

ENTRENCHING THE RIGHT TO MATERNITY LEAVE

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1 Perhaps more than any other issue in employment law, the issue that has in recent times dominated the local press¹ is maternity leave and among other things it has been reported that the number of women seeking the help of the Ministry of Manpower in relation to maternity leave-related disputes has risen.² This article looks at the issues surrounding the right to maternity leave in Singapore and queries whether it is time for change. Some comparisons are made to the position in Hong Kong and Malaysia, where appropriate. International standards and conventions are also referred to. However, it is not the aim of this article to look into certain other more general matters such as the introduction of general anti-discriminatory legislation.

I. The basic statutory position

2 The Employment Act³ is one of the two statutes⁴ governing maternity leave in Singapore. All sections referred to in this article are with reference to the Employment Act unless otherwise stated. Section 76(1) provides that every female employee shall be entitled to absent herself from work:

- (a) during —
 - (i) the period of 4 weeks immediately before her confinement;⁵ and
 - (ii) the period of 8 weeks immediately after her confinement;

1 See, for instance, *The Straits Times* (11 June 2005, 23 June 2005, 10 September 2005, 26 May 2006, 27 June 2006, 30 June 2006, 1 July 2006, 3 July 2006, 4 July 2006 and 13 November 2006).

2 See *The Straits Times* (3 July 2006).

3 Cap 91, 1996 Rev Ed.

4 The other statute is the Children Development Co-Savings Act (Cap 38A, 2002 Rev Ed), which is referred to below.

5 The term “confinement” is defined as “the delivery of a child” under s 2 of the Employment Act. See also s 2(1) of the Children Development Co-Savings Act.

- (b) during a period of 12 weeks, as agreed to by her and her employer,⁶ commencing —
- (i) not earlier than 28 days immediately preceding the day of her confinement; and
 - (ii) not later than the day of her confinement; or
- (c) during —
- (i) a period of 8 weeks, as agreed to by her and her employer, commencing —
 - (A) not earlier than 28 days immediately preceding the day of her confinement; and
 - (B) not later than the day of her confinement; and
 - (ii) one or more further periods, not exceeding 24 days⁷ in the aggregate, as agreed to by her and her employer, which shall be within the period of 6 months commencing on the day of her confinement.

3 This then is the basic provision relating to maternity leave under the Employment Act. However, the Employment Act does not apply to all employees.⁸ Nonetheless, by virtue of the Children Development Co-Savings Act, even employees⁹ not covered by the Employment Act are covered and are conferred a similar¹⁰ right.¹¹

6 Section 76(1)(a) does not require the agreement of the employer whereas ss 76(1)(b) and 76(1)(c) do. This would mean, for instance, that an employee cannot insist on taking 12 weeks of maternity leave at one go upon confinement under s 76(1)(b), unless she has the agreement of her employer.

7 Since the section provides, “not exceeding 24 days”, the question may arise whether the employer can insist on granting something much less, for instance, two days. The answer is in the negative as the phrase “not exceeding 24 days” is with reference to the remaining four weeks of maternity leave which has not been taken. The phrase “not exceeding” is used as some businesses may operate on a five-day work-week (which will amount to 20 days of work in four weeks) and others may operate on a six-day work-week (which will amount to 24 days of work in four weeks). See, *Singapore Parliamentary Debates, Official Report* (21 September 2004) vol 78 at col 734.

8 For the categories of employees covered or not covered, see, s 2. Thus, for instance, domestic workers and employees employed in a managerial, executive or confidential position are excluded.

9 This is because the term “employee” has been defined broadly under s 2(1) of the Children Development Co-Savings Act to mean “any person who has entered into or works under a contract of service” and does not have any exclusion. Thus, for instance, employees employed in a managerial, executive or confidential position are not excluded. Domestic maids are also not excluded. However in the case of foreign domestic maids, since the conditions imposed upon them on the issuance of their work permits would normally state that they are not to become pregnant (see

4 However, for employees covered under the Employment Act, the employee concerned would not be entitled to maternity leave if she has two or more living children who were born in more than one previous confinement.¹² Thus if an employee has a third child and already has two living children born in two different confinements, she would not be entitled to maternity leave under the Employment Act. In contrast, under the Children Development Co-Savings Act, a female employee would be entitled to maternity leave and pay provided she has fewer than four other living children at the time of her confinement.¹³ Thus the female employee in the earlier illustration, while she would not be able to claim

<<http://www.mom.gov.sg/>>), if they do become pregnant and this is discovered, it is likely that the work permit would be cancelled and they would have to return home. Thus this may just be a theoretical point. See also *infra* n 10 on the requirement that the child must be a Singapore citizen.

