Optolis*:[54] "The Crown Court and the Tribunal were considering very different problems. The Crown Court was concerned with whether it has been proved beyond reasonable doubt that the appellant had committed a criminal offence, whilst the Tribunal was merely concerned with the question of whether the employer had proved that grounds existed on which he could properly dismiss him." Similarly, in *Harris (Ipswich) Ltd v Harrison*,[55] it was stated that: "Thus, where an employee is charged with a criminal offence alleged to have been committed in the course of employment, and consequently dismissed, it does not follow that because he is later acquitted, the dismissal is unfair. It will not always be wrong to dismiss the employee before his guilt has been established. For, quite apart from guilt, involvement in the alleged criminal offence often involves a serious breach of duty or discipline. For example, the cashier charged with a till offence, guilty or not, is often in breach of company rules in the way in which the till has been operated. The employee who removes goods from the premises without express permission, guilty or not, is often in breach of company rules in taking his employer's goods from the premises without express permission; and it is irrelevant to that matter that a jury may be in doubt whether he intended to steal them. What it is right to do, therefore, in a case of this kind, will depend on the exact circumstances, including the employer's disciplinary code."

B. Repudiatory breach by reason of being in remand

24 Assuming the employer cannot summarily dismiss on the ground of the criminal misconduct, the issue could also arise whether the employer can do so on the ground that the employee is in repudiatory breach by reason of not turning up for work (in so far as the employee has been remanded and is not granted bail). In this regard, if the employee has informed the employer and applies for annual leave or no-pay leave and such leave is granted, then, obviously, the employer cannot terminate on this ground.

25 However, what if the employee has informed the employer, but does not apply for leave or has no more annual leave or has insufficient annual leave? In this regard, the issue may arise whether it could be implied that the employer would grant the employee no-pay leave for a

54 [1976] IRLR 178 at 180. See also *Velayutham v Port Authority of Singapore* [1976] 1 MLJ 210 and *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair* [2002] 3 AMR 2898.

55 [1978] ICR 1256 at 1259.

reasonable period[56] given the grave circumstances and given that the employee has not been proven guilty of any offence as yet, on the basis of the implied term of trust and confidence.[57] Since it is assumed that the leave is for a reasonable period, the employer is unlikely to suffer any loss. Hence, it is arguable that the implied term of trust and confidence extends to this.

26 On the other hand, it is also possible that the employee never informs the employer. In such a situation, again based on the implied term of trust and confidence, it may be argued that the employer should grant no-pay leave for a reasonable period so long as he knows or ought to know that the employee is in remand, and that the employer would be deemed to have known that the employee was in remand, if he could have found out through reasonable means (such as through the newspapers or by contacting his family members at home). However against this, it may be argued that since the duty of trust and confidence is a mutual duty, the employee should at the very least have informed the employer the reasons for his absence or should have gotten someone else to do so on his behalf. Of the two, it is suggested that latter is to be preferred as the former might place too onerous a duty on the employer.

27 Thus far, the position of employees not covered under the Employment Act has been considered. In relation to employees covered under the Employment Act, the relevant section is s 13(2), which has already been considered.[58]

C. Termination by notice or salary in lieu of notice

28 Assuming the employer cannot summarily dismiss the employee on grounds of repudiatory breach by reason of the criminal misconduct or by reason of absence, the question of whether he can terminate the contract by giving notice or salary in lieu of notice may arise.

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56 What would be a reasonable period, it is suggested, would depend on the factors such as the nature of the employer's business, the nature of the employee's position and whether someone else could be roped in to do the employee's job for a temporary period of time.

57 The implied term of trust and confidence was crystallised in *Malik v BCCI* [1997] 3 WLR 95. The implied term of trust and confidence has been recognised in Malaysia (*Dr Rayanold v Pereira v Minster of Labour* [1997] 5 MLJ 366), Hong Kong (*Semana Bachicha v Poon Shiu Man* [2000] 3 HKC 452), Australia (*Blakie v SA Superannuation Board* (1995) 65 SASR 85) and New Zealand (*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372). In Singapore, passing reference to it has been made in *Arul Chandran v Gartshore* [2000] 2 SLR 446 and *Tullet Prebon (Singapore) v Chua Leong Chuan Simon* [2005] 4 SLR 344.

