WAGE CUTS AND THE LAW IN SINGAPORE AND MALAYSIA

With the recent economic downturn in the region employers have resorted to cutting wages in an attempt to cut costs. The aim of this note is to see to what extent this is legally valid in Singapore and Malaysia.

Express Term

One possible situation is the case where the contract itself contains an express clause allowing the employer to vary any term of the contract unilaterally or more specifically a clause allowing the employer to vary the pay unilaterally. If there is such a clause, will it be upheld? The effect of variation clause in the context of an employment contract was considered in the recent English case of *Wandsworth London Borough Council* v *D'Silva*[1]. In this case the contract expressly provided that the terms and conditions of employment will be "supplemented by .... rules and other conditions as may be determined by the authority.....From time to time.... variations in your terms of employment may occur, and these will be separately notified to you or otherwise incorporated in the documents to which you have reference". Wandsworth London Borough had a policy of reviewing and monitoring people on sick leave. If an employee was on sick leave for a certain period of time his case would be reviewed and depending on the outcome of the review, his services could be redeployed or terminated. However, the employee was given a right of appeal if he was not satisfied with the decision of the review board. In 1995, Wandsworth London Borough made certain changes to these terms the effect of which was that it was now easier for a case to come under review than before. This was against the interests of employees and two of them brought the matter to court. The Court of Appeal stated, "in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party .....However, clear language is required to reserve to one party an unusual power of this sort"[2] and held that the variations in question were within the purview of the variation clause. However, the court went on to state in obiter that "In relation to the provisions as to *appeals* the position would be different. To apply a power of unilateral variation to the rights which an employee is given....could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result". Thus it would appear from this case that if there was a general variation clause, while some variations would be allowed, others would not.

1 [1998] FRLR 193.
2 *Ibid* at p. 197.

Perhaps a way of rationalizing this decision is to draw an analogy to exclusion clauses. In the context of exclusion clauses, where one party tries to exclude liability for a fundamental breach, whether this can be done, would depend on the intention of parties at the time of contracting or in other words would be a matter of construction of the contract[3]. Similarly, in the context of variation clauses it is suggested whether the variation clause can be used to bring about fundamental changes would be a matter of construction of the contract. In this regard, if the employer unilaterally decides to pay the employee no wages at all, since the result would be unreasonable going by the dicta stated above, the court would be slow to find that it was within the contemplation of the parties for the contract to be so varied. Hence the variation clause would be ineffective. On the other hand, if the employer makes a cut which is in accordance to market practice or due to economic reasons, the court will be more inclined to hold that the variation is within the contemplation of the parties and hence covered by the variation clause.

Consideration

Another situation could be the case where the variation is supported by fresh consideration as in *Hartley* v *Ponsonby*[4], where crew members of a ship who were promised additional amounts to perform more than their contractual obligations were able to enforce the promise.

Thus if in addition to the reduction in pay, the employee's duties are clearly and noticeably reduced, then there could be consideration for the variation. However, the mere fact that generally there is less work as a result of the slow down in business is unlikely to be sufficient. This is because, in promising the original pay, the employer would not have stated the exact volume of work expected for that pay and parties would have understood that at times there may be a little more and at times a little less work for that same pay.

But where it can be clearly demonstrated the employee's duties have been reduced as in the case of a manager whose responsibilities have been drastically reduced by the closing down of certain key divisions or operations, there could be consideration and if so the variation would also be upheld[5].

3 *Photo Production Ltd* v *Securicor Transport Ltd*, [1980] AC 827; *Parker Distributors (Singapore) Pte Ltd* v *A/S D/S Svenborg*, [1983] 2 MLJ 26.

4 (1857) 7 EL & BL 872. *Hartley* v *Ponsonby* was approved in Malaysia in *Hanafiah Rasiah Mohamed* v *Weng Lok Mining Co Ltd*, [1977] 1 MLJ 248 at 250.

5 The issue of consideration may also arise in another way. Take the case of an employee who starts off with a salary of $2000 and who receives an increment of $200 in the following year though there is nothing in the contract which makes it obligatory for the employer to give increments. If after having paid the employee $2200 for some time, the employer decides to reduce his pay to $2000, it may be open to the employer

Williams v *Roffey*

Even if there is no express clause, and the variation is not supported by consideration, it must next be determined whether the variation can be upheld by invoking the principle in *Williams* v *Roffey*[6]. In this case, the plaintiff was the sub-contractor of the defendants. The plaintiff got into financial difficulties because the agreed price for the sub-contract was too low for him to operate satisfactorily. As the main contract contained a penalty clause for delay and the defendants were worried that the plaintiff may not complete the sub-contract in time, the defendants promised the plaintiff additional sums. The court held that the plaintiff could claim these additional sums as the defendants obtained a practical benefit and there was no fraud or duress involved. The precise test as laid down by Glidewell LJ in *Williams* v *Roffey* is as follows[7]:

> (i) if A has entered into a contract with B to do work for, or to supply goods or services to B in return for payment by B; and
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> (ii) at some stage before A has completely performed his obligations under the contract, B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
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> (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations in time; and
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> (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
>
> (v) B's promise is not given as a result of economic duress or fraud on the part of A; then
>
> (vi) the benefit to B is capable of being consideration for B's promise, and that promise will be legally binding.