- 10 The right is similar, not identical. One difference relates to the 180-day rule which is discussed below. Another difference relates to the number of children, which is also discussed below. Further, unlike under the Employment Act, under the Children Development Co-Savings Act, there is a requirement that the employee must be lawfully married to the child's natural father at the time the child is conceived or must become lawfully married to the child's natural father after the child is conceived but before the child is born (see s 9A(1)(c) of the Children Development Co-Savings Act). Though this is based on policy grounds, it is difficult to see why there should be a difference between the two statutes in this regard. Another difference is that under the Children Development Co-Savings Act, the child delivered must be a Singapore citizen at the time of the child's birth (see s 9A(1)(a) of the Children Development Co-Savings Act). There is no similar requirement under the Employment Act. This could, for instance, mean that a foreign employee who is working in an executive and confidential position in Singapore may not be entitled to maternity leave if her child would not be a Singapore citizen at the time of her birth, unless her contract grants her such a right. Thus the aim appears not to be whether a female is given adequate rest and time to bond with her child. Rather, the aim appears to be whether Singapore benefits in terms of an increase in the population of its citizens. Whatever the reason, again it is difficult to see why there should be a difference between the two statutes. It would have been less objectionable if the requirement was restricted to the extra payment an employee is entitled to receive under the Children Development Co-Savings Act as compared to the Employment Act (see further, *infra* n 14) and the corresponding reimbursement the employer is entitled to receive from the government (see ss 9A(4) and 10 of the Children Development Co-Savings Act). But as it stands, the requirement applies to *both* maternity leave and the *entire* entitlement to payment during that leave.
- 11 See s 9(1) of the Children Development Co-Savings Act.
- 12 Section 76(4). Thus if a female employee has more than one child in her first confinement, she would not be barred from claiming in respect of her second confinement under the Employment Act.
- 13 Section 9A(1)(b) of the Children Development Co-Savings Act, subject to s 9A(2) of the said Act which provides that if an employee has four or more children in her first confinement, she would be still be entitled to the maternity leave and benefits in respect of her second confinement.

maternity leave in respect of her third child under the Employment Act,¹⁴ would be able to do so under the Children Development Co-Savings Act, provided the other requirements¹⁵ are satisfied. Thus taking both statutes together, subject to two minor exceptions,¹⁶ a female employee would not be entitled to maternity leave or pay when she has more than four living children. This is in contrast with the position in Hong Kong where there is no limit.¹⁷ In Malaysia, there is a limit, but it is greater, namely five surviving children.¹⁸ It may also be noted that there are no limits under the relevant international standards and conventions.¹⁹ Given that the birth rate in Singapore has not been very encouraging for quite a long time,²⁰ it is difficult to see why maternity leave and pay should generally be limited to four children. This is especially so when one considers the fact that for the third child and fourth child, though the employer pays, he gets a reimbursement from the government.²¹ Further, since an employer is unlikely to be faced with many such employees, there is unlikely to be a considerable disruption to his business either.

II. The service period

A. The 180-day rule

5 However, the entitlement to maternity leave under the Employment Act is subject to a further requirement as set out in s 76(2). Section 76(2) provides that a female employee who has served an employer for less than 180 days immediately preceding the day of the confinement shall not be entitled to pay²² during the benefit period. Thus

14 Even in respect of the first two children under the Employment Act, the employee can only claim payment in respect of the first eight weeks (see, s 76(1A)). Thereafter if she seeks to claim payment for the remaining four weeks, she has to do so under the Children Development Co-Savings Act provided she meets the requirements specified in that Act (see s 9A(4) of the Children Development Co-Savings Act). Further, under the Children Development Co-Savings Act, the employer is obliged to pay only up to \$10,000 and this amount can be reimbursed from the Government (see ss 9A(4) and 10 of the Children Development Co-Savings Act respectively).

15 See *supra* n 10.

16 As to the exceptions, see *supra* nn 12 and 13.

17 The relevant statute in question is the Employment Ordinance (Cap 57) (HK).

18 See s 37(1)(c) of the Employment Act 1955 (Act 265, 1981–82 Rev Ed) (M'sia).

19 As to the relevant standards and conventions, see paras 33 to 35 of the main text below.

20 See <<http://www.singstat.gov.sg>>. See also *The Straits Times* (21 August 2006) and *The Straits Times* (24 August 2006).

21 See ss 9A(4) and 10 of the Children Development Co-Savings Act.

22 As to the calculation of the amount of pay and the period during which payment has to be made under the Employment Act, see s 76(1A).

if a female employee covered by the Employment Act has served the employer for less than 180 days immediately preceding the day of the confinement, while she would be entitled to maternity leave, she would not be entitled to payment during that period.

6 On the other hand, for employees claiming under the Children Development Co-Savings Act, reading s 9A(1) with sub-s 9A(1)(d), an employee would be entitled to leave *and pay* only if she has served the employer for a period not less than 180 days immediately preceding the day of the confinement. Thus if a female employee has served the employer for less than 180 days immediately preceding the day of the confinement, she would not even be entitled to any maternity leave under the Children Development Co-Savings Act. It is not at all clear why there should be a difference between the two statutes and the position under the Employment Act seems more equitable, assuming of course it is necessary to retain the reference to the 180-day period in the first place.²³

B. *Must the period be continuous?*

7 In relation to the 180-day period, the question may also arise, whether this has to be a continuous period of 180 days. For instance, a department store may hire temporary workers as and when there is a need and such a worker may have worked for 180 days over a longer period of time, such as over 12 months. In such a situation, would that worker be entitled to maternity benefits? It is likely that period has to be a continuous period and not one that has breaks in between as the use of the words “immediately preceding”, suggests that the 180 days cannot be spread out over a longer period of time. Thus casual workers who are employed as and when there is work are unlikely to be covered. This is also likely to be the position in Hong Kong where maternity rights are based on there being a “continuous contract”.²⁴ In contrast, in Malaysia, casual workers are included provided the worker “has been employed by the employer for a period of or periods amounting in the aggregate to, not less than ninety days during the nine months immediately before her confinement”.²⁵

