DOING THE RIGHT THING AS AN EMPLOYER

How to navigate common employment law pitfalls faced by SMEs in Singapore

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EMPLOYMENT law issues, if handled wrongly or poorly, may cause a business and its owners to suffer a range of unpleasant consequences – from crippling law suits to investigations and sanctions from the authorities; not to mention the damage to a business or owner's reputation and the down time spent on dealing with these issues which could otherwise be better spent on growing the business.

• Terminating an employee without notice pay

First, the employer needs to be sure that the conduct triggering the termination without notice pay is covered in the employment agreement to begin with. Second, the law is clear that even if the employee is in the wrong, the employer cannot withhold the employee's salary and must still pay the employee till the last day of service.

On the first point, employers often fall victim to poorly drafted or unnecessarily wide clauses which purport to entitle an employer to terminate an employee's employment if he is in "breach of material terms" or has engaged in "serious misconduct". But what really amounts to a "material term" or what constitutes "serious misconduct"? Being late for work twice in a month? How about three times? Is there a difference between an employee who is late for 10 minutes, five times a month as opposed to an employee who is late by an hour, twice a month? What if an employee refuses to comply with a direction from a supervisor, or who shows disrespect to another colleague?

It is now easy to see that unless the offending situation is specifically identified so as to justify the immediate dismissal of the employee, generic termination clauses would ironically instead provide a disgruntled employee with the opportunity to argue that he was wrongfully terminated on the basis that he did not commit the act complained of; or, even if he did, that the act did not amount to the level of materiality or seriousness that would warrant immediate dismissal without notice. This then exposes the employer to the risk of damages for wrongful termination, which would not be limited simply to notice pay, but may also include damages for loss of future employment.

On the second point, employers often believe that they are justified in telling the employee to leave immediately without paying them after the discovery of a wrongful act committed by the employee. This reaction is understandable because the employer has already performed a mental "set-off" against the perceived damage or loss that the employee would have caused the business, and concluded that far from needing to pay the employee, the employee would end up owing the business money instead.

This approach, however tempting, is wrong in the eyes of the law. The law requires that the employer must pay the employee up to his last day on the job even if the employer was justified in terminating employment. However, the employer is not without remedy, as the law also provides that it is open to the employer to then sue the employee for damages in respect of the wrongful act committed. Matters become more complicated when there is no provision for the termination of the employee without a notice period or notice pay. Generally when there is no notice period stated in the employment contract, it is implied in law that an employer must give reasonable notice to an employee. What is reasonable will depend on the circumstances of employment such as the role and position of the employee and his seniority in the company. Furthermore, if the employee is covered under the Employment Act, the minimum notice periods set out in section 10(3) are applicable.

Whether or not a company can terminate the employment of an employee is highly fact specific, and companies should not be too trigger happy to do so. Nonetheless, the risks can be mitigated with proper legal advice and properly drafted employment documents which stipulate clearly when summary dismissal is justified.

• Adhering to fair employment practices

Singapore prides itself on being a meritocratic society with a diverse workforce in terms of its ethnic, religious, gender and age makeup. Fair and merit-based employment practices should be implemented by employers to treat employees with respect and motivate them to put in their best for the organisation. The Tripartite Guidelines on Fair Employment Practices, formulated by the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP), sets out five fair employment practice principles for employers.

- Recruit and select employees on the basis of merit (such as skills, experience or ability to perform the job), and regardless of age, race, gender, religion, marital status and family responsibilities, or disability.
- Treat employees fairly and with respect, and implement progressive human resource management systems.
- Provide employees with equal opportunity to be considered for training and development based on their strengths and needs to help them achieve their full potential.
- Reward employees fairly based on their ability, performance, contribution and experience.
- Abide by labour laws and adopt the Tripartite Guidelines on Fair Employment Practices.

While the above principles are cast as guidelines, employers are advised not to make light of them. Companies have been investigated by TAFEP as a result of complaints made to the Ministry of Manpower (MOM) or TAFEP by disgruntled employees who perceive that the company is in breach or non-adherence of the above guidelines. This not only sours the relationship between the company, TAFEP and potentially MOM, but may also result in sanctions such as a suspension of renewals and applications for work passes. Such disruptions to a company's labour supply would in some cases even result in a stoppage of operations. It is therefore critical that businesses must not only seek legal assistance to ensure that their employment practices are in line with the guidelines, but that they also conduct themselves accordingly.

• Constructive dismissal

Under certain conditions, an employee may be entitled to treat his employment agreement as being terminated by the employer's conduct even if the employer did not actually dismiss the employee; and if so, then the employee would be entitled to damages. This situation usually arises from two scenarios.

First, where the employer has perhaps lost faith in the employee, but instead of having a frank conversation and to set objective benchmarks for the employee to improve on, the employer simply keeps taking away roles and responsibilities from the employee, or excludes the employee from meetings, in the hope that such passive "messaging" would be sufficient for the employee to have enough awareness to voluntarily resign. Second, where the employer changes the work scope of the employee, whether out of a business reason or out of a wish to "punish" the employee.

In the first instance, we believe that it is always more constructive and useful to sit a non-performing employee down and to discuss objective and measurable standards for improvement. If the employer tries to "let the employee down easy" by resorting to excluding the employee from work, the employer might actually provide the non-performing employee with the grounds to sue the company for constructive/wrongful dismissal and claim damages.

In the second instance, employers should be careful when making changes to an employee's scope of work, or even reporting lines because if the changes are material enough, they might give rise to a complaint of constructive/wrongful dismissal and claim damages. For instance, it would not be in the company's interest to increase the responsibilities of the employee with no corresponding increase in remuneration – an astute employee might rightfully refuse to assume those additional tasks. Similarly, if an employee was formerly reporting to a regional head, and the reporting lines are then changed to make the employee report to a country head instead, that might also constitute a material adverse change to the terms of the employee's employment, and might give rise to a claim for constructive/wrongful dismissal.

Ultimately, what amounts to a material or fundamental change to an employee's employment that would give rise to a situation of constructive dismissal is highly fact-dependent, and it is always best to seek legal advice prior to making any such changes. ■

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