58 See paras 13–14 of this article.

29 In this regard, as stated above, in common law, it is generally possible to terminate the contract of employment by notice or salary in lieu of notice.[59]

30 Thus, even if there is no nexus between the alleged crime and the work, it is possible for the employer to terminate the contract by notice or salary in lieu of notice for, as stated in *D'Cruz v Seafield Amalgamated Rubber Co Ltd*:[60]

> … 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.

31 However, *D'Cruz v Seafield Amalgamated Rubber Co Ltd* was decided before development of the implied term of trust and confidence.[61] The question today would be whether, in light of the likely to be present implied term of trust and confidence, an employer can exercise a contractual right to terminate the contract where guilt has not been proven? If the contract states clearly that it can be terminated without reason or cause, it would be difficult to maintain that the employer's express right is nonetheless subject to an implied term of trust and confidence.[62] However, what if the contract is not so clear and just states that the contract may be terminated by notice or salary in lieu of notice? In *Latham v Credit Suisse First Boston*,[63] the contract provided that "either party may terminate the employment by giving one month's notice in writing". When the plaintiff's employment was terminated, among other things, the plaintiff alleged that the termination was motivated by bad faith. The Court of Appeal examined this allegation[64] in detail and came to the conclusion that the termination was not motivated by bad faith. However, the exact implications of this are unclear. Does this mean that if the contract had been terminated by bad faith, the termination would have been wrongful? The point was not really argued, but perhaps it may be that it is possible to so argue.

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59 See *Richardson v Koeford* [1969] 1 WLR 1812, [1969] 3 All ER 1264; *D'Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154; *KV Pillay v Power Foam Rubber Products (MFG) Co Ltd* [1963] MLJ 268; *Konski v Peet* [1915] 1 Ch 530. *Cf*, *Morrish v NTL Group Ltd* [2007] CSIH 56.

60 [1963] MLJ 154 at 156. See also *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 at 1582, [1971] 2 All ER 1278 at 1282.

61 See para 25 of this article.

62 *Reda v Flag* [2002] IRLR 747.

63 [2000] 2 SLR 693.

64 See also *Hui Cheng Wan Agnes v Nippon SP Tech (S) Pte Ltd* [2001] SGHC 271) and *GYC Financial Planning Pte Ltd v Prudential Assurance Co Singapore (Pte) Ltd* [2006] 2 SLR 865. In both these High Court decisions, the courts while stating that there was no duty of good faith in relation to termination, nonetheless went on the consider whether the termination on the facts was motivated by bad faith.

Nonetheless, as this point has been canvassed elsewhere by the author, nothing more will be said of it in this article.[65] It has also been assumed that termination on such a ground amounts to termination in bad faith, which may not necessarily be the case.[66]

32 Thus far, the position of employees not covered by the Employment Act has been covered. For employees covered by the Employment Act, s 14(2) provides that where an employee considers himself to be "dismissed" without just cause or excuse, the employee may make representations to the Minister in writing, within one month of the dismissal, to be reinstated in his former employment. Formally, it was not entirely clear if the term "dismissed" included termination by notice or salary in lieu of notice.[67] However, under the recent amendments to the Employment Act,[68] the term "dismissed" is defined in s 2 of the Act to include termination by notice and salary in lieu of notice. Thus, now, for employees covered by the Employment Act, if there is no just cause or reason for the termination, the employee concerned can make representations to the Minister.