23 This issue is discussed at paras 15 of the main text below.

24 See s 12(1) of the Hong Kong Employment Ordinance, *supra* n 17.

25 See s 37(2)(a)(ii) of the Malaysian Employment Act 1955, *supra* n 18.

C. *Service under different contracts*

8 The question may also arise whether, if an employee, who has been working for the company for a continuous period exceeding 180 days immediately preceding the day of the confinement, signs a new contract with the company, for instance, 100 days before the confinement, would the new contract mean that she would not have fulfilled the 180-day requirement? Since s 76(2)²⁶ uses the word “served” as opposed to “worked under a contract”, it is likely that the employee would still be so entitled. The position in Hong Kong and Malaysia is also not entirely clear in this respect. Nonetheless, it would be better if the matter was expressly clarified in the section itself.

D. *Applicability to specific types of employees and related issues*

9 The question may also arise whether these benefits apply to employees on probation. Since there is no specific exclusion and since probationary employees are employees nonetheless, it is most likely that they are covered. The question may also arise whether maternity leave is applicable to employees on a fixed term contract.²⁷ If the employee is truly on a fixed term contract, it may be argued that the expectation of the parties is that the employee should be performing work for that fixed period and should not be going on long maternity leave. However, in the light of the fact that it is provided that any contract of service whereby a female employee relinquishes any right to maternity benefit shall be null and void,²⁸ it is likely that employees on fixed term contracts are also entitled to maternity leave.

10 However, in both situations, the question could arise, what if the employee’s fixed term contract or probationary period comes to an end

26 In this respect the wording is similar under the Children Development Co-Savings Act (see s 9A(1)(d)).

27 In this context, a fixed term contract is a contract expressed to be for a fixed period of time and which does not allow either party (expressly or impliedly) to terminate it by notice before the end of the period: see *British Broadcasting Corporation v Ioannou* [1975] QB 781. In relation to the Employment Act, by virtue of sections 10 and 11(1), either party has the implied right to terminate the contract by giving notice or salary in lieu of notice. Hence, it may be that, technically, there cannot be fixed term contracts in relation to employees covered by the Employment Act. However, there could be such fixed term contracts in relation to other employees covered by the Children Development Co-Savings Act.

28 Section 86 of the Employment Act. Section 12(1) of the Children Development Co-Savings Act extends the applicability of s 86 to employees covered under the Children Development Co-Savings Act as well.

after the start of, but before the end of, the maternity leave and the employee is not retained in the company thereafter? Is the employer still obliged to pay the employee for the rest of the maternity leave?

11 Strangely, it may be possible to make an argument in the affirmative by reference to s 76(6).²⁹ Section 76(6) provides:

Where the employment of a female employee is terminated (whether by resignation or dismissal, upon the completion of her contract of service, or for any other reason) before she has exercised, wholly or partly, her entitlement to absent herself from work during a period referred to in subsection (1)(c)(ii), she shall forfeit that entitlement (or the balance thereof) upon the termination of her employment.

12 Since s 76(6) is only with reference to s 76(1)(c)(ii),³⁰ it may be argued that if the employee were to claim her leave under the other sections, namely, ss 76(1)(a) or s 76(1)(b),³¹ she would be entitled to do so, even if the employment contract comes to an end before the expiration of the leave. This would mean that the correct test is whether the female was an employee of the employer at the start of her maternity leave and not whether she was one thereafter. If she was an employee at that relevant point, she would still be entitled, provided she meets the other requirements such as having served the employer for a period not less than 180 days immediately preceding the day of the confinement.

13 However, this would also mean that if an employee resigns from the job immediately after the confinement (though this is unlikely), then she would still be entitled to the benefits. It may be argued that such an odd result cannot have been intended by Parliament and hence once an employee ceases to be one, she should no longer be entitled to maternity benefits. In support of this argument, reference may be made to s 79(2) of the Employment Act.³² Section 79(2) of the Employment Act relates to death of a female employee after confinement and it provides that the female employee would be entitled to payment “in respect of the period after confinement *up to the day preceding the day of her death*” [emphasis added]. Thus, her estate would not be entitled to payment for the rest of the maternity leave period.

29 The equivalent under the Children Development Co-Savings Act is s 9(3).

30 The equivalent under the Children Development Co-Savings Act is s 9(1)(c)(ii).

31 The equivalent under the Children Development Co-Savings Act is s 9(1)(a) and s 9(1)(b) respectively.

32 By virtue of s 12(1) of the Children Development Co-Savings Act, s 79(2) also applies to employees covered by the Children Development Co-Savings Act.

14 Of the two views it is suggested that the latter is to be preferred. However, the position would be much clearer, if the matter was expressly clarified.

