

TERMINATION OF EMPLOYMENT – SOME ISSUES TO CONSIDER

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Author: Bill Jamieson.

Employers (and employees) frequently fail to appreciate the importance of issues relating to termination and the impact that they may have in relation to the rights and obligations of each party when the employment relationship comes to an end. In a typical employment relationship, there are a number of ways the relationship can be terminated – whether automatically, unilaterally or mutually; for cause or without cause; pursuant to exercise of contractual rights or under common law. Depending on what is set out in the employment contract and the manner by which the employment relationship is terminated, the employer and the employee may have certain claims against the other.

Issues relating to the termination of an employment recently came before the Singapore Court of Appeal (“**CA**”) in *Phosagro Asia Pte Ltd v Piattchanine*, Iouri SGCA 61 (“**Phosagro**”). In its written judgment, the CA shed light on, amongst other things, contractual termination for cause and the CA’s view on whether an employer, who had terminated an employment pursuant to an express term in the contract, may subsequently seek to terminate the employment at common law for a subsequently discovered repudiatory breach instead.

The Brief Facts

In 2013, Iouri Piattchanine (the “**Employee**”) sold his company, Asiafert Trading Pte Ltd (now known as Phosagro Asia Pte Ltd, hereinafter referred to as the “**Employer**”), to the Phosagro group (the “**Group**”) but stayed on as the managing director.

In his employment contract, which the Employee drafted, the Employee was to “faithfully serve in all

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respects and use his best endeavours to promote the interests of ”. However, if “at any time during his employment, hereunder the shall be guilty of any serious misconduct or any willful breach or non-observance of any of the stipulations herein contained and on his part to be observed or performed..., may terminate ’s employment hereunder without any notice or payment in lieu of notice” (emphasis added). In such event, the Employee would not be entitled to receive an “annual salary as one-off payment” which he would otherwise have been entitled to if his employment is terminated before the completion of his contractual period of three years.

Shortly after the commencement of his employment, tensions arose between the Employee and officers from the Group due to disagreements relating to the direction of the Employer’s business. In February 2014, the Employer served a letter to the Employee purporting to terminate his employment with immediate effect “pursuant to the terms of employment contract”. Subsequently, in March 2014, another letter was issued to the Employee alleging that the Employee was “guilty of serious misconduct and/or not acted in ’s best interest and/or acted in breach of his fiduciary duties to ” such that the Employee was not “entitled to receive either payment in lieu of notice or the 100% annual salary as one-off payment”.

In making its allegations of misconduct, the Employer primarily relied on the Employee’s practice of claiming for all expenses charged to his credit card (used primarily for corporate expenses but occasionally used for personal expenses) during the year and reimbursing the Employer when and if queries were raised by their accountant at the end of the financial year. Such practice was earlier found by the High Court (the “HC”) as not being in the interest of the Employer as there was a likelihood that not all the personal expenses would be reimbursed to the Employer since it would have been impossible for the accountant to determine which of the claimed expenses were legitimate corporate expenses and which were the Employee’s personal expenses.

Issues before the CA

As a preliminary issue, the CA briefly considered that an employer may, if it had exercised its contractual right to terminate a contract without relying on any particular clause, subsequently specify and rely upon a clause which justifies summary dismissal even if the employer was not initially aware of its right to do so at the time of termination.

The main issue then considered by the CA was whether the Employee was guilty of “serious misconduct” and/or “willful breach” under his employment contract such that the Employer may summarily dismiss the Employee without making payment in lieu of notice or 100% annual salary as one-off payment.

“Serious Misconduct”

As the phrase “serious misconduct” was not defined in the employment contract, the CA turned to the common law principles relating to repudiatory breach and considered it to refer to a breach of contract that is so serious that it would justify the Employer terminating the Employee’s employment without more.

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The CA noted that *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* and another appeal 4 SLR(R) 413 (“**RDC Concrete**”) sets out four situations in which a breach of contract would amount to a repudiatory breach:-

1. Where the contract clearly and unambiguously states that in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract;
2. Where a party, by his words or conduct, simply renounces his contract inasmuch as he clearly conveys to the other party to the contract that he will not perform his contractual obligations at all;
3. Where the breach is of an important term of the contract (i.e. a “condition” as opposed to a “warranty”), in particular, where the intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the consequences of the breach, would entitle the innocent party to terminate the contract; or
4. Where the breach is of such a nature and consequence as to give rise to an event which will deprive the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract.

Earlier in the HC, emphasis was placed on situation (d). Even though the HC found that the Employee had not acted in the Employer’s best interests and was hence in breach of his express contractual obligations to “faithfully serve in all respects and use his best endeavours to promote the interests of”, the HC was of the view that it was not sufficient to justify a finding of “serious misconduct” as the breaches were not so serious that they struck at the root of the employment contract or destroyed the confidence underlying the employment contract. The CA agreed that the Employee’s breach through the expense accounting practice did not amount to “serious misconduct” within the meaning of the contractual clause as the breach did not detract from the Employee’s overall contributions to the Employer such that the Employer could be said to have been deprived of substantially the whole benefit of the employment contract.