D. Frustration during the interim period

33 The issue of frustration has already been considered above, the only difference being, in this situation, it may not be possible to predict with accuracy the exact period during which the employee would be absent, though this, by itself, does not mean that there cannot be frustration.[69]

E. Right of employer to suspend the employee for the criminal misconduct in the interim period

34 Instead of summary dismissal, the question may also arise whether the employer can suspend the employee during the interim period. In common law, the employer has no implied right to suspend the employee *without* pay[70] for misconduct unless the contract expressly provides for it. However, it is always possible for the employer to suspend the employee *with* pay as generally the employer has no duty to provide the employee with work.[71] However, this is in reference to the

65 See *Employment Law in Singapore* (LexisNexis, 2nd Ed) at p 201.
66 As to what amounts to bad faith, see, for instance, *Clark v Nomura International plc* [2000] IRLR 766 and *Commerzbank AG v Keen* [2007] IRLR 132.
67 See *Employment Law in Singapore* (LexisNexis, 2nd Ed) at p 233.
68 Act 32/2008.
69 See, for instance, *Chakki v United Yeast Co Ltd* [1982] ICR 140 at 144. See also *DHL Sdn Bhd Selangor v Ravendiran a/l Subramaniam* [1997] 1 ILR 52.
70 *Hanley v Pease & Partners* [1915] 1 KB 698.
71 See, for instance, *Turner v Sawdon* [1901] 2 KB 653.

criminal misconduct. Quite apart from that, if the employee is in remand, the employee would not be turning up for work. Since turning up for work is a precondition to receiving pay,[72] it is likely that the employer does not have an obligation to pay in any case.

35 Thus far, the position of employees not covered by the Employment Act has been considered. In respect of employees covered by the Employment Act, reference must be made to s 14(1)(*b*) of the Employment Act, which provides that an employer may, instead of dismissing an employee for misconduct, after a due inquiry, suspend him from work without payment of salary for a period not exceeding a week. In addition, s 14(8) provides that, while conducting an inquiry to determine if the employee should be dismissed, the employer may suspend the employee for a period not exceeding one week but shall pay him not less than half his salary for such period. Thus, compared to the common law position, for employees covered under the Employment Act, the employer has far less flexibility in relation to suspension. For instance, it would not be possible for the employer to suspend the employee without pay while he is out on bail for more than the periods stated above or if the conditions stated above are not met. The employer's right to "suspend" is similarly limited when the employee is not granted bail. However, in such an instance, as suggested above in relation to the common law, since the employee does not turn up for work, it is likely that the employer does not have to pay him his salary in any case. Finally, it may also be mentioned that these provisions relating to "suspension" under the Employment Act have not been the subject of change under the recent amendments[73] to the Employment Act.

III. Conclusion

36 As discussed above, when an employee has been convicted of a criminal offence or is charged with one, the employer's rights depend on the circumstances, and there can be some uncertainty especially if the crime does not relate to the job or if the punishment is in the form of a fine instead of imprisonment. Thus, from the employer's point of view, it would be preferable if the contract of employment has express clauses to deal with such issues. For instance, it could be provided that, without prejudice to other rights, the employer may suspend an employee without pay[74] upon being charged with an offence. In addition, it may be

72 See *Henthorn and Taylor v CEGB* [1980] IRLR 361; *Mercantile Bank Ltd v The Singapore Bank Employees' Union* [1967] MLJ xli. These cases relate to the issue of whether employees on strike can continue to receive their pay during the strike and have unanimously held that the employees would not be so entitled.

73 Act 32/2008.

74 It should also be made clear whether the employee would receive back his pay if the charge is withdrawn or he is acquitted.

provided that the employer has the option to dismiss the employee summarily should he be convicted of a criminal offence. However, in relation to employees covered by the Employment Act, such contractual provisions cannot override the relevant provisions of the Employment Act.[75]

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75 The restrictions in relation to suspension under the Employment Act (Cap 91, 1996 Rev Ed) were highlighted in the preceding paragraph. In relation to summary dismissal upon conviction, though contractual provisions could be relevant, ultimately, it must still be established that there is just cause or excuse for the dismissal as a result of s 14(2) of the Employment Act.