E. *The necessity for the rule*

15 It may also be questioned, why it is necessary to have the 180-day rule in the first place. In Hong Kong, there is no such requirement. There is also no such limitation under the relevant international standards or conventions.³³ In Malaysia, there is such a requirement, but the period is shorter, namely four months and even then this relates to payment during maternity leave rather than maternity leave itself.³⁴ If the provisions relating to termination, which are discussed below, are not amended, at the very least, this requirement should be removed or shortened so that employees whose contracts are unfairly terminated on the ground of pregnancy can at least have a chance of finding another employer who would have to grant them maternity benefits. Even if the period is removed or shortened, there is nothing to stop a prospective employer from asking an employee in an interview whether she is pregnant before employing her. Nonetheless, there could be employers who do not ask that question either out of far-sightedness or ignorance and hence possibly the change would have some significance.

III. Dismissal during maternity leave

16 Section 81 of the Employment Act³⁵ provides that when a female employee absents herself from work in accordance with the provisions of Part IX it shall not be lawful for her employer to give her notice of dismissal during her absence or on such a day that the notice will expire during her absence. Several issues arise in relation to s 81.

A. *Termination by notice or salary in lieu of notice*

17 The question may arise whether the term “dismissal” refers only to summary dismissal or includes termination by notice or salary in lieu of notice. At first blush, it may seem that the term “dismissal” is restricted

33 As to the relevant standards and conventions, see paras 33 to 35 of the main text below.

34 See s 37(2)(a) of the Malaysian Employment Act 1955, *supra* n 18.

35 By virtue of s 12(1) of the Children Development Co-Savings Act, s 81 also applies to employees covered by the Children Development Co-Savings Act.

to summary dismissal. However, there are several reasons why this is unlikely to be the position. Firstly, the word dismissal appears in some other sections in the Employment Act and in that respect of those sections it would appear that the term “dismissal” includes termination.³⁶ For instance, s 43(7), which relates to annual leave, provides that an employer shall pay the employee his gross rate of pay for every day of such leave and if an employee has been dismissed otherwise than for misconduct before he has taken that leave, the employer shall pay the employee his gross rate of pay in respect of every day of that leave. Thus, for instance, if an employee has been summarily dismissed for incompetence (assuming this does not amount to misconduct), then the employee would be entitled to payment in respect of annual leave not taken. However, certainly an employee whose contract has been terminated by notice or salary in lieu of notice (for instance, on the ground of retrenchment) should be in a better position than an employee who has been summarily dismissed for incompetence, in terms of entitlement. That aside, s 81 uses the terminology, “notice of dismissal” and “notice will *expire*” [emphasis added]. If this does not include termination by notice, it is difficult to see how the notice can *expire* during the maternity leave. Reference may also be made to the position in Malaysia under the Industrial Relations Act, 1967.³⁷ Section 20 of the Malaysian Industrial Relations Act allows a workman who considers himself to have been “dismissed” without just cause or excuse to make a representation to a relevant authority. However, the term “dismissed” is not defined in the statute. Nonetheless, numerous Malaysian decisions³⁸ have held that dismissal includes termination by notice or salary in lieu of notice. In addition, using the purposive rule of statutory interpretation,³⁹ if dismissal does not include termination by notice or salary in lieu of notice, it would be very easy to sidestep the protection conferred by the statute. Thus it is suggested that dismissal includes termination by notice or salary in lieu of notice. Nonetheless, the position would be clearer if

36 See also s 76(6). On the other hand, see s 22 which *seems* to refer to dismissal and termination as being two different things.

37 Act 177, 1976 Rev Ed (M’sia).

38 See, for instance, *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah* [2000] 4 MLJ 87, *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714, *Yap Kok Foong v Colgate Palmolive (M) Sdn Bhd* [2000] 4 MLJ 314, *Quah Swee Khooon v Sime Darby Bhd* [2000] 2 MLJ 600. See also Indian Supreme Court decision of *Management of U B Dutt and Co (Private) Ltd v Workmen of U B Dutt and Co (Private) Ltd* AIR 1963 SC 411.

39 See s 9A(1) of the Interpretation Act (Cap 1, 1999 Rev Ed). See also for instance, *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 and *Chia Choon Yong v Central Provident Fund Board* [2005] 2 SLR 594.

the section was amended to expressly provide for this. A good model to follow could be the Retirement Age Act,⁴⁰ under which it is provided that an employee shall be treated to be dismissed by his employer if the contract under which he is employed is terminated by the employer, whether by notice or without notice.⁴¹ It may also be noted that under the relevant international standards, termination (whether with or without notice) on the ground of pregnancy or child birth is prohibited.⁴²

B. Constructive dismissal and other issues

18 Another problem relating to s 81 is the issue of constructive dismissal. For instance, if the employer unilaterally reduces the salary of the employee without justification⁴³ or demotes the employee without justification⁴⁴ just before the confinement and the employee resigns on that ground, would the employer face any criminal liabilities under the Employment Act⁴⁵ or the Children Development Co-Savings Act?⁴⁶ As Lord Denning stated in *Western Excavating (ECC) Ltd v Sharp*:⁴⁷

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all ...

19 The concept of constructive dismissal clearly applies in common law⁴⁸ and it has also been applied in Singapore.⁴⁹ However, the more important question for our purposes is whether the concept applies in the statutory context. If a statute expressly provides for it, then clearly the concept of constructive dismissal can apply. For instance, in the UK,

40 Cap 274A, 2000 Rev Ed.

41 See s 2(2) of the Retirement Age Act, *supra* n 40.

42 As to the relevant international standards, see paras 33 to 35 of the main text below.

43 See, for instance, *Rigby v Ferodo Ltd* [1987] ICR 457.

44 See, for instance, *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92.

45 See s 87.

46 See s 17(1)(b) of the Children Development Co-Savings Act.

47 [1978] QB 761 at 769.