Though the exact scope of the decision is yet to be settled[8], the case has been applied in the employment context[9] and was considered and applied

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to argue that there was no consideration for the variation in the first place and hence he is entitled to pay $2000 only. The employee would of course raise the doctrine of promissory estoppel, which is discussed below , but he may not be successful as the doctrine is likely to be used a sword and not a shield in such an instance; *Combe* v *Combe*, [1951] 2 KB 215; *Ong Tiaw kok* v *Bian Chiang Bank Ltd*, [1972] 2 MLJ 134 at 145; *Liew Ah Hock* v *Malayan Railway*, [1967] 1 MLJ 53 at 56.

6 [1991] 1 QB 1.

7 *Ibid* at p. 15.

8 For instance, *Williams* v *Roffey Bros* was not followed in unreported English Court of Appeal decision of *Re Selectmove Ltd* (The Times, 13 January 1994) though on the facts it could have been. For a more complete discussion of uncertainties following *Williams* v *Roffey Bros*, see JW Carter, Andrew Phang and Jill Poole. *Reactions to Williams* v *Roffey*, (1995) 8 JCL 248.

9 *Lee* v *GEC Plessey Telecommunications*, [1993] IRLR 383.

respectively in the local decisions[10] of *Sea-Land Service Inc* v *Cheong Fook Chee Vincent*[11] and *Fong Holdings Pte Ltd* v *Computer Library (S) Pte Ltd*[12].

The first question that arises in applying *Williams* v *Roffey* to wage cuts is whether the test laid down by Glidewell LJ has to be followed precisely. If it has to be followed exactly, it is unlikely that wage cuts would be covered as parts (ii) and (iii) stated above are unlikely to be satisfied.

In this regard, *Fong Holdings Pte Ltd* v *Computer Library (S) Pte Ltd*[13] is of relevance. In this case the issue arose whether there was any consideration for the landlord's promise to allow the tenant to terminate the lease at an earlier date than that allowed by the contract. The court held that since on the facts the landlord had derived a practical benefit, there was consideration. The court did not even cite the precise test as enunciated by Glidewell LJ and on the facts had the test been cited, parts (i) to (iii) above would not have been met. Thus it would appear that Glidewell LJ's test is not a statutory formulation which has to be followed exactly and all that is required is as a result of a promise, the promisor gets a practical benefit or obviates a disbenefit and there is no fraud or dishonesty involved.

That brings us to the second problem, which is that in the context of wage cuts, employees are unlikely to have made any express promise that they are willing to accept less pay. However, it would appear that the promise need not be express and can be implied, the case in point being the English Court of Appeal decision of *In Re C(A Debtor)*[14]. In this case the court seemed to have accepted the principle that a promise can be implied, though on the facts it was doubted whether any promise was actually so implied.[15]

Thus in the context of wage cuts arising out of an economic slowdown, it may be argued that by keeping quiet and not resigning the employee may have impliedly promised to accept the lower pay. It may also be

10 In Malaysia, there appears to be no decision approving *Williams* v *Roffey Bros.* However, there have also been calls to apply greater flexibility and business sense when dealing with issues of consideration under the Malaysian Contracts Act; see *South East Asia Insurance Bhd* v *Nasir Ibrahim,* [1992] 2 MLJ 355 at 361 and hence it construing what amounts to consideration under that Act, a Malaysian court may following *Williams* v *Roffey Bros* take the practical benefit or disbenefit that results as amounting to sufficient consideration.

11 [1994] 3 SLR 631.

12 [1992] 1 SLR 332.

13 *Ibid.*

14 Unreported, 11 May 1994.

15 Further, even in the context of promissory estoppel discussed below, it would appear that the representation need not be express and may be implied, see for instance, *Boustead Trading Sdn Bhd* v *Arab-Malaysian Merchant Bank Bhd,* [1995] 3 MLJ 331 at 344.

argued that by making the promise, the employee got a practical benefit as if he had not accepted this cut he would have been dismissed and may not have been able to find a replacement job in these uncertain times.

