EMPLOYMENT TRIPARTITE GUIDELINES

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On 1 April 2019, a number of amendments to the employment law landscape in Singapore came into force. With the transfer of the dispute resolution process for wrongful dismissal claims to the Employment Claims Tribunals and the expanded definition of "dismissal" in the Employment Act (**EA**), the risk of wrongful dismissal claims by employees is coming more into focus in the minds of employers.

A set of Tripartite Guidelines on Wrongful Dismissal was jointly issued by the Ministry of Manpower (**MOM**), the National Trades Union Congress (**NTUC**) and the Singapore National Employers Federation (**SNEF**) on 1 April 2019 (the Guidelines) to help provide additional clarity and guidance on the ambit of to the revamped statutory protections against wrongful dismissal.
Under the Guidelines, the following dismissals are presumed not to be wrongful (and the employee bears the burden of proving that the dismissal is wrongful):

- **Dismissal pursuant to contractual right to terminate** – dismissals with notice are presumed not to be wrongful where the employer invokes its right to contractually terminate the employment. No reasons have to be furnished and the employee bears the burden of proving the dismissal is wrongful.
- **Dismissal due to redundancy** – for example, when the company is undergoing restructuring, which affects certain jobs or changes the employee's job scope.

To succeed in discharging the burden of proof, employees must provide and substantiate a wrongful reason for the dismissal. These can include discrimination, e.g. against the employee on the grounds of age, race, gender, religion, marital status, and family responsibilities, or disability, intended deprivation of the

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employee of benefits she would otherwise have earned, e. g. maternity benefits, or punishment of an employee for exercising his employment right, e.g. filing a mediation request with TADM or declining a request to work overtime.

In addition, the dismissal would also be wrongful if an employer gives a reason for dismissal with notice which turns out to be false.

Dismissal on grounds of misconduct

Under the Guidelines, misconduct is the only legitimate reason for dismissal without notice. An employer may, after due inquiry, dismiss an employee without notice for misconduct. Misconduct includes but is not limited to theft, dishonest or disorderly conduct at work, insubordination, and bringing the organisation into disrepute. The employer is required to carry out a due inquiry the Guidelines suggest that the employer bears the burden of proving the employee was given a chance to be heard, and could not offer any legitimate explanation for falling short of the conduct justifiably expected of him.

Dismissal on grounds of poor performance

Employees may not be dismissed without notice for poor performance (unless the performance was so poor as to amount to misconduct justifying summary dismissal, after a proper inquiry and giving the employee a chance to be heard) and the employer would need to substantiate the poor performance if that is cited as the reason for dismissal with notice. In order to substantiate findings of poor performance, the employee's shortcomings should be documented in their performance reviews.

A point to note is the "conduct" of an employer may be examined in a dispute. This may be raised by an employee seeking to discharge his/her burden in proving that the dismissal was indeed wrongful. For example, under the Guidelines, a dismissal is wrongful even with adequate notice, if an employer's conduct showed that it had adopted a discriminatory attitude towards the employee. The definition of "dismiss" in the Employment Act now includes the resignation of an employee if the employee can show, on a balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of any conduct or omission, or course of conduct or omissions, engaged in by the employer.

Although the illustrations in the Guidelines help to further delineate the concept of wrongful dismissal, it is important to bear in mind that the Guidelines are not meant to be exhaustive.
Dismissals will continue to require careful management and it will be prudent for companies to maintain contemporaneous employment records and, in particular, regarding any communication with employees in the event of termination of their employment.

You may also refer to our previous CNPupdate on 20 February 2019 and 9 May 2018 where we canvassed other major amendments to the employment law legislation that recently came into effect. You may also refer to this link for a copy of the Tripartite Guidelines.

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