48 *Bouzourou v The Ottoman Bank* [1930] AC 271.

49 *Ramzi Toufic Fares v Aidec Management Company Pte Ltd* [1998] SGHC 208. See also *Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon* [2005] 4 SLR 344. However, on the facts of both cases, constructive dismissal was not made out.

s 95(1)(c) of the Employment Rights Act⁵⁰ provides that an employee can be considered to be dismissed if the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. However, in Singapore, the Employment Act does not have any similar definition in relation to the term "dismissal". Nonetheless, reference may be made to the position in Malaysia. In Malaysia, it has been clearly established through a long line of cases⁵¹ starting with the Malaysian Supreme Court decision of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*⁵² that constructive dismissal may apply in a statutory context even if the statute itself does not state so expressly and merely refers to the term "dismissed" or "dismissal".

20 Thus there is support for the proposition that even though a statute does not expressly refer to constructive dismissal, it is possible to invoke the doctrine.⁵³ However, while even if the statute does not expressly refer to constructive dismissal, it may be possible to invoke the doctrine of constructive dismissal, there must be nothing in the section itself to go against such a construction. In relation to s 81, the problem is that it does not merely state the employee shall not be dismissed. It states that the employer shall not "give" the employee a "notice of dismissal". Thus if the employer does not "give" a "notice of dismissal" and the employee resigns on the ground of a repudiatory breach on the part of the employer, it may be difficult to fit in the concept of constructive dismissal into s 81. Thus this could mean that all the employer has to do is to commit a repudiatory breach and if the employee resigns on that ground, the employer would be able to get around s 81. However, since there is a repudiatory breach and the employee has suffered a loss, the employee may be able to sue for that loss, and this could include the loss

50 Employment Rights Act 1996 (c 18) (UK).

51 See, for instance, *Michael Brian Davis v Microsoft (M) Sdn Bhd* [2000] 3 MLJ 66, *MBF Unit Trust Management Bhd v Mahkamah Perusahaan Malaysia* [2004] 5 MLJ 526, *Kejuruteraan Samudra Timur Sdn Bhd v Seli a/k Mandoh* [2004] 5 MLJ 179, *Thangasamy Brown a/l DN Gnanayutham v Pelabuhan Tanjung Pelepas Sdn Bhd* [2005] 5 MLJ 369, *Sitt Tatt Berhad v Flora a/p Gnanapragasam* [2006] 1 MLJ 497, *Chong Lee Fah v The New Straits Times Press (M) Bhd* [2006] 1 MLJ 289.

52 *Supra* n 44.

53 A Singapore statute in which such a doctrine may apply is the Workplace Safety and Health Act (Act 7 of 2006). Section 18(2) of the said Act provides that an employer shall not dismiss or threaten to dismiss an employee who has among other things reported to an inspector a safety and health matter. Interestingly this issue was specifically raised in Parliament (see *Singapore Parliamentary Debates, Official Report* (17 January 2006) vol 80 at col 2225), but there was no reply.

of a statutory right.⁵⁴ However, many employees may not initiate legal action and, in any event, the employer may not be committing an offence since s 81 is unlikely to be breached. Thus there may not be much of a deterrence to stop an employer from doing this.

21 Thus it is crucial that s 81 be amended to specifically include constructive dismissal. One alternative would be to follow the Retirement Age Act. Section 2(2) of the Retirement Age Act provides that dismissal includes the situation where “the employer retires the employee, or requires or *causes* that employee to retire or *resign* on the ground of age” [emphasis added]. It may also be noted that in Hong Kong, there is a Sex Discrimination Ordinance⁵⁵ which specifically deals with these issues.⁵⁶

22 Even if such an amendment were to be made, that by itself may not be sufficient. For instance, if the employer has committed a repudiatory breach, for instance, by unilaterally reducing the salary of the employee or by demoting her, for no apparent reason other than to make less payment during maternity leave, *but* the employee does not resign, then the employer would not face any liabilities under the Employment Act or the Children Development Co-Savings Act. Thus it is necessary that the employer should also be made to guarantee that terms will not be changed unilaterally unless there are sufficient reasons for doing so. Further, while s 81 relates to dismissal during maternity leave, it does not relate to the period after the leave. Hence there is nothing to stop the employer from terminating the services of the employee immediately after she returns to work.⁵⁷ Thus it is also necessary that the employee be guaranteed that she would be able to return to the same position or an equivalent unless there is sufficient reason as to why this cannot be done. In Hong Kong, these issues would be covered under the Sex Discrimination Ordinance.⁵⁸ Guaranteeing such protection is also in line with the international standards and conventions.⁵⁹