The court may be persuaded by such arguments for the alternative of holding the wage cuts not to be legally binding may not accord with commercial reality and would have profound implications on the business community.

Promissory Estoppel

An employer who is sued by the employee may also try to raise the defence of promissory estoppel. The doctrine of promissory estoppel can be traced to Lord Cairns in *Hughes* v *Metropolitan Rly* Co[16], wherein he stated,

" It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties".

For the doctrine to be invoked today, it would appear that it must be established that a clear and unambiguous representation was made by one party to another that strict legal rights would not be enforced[17]. It would also appear that the doctrine cannot be applied when there is no "true accord" between the parties[18]. Finally it would also appear that it must be established that it would be inequitable for the representor to insist on his strict legal rights[19].

In the context of a wage cut, it may not be easy to satisfy the first two requirements. The mere fact of continuing in the job may not amount to a clear representation and since the employee would have little choice but to accept the wage cut there is unlikely to be a "true accord" either.

16 (1877) 2 App Cas 439 at 448. The doctrine of promissory estoppel clearly applies in Singapore; see for instance, *Mun Hean Realty Pte Ltd* v *Fu Loong Lithographer Pte Ltd*, [1993] 1 SLR 713. The same can be said of Malaysia, see for instance, *Leong Huat Sawmill Pte Ltd* v *Lee Man See*, [1985] 1 MLJ 47 and *Boustead Trading Sdn Bhd* v *Arab-Malaysian Merchant Bank Bhd*, [1995] 3 MLJ 331.

17 *Woodhouse AC Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co Ltd*, [1972] AC 741.

18 *Per* Lord Denning in *D & C Builders Ltd* v *Rees*, [1966] 2 QB 617 at 625.

19 *Per* Robert Goff J in *The Post Chaser*, [1982] 1 ALL ER 19 at 27.

Nonetheless, taking the policy considerations mentioned above into account, the court may be inclined to hold that these conditions are satisfied. If these hurdles are crossed, the next question would be whether it would be inequitable to allow the employee to insist on his strict legal rights. Since it is generally thought that the doctrine of promissory estoppel is merely suspensory[20], would it be equitable for the employee when the business picks up to request the employer for all the pay that was cut after giving reasonable notice? Once again due to policy reasons, the courts may be inclined to hold that this is not equitable.

Employment Act

Thus far we have considered the position of employees who are not covered under the Employment Act[21]. Is the position the same for employees covered under the Employment Act[22]? There are no sections expressly dealing with pay cuts. However, section 26[23], provides that "no deductions" shall be made other than the deductions authorized under the Act unless they are made by order of court or other authority competent to make such orders. Breach of section 26 results in an offence under section 34[24] of the Employment Act. The deductions authorized under the Employment Act such as deductions for absence from work and CPF contributions, are set out in section 27[25]. The term "deductions" has not been defined in the Employment Act. However, since the employer is cutting the pay and giving the employee a new salary rather than acknowledging that salary is as before but that he is making a deduction, section 26, it is suggested should have no application. Thus for employees covered under the Employment Act, it is suggested the position should be the same as for employees not covered under the Employment Act.

Conclusion

Though it is not entirely clear it would appear partly at least due to policy considerations that it may be difficult to challenge the employer's decision to cut wages. Though the Singapore position was considered thus far, it would appear the position in Malaysia too is generally similar[26]. In

20 *Emmanuel Ayodeji Ajayi* v *RT Briscoe (Nigeria) Ltd*, [1964] 3 ALL ER 556.
21 Cap 91 of the Statutes of the Republic of Singapore, 1996 Ed.
22 Section 2 of the Employment Act lists the categories of workers covered under the Employment Act.
23 In Malaysia, the equivalent provision is section 24(1) of the Malaysian Employment Act.
24 In Malaysia, the equivalent provision is section 91 of the Malaysian Employment Act.
25 In Malaysia, the equivalent provision is section 24(2) of the Malaysian Employment Act.
26 See *supra* notes 4, 10, 16, 23, 24 and 25.

fact, in Malaysia, the position of the employer may be clearer by virtue of section 64 of the Malaysian Contracts Act which provides "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him...".[27] Notwithstanding this it may always be prudent to have the pay cut made by way of deed or seal[28] and in future of course it would also be prudent to have a variable component built into all salary packages.

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27 See for instance, *Kerpa Singh* v *Bariam Singh*, [1966] 1 MLJ 38, where part payment of a debt was held to have discharged the balance as a result of this section.

28 In Malaysia however, as a result of the Malaysian Contracts Act it would appear that if there is no consideration, the fact that the document is made under seal makes no difference; see *Guthrie Waugh Bhd* v *Malaiappan MuthuChumaru*, [1972] 2 MLJ 62 at 67.

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