However, the CA also considered the applicability of situation (c). The CA highlighted that the Employee was in a unique position of being entrusted with a significant degree of authority, responsibility and independence in the conduct of the Employer’s affairs. With such trust being reposed in the Employee, the CA took the view that the contractual obligation to “faithfully serve in all respects and use his best endeavours to promote the interests of” would have been intended by the parties to be of the utmost importance such that it is a condition, the breach of which would have been a repudiatory breach constituting “serious misconduct” within the meaning of the contractual clause. As the said clause was found by the HC to have been breached, the CA held that the Employer was entitled to summarily dismiss the Employee pursuant to the terms of the employment contract without making payment in lieu of notice or 100% annual salary as a one-off payment.

“Willful Breach”

For completeness, the CA also considered and agreed with the HC’s finding on whether there were willful breaches of the employment contract. The HC took a plain reading of the undefined word “willful” and held

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that a “willful” breach requires some form of intentionality or deliberateness in the commission of the breach. The HC found that the Employee genuinely believed what he did was correct so there was no “willful” breach.

Contractual Terminations and Terminations at Common Law

In addition to ruling on the issue of “serious misconduct”, the CA also made a passing comment (in obiter dicta) on the issue as to whether an employer, who had first sought to terminate an employment pursuant to an express term in the employment contract but subsequently discovers a wrongdoing which would have entitled it to terminate for a breach at common law, could subsequently terminate the employment at common law instead.

The HC had earlier endorsed the position set out in the English case of *Cavenagh v William Evans Ltd* 1 WLR 238 (“**Cavenagh**”) – i.e. that the employer could not do so. The court in *Cavenagh* drew a distinction between a termination under contract and a termination under common law because of the former results in an accrued debt due to the employee (e.g. payment in lieu of notice, etc) while the latter, if wrongful, results in an award of damages to the employee. The court in *Cavenagh* was of the opinion that, upon termination under contract, general law does not release the employer from its contractual liability to pay the accrued debt solely on the ground that it had subsequently acquired knowledge that would have entitled it to terminate the employee summarily without liability instead.

While the CA agreed that the distinction between a termination under contract and a termination under common law is logical and principled, the CA was of the view that, if the focus is on whether the employer is justified in terminating the employment, it does not necessarily follow that the employer should be precluded from relying on facts that justify a termination, albeit on a different basis.

The court in *Cavenagh* suggested that a balance may be achieved as:-

1. the employer may bring a counterclaim for damages on the basis that the employee had breached his duty to the employer by failing to inform it of his gross misconduct; or
2. it might be open to the employer to argue that the agreement to make payment in lieu of notice was void or voidable by reason of a vitiating unilateral mistake on the part of the employer which was known to the employee.

The CA considered that there could be practical difficulties with the suggested approach in (a) as the employee in question might not be in a fiduciary position and in such cases, the only breach that the employer can rely on is the employee’s original misconduct. The CA was also of the view that there could be a disconnect between the sum which the employee would have wrongfully received in severance and what the employer would be able to recover for the employee’s breach, particularly as it would be difficult to establish that the employee’s repudiatory breach at common law had caused the employer to make the payments. The CA noted suggestions by practitioners that payment to the employee could be made conditional upon the employee not being guilty of any misconduct and made repayable on demand if it

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transpires that the employee had in fact been guilty of any such breaches. However, the CA also questioned in passing whether onus should be placed on employers to word their employment contracts in the manner described.

In view of the above, the CA was of the view that Cavenagh raises a number of difficult issues that require resolution and a definitive ruling on these issues should be made only when they arise directly for the Singapore courts' consideration in a future case.

Comments

It is evident from the CA's judgment in Phosagro that issues relating to the termination of an employment contract require careful deliberation right from the outset when the employment contract is being drafted.

The principles set out in RDC Concrete illustrate the importance of having a clearly drafted employment contract to ensure that the parties' intentions (e.g. on the scope of the employee's duties and intended consequences of any breaches thereof) are fully and adequately captured so that due reliance may be placed upon the contractual provisions when the time comes. In addition, pending the resolution of the practical difficulties with Cavenagh as raised by the CA, it would be advisable to adopt the practical solution of ensuring an employment contract includes appropriate provisions to deal with the situation where wrongdoings are discovered only after employment has been terminated pursuant to the terms of the contract. Appropriate language may also be included in any documentation for termination (e.g. separation agreement) to provide that any payment is conditional upon the employee not being guilty of any misconduct and is void or repayable on demand should it transpire that the employee had in fact been guilty of breaches of the employment contract or the termination agreement (if applicable).

Similarly, it would be advisable for employers to carefully consider the appropriate manner of termination before any steps are taken. Where necessary or if in doubt, legal advice should be sought to ensure that the relevant consequences are fully considered.

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