54 See, for instance, *Robert Cort & Son Ltd v Charman* [1981] ICR 816.

55 Cap 480 (HK).

56 See, for instance, *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] 2 HKC 129.

57 See, for instance, *The Straits Times* (1 July 2006).

58 *Supra* n 55. See also, *Lam Wing Lai v Y T Cheng (Ching Tai)* [2006] 1 HKC 323 and *Chang Ying Kwan v Wyeth (HK) Ltd*, *supra* n 56. Under an anti-discrimination legislation, there will not be a time limit. But short of that, it would be necessary to have a time limit as to the guarantee so as not to be unfair to the other employees. A possible time limit could be six months from the day of the confinement, in line with s 76(1)(c)(ii) of the Employment Act and s 9(1)(c)(ii) of the Children Development and Co-Savings Act. It may be argued that to introduce such a protection to the employee would be unfair to the employer as he does not have any similar protection that the employee would not resign upon receiving her maternity entitlements (see

C. Valid reason for dismissal

23 Another problem relating to s 81 is the fact that if the employer discovers some repudiatory breach on the part of the employee once she goes on maternity leave, he would still have to continue paying the benefits as the duty is absolute, subject to the two limited exceptions discussed below. For instance, if while on maternity leave, it is found out that the employee was guilty of fraud before she went on that leave, the employer would still have to pay her the maternity benefit. It would be fairer if there was an exception made in relation to such circumstances.⁶⁰ In Hong Kong, for instance, it is provided that an employer may terminate the contract of employment during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by confinement), if the employee:

- (a) wilfully disobeys a lawful and reasonable order,
- (b) misconducts herself, such conduct being inconsistent with the due and faithful discharge of his duties,
- (c) is guilty of fraud or dishonesty, or
- (d) on any other ground is entitled to terminate the contract without notice at common law.⁶¹

24 It may also be noted that under the relevant international standards and conventions too,⁶² there is no prohibition against terminating the contract on valid grounds. This reasonably balances the interests of the employer against that of the employee. However, the onus

The Straits Times (22 July 2006). Nonetheless, since there may not be much of a practical benefit in forcing an unwilling employee to work for a specified period after returning from maternity leave, it is suggested, it may not be a prudent to legislatively provide for this.

59 As to the relevant standards and conventions, see paras 33 to 35 of the main text below.

60 There is such an exception in relation to the period prior to the confinement, (see s 84, which is discussed below) but there is none for the period thereafter. By virtue of s 12(1) of the Children Development Co-Savings Act, s 84 of the Employment Act applies to employees covered by the Children Development Co-Savings Act as well.

61 See, ss 9(1) and 15(1) of the Hong Kong Employment Ordinance, *supra* n 17.

62 As to the relevant international standards and conventions, see paras 33 to 35 of the main text below.

of proving that the justifiable grounds for dismissing the employee should be on the employer.⁶³

D. Forfeiture of the right not to be dismissed

25 However as stated above, s 81 is subject to two exceptions. The more pertinent one⁶⁴ for our purposes is s 76(6).⁶⁵ It provides:

Where the employment of a female employee is terminated (whether by resignation or dismissal, upon the completion of her contract of service or for any other reason) before she has exercised, wholly or partly, her entitlement to absent herself from work during a period referred to in subsection (1)(c)(ii), she shall forfeit that entitlement (or the balance thereof) upon the termination of her employment.

26 Thus if an employee comes back after eight weeks of the maternity leave, and thereafter the employer seeks to terminate the contract, the employee's rights would be forfeited. This would mean that in effect the remaining days of entitlement under s 76(1)(c)(ii)⁶⁶ may turn out to be illusory when they are sought to be taken out separately. Since payment by the employer in respect of this period will be reimbursed by the government,⁶⁷ it is less likely that the employer would try to terminate the contract in order to avoid making payment. Nonetheless, there could be employers who try to terminate the contract so that there would not be a further disruption in the operation of the business. Hence it would be preferable if the section guaranteed the benefit to an employee unless she resigns in circumstances when there is no repudiatory breach on the part of the employer⁶⁸ or in circumstances where the contract is frustrated or in circumstances where there are

63 See Art 8(1) of the International Labour Standards' Maternity Protection Convention, 2000 (Convention No 183) available at <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183>> (accessed 13 October 2006). See also s 15(1B) of the Hong Kong Employment Ordinance, *supra* n 17, though this is with respect to criminal prosecutions rather than civil proceedings (see s 15(1C) of the Hong Kong Employment Ordinance).

64 The other is s 83 which relates to forfeiture of payment if the female employee were to work for another employer while she is on maternity leave. Section 83 also applies to employees covered by the Children Development Co-Savings Act by virtue of s 12(1) of the Children Development Co-Savings Act.

65 The equivalent section under the Children Development Co-Savings Act is s 9(3).

66 The equivalent section under the Children Development Co-Savings Act is s 9(1)(c)(ii).

67 See s 10(1) of the Children Development Co-Savings Act.

68 If she resigns in circumstances where the employer has committed a repudiatory breach, for instance, if the employer sexually harasses the employee and hence she resigns, it is suggested it would be unfair to deprive the employee of her benefits.

sufficient grounds for the employer to terminate her contract. Again the onus of proving that there are sufficient grounds for terminating the contract should be on the employer.

IV. Dismissal prior to the confinement

A. *The three-month rule*

27 Section 84(1)⁶⁹ provides that no notice of dismissal given without sufficient cause⁷⁰ by an employer to a female employee within a period of three months before her confinement⁷¹ shall have the effect of depriving her of any payment to which, but for that notice, she would have been entitled or would, on or before the date of her confinement, have been entitled.

28 As to whether dismissal includes termination by notice or salary in lieu of notice and as to whether dismissal includes constructive dismissal, that has already been considered above.⁷²

B. *The necessity for the rule*

29 The other problem relating to s 84 is that it only applies three months prior to the confinement. In Hong Kong, for instance, there is no time limit. In Malaysia too, terminating the employment contract of a pregnant employee in order to avoid paying maternity benefits would amount to termination without just cause and would make the termination null and void pursuant to s 20 of the Industrial Relations Act.⁷³ The relevant international standards and conventions⁷⁴ also do not

69 Section 84(1) applies to the employees covered by the Children Development and Co-Savings Act by virtue of s 12(1) of the Children Development and Co-Savings Act.

70 In this regard if there is a genuine need for retrenchment and the employee is not chosen to be retrenched on the basis of her pregnancy, it is likely that that would amount to a sufficient cause: see *Stephen Bong v FCB (M) Sdn Bhd* [1999] 3 MLJ 411 and *Tuan Syed Hashim bin Tuan Long v Eppo Production Malaysia Inc* [1998] 5 MLJ 535, though these cases do not relate to pregnant employees as such.

71 Strangely, while this section effectively allows dismissal within three months prior to the confinement, if there is a sufficient cause, s 81 provides that if the employee is already on maternity leave prior to confinement, she cannot be dismissed at all. It is not at all clear, which section would take precedence in such a situation.

72 See paras 18 to 21 of the main text above.

73 See, for instance, *Broadway Typesetting Sdn Bhd v Puan Ho Nyet Khoon* [1987] 2 ILR 350.

provide for any limit as to time. Thus, and in view of the fact that many of the recent letters to the press relate to this issue,⁷⁵ perhaps more than any other amendment, this should receive particular attention.

C. *Apparent practice of the Ministry of Manpower*

30 In practice, it would appear⁷⁶ that if there has been a dismissal on the ground of pregnancy, the Ministry of Manpower allows the employee concerned to make a claim under s 14(2) which provides that:

Notwithstanding subsection (1), where an employee considers that he has been dismissed without just cause or excuse by his employer, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.

Whether it is legally justifiable to allow a claim under s 14(2) when an employee has been dismissed on the grounds of pregnancy is not entirely clear.

31 The first question that arises in this regard is whether the term “dismissal” in s 14(2) includes termination by notice or salary in lieu of notice.⁷⁷ As suggested earlier,⁷⁸ it is possible for the term “dismissal” to

74 As to the relevant standards and conventions, see paras 33 to 35 of the main text below.

75 See, for instance, *The Straits Times* (26 May 2006, 27 June 2006, 30 June 2006, 1 July 2006 and 4 July 2006).

76 See reply by Ministry of Manpower in *The Straits Times* (19 July 2006 and 17 November 2006). Cf *Singapore Parliamentary Debates, Official Report* (18 April 2005) vol 80 at col 40 and the reply by Ministry of Manpower in *The Straits Times* (30 June 2006).

77 This issue was raised as a query in Parliament at the time of the passing of s 14(2), but there was no reply given; see *Singapore Parliamentary Debates, Official Report* (25 July 1973) vol 32 at col 1168. See also, *Singapore Parliamentary Debates, Official Report* (19 March 1982) vol 41 at col 1235 and *Official Report* (18 August 1999) vol 70 at cols 2137 and 2141, though it must be noted that the statements made

include termination by notice or salary in lieu of notice. Nonetheless, in the context of s 14, since s 14(1) relates to “dismissal without notice” for misconduct, it may be argued that s 14(2) too must refer to summary dismissal. However, it must be pointed out that s 14(2) was enacted subsequently⁷⁹ to confer on non-unionised employees rights similar to those enjoyed by unionised employees pursuant to s 35(3) of the Industrial Relations Act.⁸⁰ Thus it may be argued that s 14(2) must be interpreted in the light of s 35(3) of the Industrial Relations Act and there is no reference to dismissal “without notice” in s 35 of the Industrial Relations Act as such. Likewise, even though the heading of s 14 and s 14(1) refer to “misconduct” it may be argued that since s 14(2) was introduced later to confer on non-unionised employees similar rights as compared to unionised employees, and since s 35(3) of the Industrial Relations Act does not refer to misconduct, it is not necessary for the dismissal to relate to misconduct in order for s 14(2) to be applicable. Another factor in favour of such a construction is the use of the words “considers that he has been dismissed”. It may be argued that this brings in a subjective element⁸¹ and so long as the employee considers that he has been dismissed, he can make a representation whether or not there has indeed been a dismissal in law.

32 However, one possible problem with such a construction is that this would render s 84 largely nugatory. Other than for a difference in terms of time limit within which an action has to be brought, s 84 would not serve any useful purpose. In any case, aside from this problem, the Employment Act does not apply to all employees and hence such employees would not be protected. Hence it is suggested that it would still be necessary to amend s 84.

V. International standards and conventions

33 The International Labour Organization has set various minimum standards in relation to various labour issues. The Maternity Protection Convention, 2000⁸² relates to maternity leave and benefits. Under the said

therein were made after the passing of s 14(2) and not at the time when s 14(2) was passed.

78 See para 17 of the main text above.

79 The Employment (Amendment) Bill (Bill 20 of 1973). See also *Singapore Parliamentary Debates, Official Report* (25 July 1973) vol 32 at col 1158.

80 Cap 136, 2004 Rev Ed.

81 See *Goon Kwee Phoy v J & P Coats (M) Bhd*, *supra* n 38, at 136.

82 *Supra* n 63.

convention all female employees are entitled to maternity leave and benefits regardless of the number of days they have worked for the employer before the confinement. Further, Art 8(1) of the said convention provides:

It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave ... or during a period following her return to work ... except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.

34 Thus there is no reference to a three-month period and termination is possible where there are grounds unrelated to the pregnancy or birth of the child and its consequences. It may also be noted that in addition to Art 8(1), Art 8(2) provides:

A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

Though Singapore has not ratified this Convention (and hence is not bound by it), this being an international convention representing minimum labour standards, it may be a good model to emulate.

35 A convention which Singapore has indeed ratified is the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women, 1979.⁸³ Article 11(2)(a) of the said convention provides that:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures [t]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave ...

Again there is no reference to a three-month period. Further, Art 11(2)(b) provides that States Parties must take appropriate measures to "introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances". However, Singapore in ratifying the Convention has tabled a reservation in relation

83 See <<http://www.un.org/womenwatch/daw/cedaw/>> (accessed 13 October 2006).

to Art 11 and hence, technically, Singapore is not bound by Art 11 as such. The reason for the reservation was stated as follows:⁸⁴

Article 11, paragraph 2, requires States Parties to take appropriate measures to prevent discrimination against women workers in regard to dismissal on grounds of marriage or pregnancy and to ensure maternity protection and benefits. Singapore's Employment Act stipulates the basic terms and conditions of employment, including maternity and maternity benefits. The Act excludes persons in managerial, executive or confidential positions, seamen and domestic workers from its coverage. The exclusion of these grounds is not based on gender and is therefore not discriminatory against female workers. Whilst there is no legislation to specifically cover female workers outside the scope of the Employment Act, there is no necessity to specifically enact employment laws as the principle of equality is enshrined in the Singapore Constitution and is widely practised in the field of employment. An employee who is aggrieved by unfair employment practices can seek the help of the Ministry of Manpower or seek redress through the civil court.

36 This was stated before the passing of the Children Development Co-Savings Act in 2001 which extended maternity leave to other employees and to the third child. However, while Art 12(1) of the Constitution⁸⁵ states that all persons are equal before the law and are entitled to equal protection of the law, that relates to the contents of the laws and not to the actions of employers as such and further while Art 12(2) relates to discrimination, there is no mention of gender-based discrimination as such.⁸⁶ Further, going by the recent newspaper reports,⁸⁷ the statement that equality "is widely practised in the field of employment" may be open to contention. In addition, it is difficult to see what civil remedy an employee can seek if she is not protected by the legislation.

VI. Conclusion

37 In line with the practices in some other jurisdictions and the relevant international standards and conventions and, most importantly,

84 See Initial Report (October 1999) available at <<http://www.un.org/womenwatch/daw/cedaw/reports.htm#s>> (accessed 13 October 2006) at para 2.5

85 Constitution of the Republic of Singapore (1999 Rev Ed).

86 Even in relation to other forms of discrimination, Art 12(2) is unlikely to cover the actions of private employers. Interestingly it may also be noted that the Federal Constitution of Malaysia was amended in 2001 to include gender-based discrimination; see Art 8(2) of the Federal Constitution (M'sia).

87 See *supra* n 1.

in the light of the recent complaints raised by members of the public (and this may just be the tip of the iceberg), it is suggested that the provisions relating to maternity leave are in need of an overhaul. More specifically, among other things, it is suggested that:

- (a) the reference to the 180-day period in s 76(2)⁸⁸ should be shortened or removed;
- (b) the reference to the three-month period in s 84⁸⁹ should be removed;
- (c) the employer should not be allowed to dismiss the employee at any time, during pregnancy or during the period maternity leave could be taken, unless there are sufficient reasons for doing so and the onus of proving this should be on the employer;
- (d) dismissal for these purposes should include termination by notice, salary in lieu of notice and constructive dismissal; and
- (e) the employee should be guaranteed that there will be no unilateral change in terms or position during pregnancy or during the period maternity leave could be taken and that the position will be available upon return from maternity leave for a period of time,⁹⁰ unless there are sufficient reasons for deviating from this, and again the onus of proving this should be on the employer.

38 It is conceded that these measures will not totally put a stop to the abuses. As already alluded to, for instance, a prospective employer may still ask an interviewee if she is pregnant and if so he may choose not to hire her or an employer may prefer to employ males or older females in order to avoid paying maternity benefits. To wipe out discrimination more completely, possibly there needs to be anti-discrimination legislation. But short of that, it is likely that the measures proposed in this paper would go some way in ameliorating the current problem. These measures could result in the employers incurring more cost in the short

88 The equivalent section under the Children Development Co-Savings Act is s 9A(1)(d).

89 This applies to employees covered by the Children Development Co-Savings Act as well by virtue of s 12(1) of the Children Development Co-Savings Act.

90 As to the possible period of time, see *supra* n 58.

term, but in view of the very discouraging birth rates,⁹¹ it is suggested this would be justifiable.

91 See *supra* n 20.