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EMPLOYMENT LAW EDITION

MARCH 2022

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In Brief

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Singapore High Court Dismisses All Claims By Senior Private Equity Employee Against Ex-employers and Superiors and Provides Key Guidance On Employee Misconduct, Insubordination and Breach of Confidence Issues

In *Uday Mehra v L Capital Asia Advisors and others* [2022] SGHC 23, the General Division of the Singapore High Court ("**High Court**") dismissed all of the plaintiff employee's claims against the defendants, namely, the plaintiff's ex-employers L Capital Asia Advisors and its group companies ("**LCA Group**").

The plaintiff had brought, among other things, the following claims: (a) breach of contract in respect of a share of profit on the next fund raised by the LCA Group (known as carried interest) which the plaintiff claimed to be entitled to; (b) fraudulent misrepresentation in relation to the carried interest; (c) breach of contract in the termination of the plaintiff's employment; (d) conspiracy to injure by terminating the plaintiff's employment in breach of contract to suppress his whistleblowing allegations; and (e) breach of a term of mutual trust and confidence which the plaintiff claimed to be implied in the employment contract, with a claim for "stigma loss" valued by the plaintiff at US$43.3 million. The defendants' position (which the High Court agreed with) was that all of the plaintiff's claims were devoid of merit.

Our Deputy Chairman Tan Chee Meng SC, Partners Jenny Tsin, Alma Yong and Chang Qi-Yang, Senior Associate Koh Jia Wen, and Associate Ephraim Tan acted for the successful defendants before the High Court. Additionally, our Chairman and Senior Partner Alvin Yeo SC, and Partners Jenny Tsin, Vivien Yui and Chang Qi-Yang acted for the LCA Group at the advisory stage when the plaintiff's employment issues arose.

Our Comments

The High Court's decision gives key guidance on several important issues in employment law.

Among other things, the decision clarifies that an employee's insubordination in response to a reasonable and lawful instruction from a superior officer amounts to misconduct, which amounts to a repudiatory breach of the employment contract and entitles the employer to terminate the employment contract. The High Court also highlighted that "stigma loss" in the form claimed by the plaintiff would not be available even if employment was wrongfully terminated.

The High Court also clarified how employee whistleblowing is factually and legally distinct from the employee's contractual obligations.

The decision further addresses breach of confidence issues between the party who owes the obligation of confidence in equity ("**Party X**", here, the employee) and the party to whom the obligation is owed ("**Party Y**", here, the employer). In particular:

(a) The High Court reconciled two Court of Appeal decisions which allocated the burden of proof to prove / disprove breach differently. For example, if Party X had acquired Party Y's confidential information without the latter's knowledge and consent, then the burden is on Party X to disprove the breach. If Party Y's knowledge and consent were provided, then the burden lies with Party Y to prove the breach.

(b) The decision also makes clear that the copying and disclosure of confidential information to Party X's solicitors or to the court for the alleged purposes of establishing or protecting Party X's legal rights as against Party Y is not a valid defence to an employer's breach of confidence claim.

This update focuses on the High Court's discussion on the issues set out above.

The decision also discusses other issues, such as breach of contract, contractual interpretation and misrepresentation arising from the plaintiff's unsuccessful claim for carried interest. If you would like information on those areas, please feel free to contact any of the Partners who acted in this matter.

Background

In August 2014, a dispute arose between the plaintiff and the LCA Group about how carried interest, which was to be offered to the plaintiff, was to be calculated.

The plaintiff was unhappy that the LCA Group refused to agree with his calculation of the carried interest he claimed to be entitled to, and this became the root cause of the rupture in the employer-employee relationship. As a result, the plaintiff embarked on a pattern of misconduct and insubordination.

By June 2015, there was a complete breakdown in the employer-employee relationship, and the plaintiff's employment was summarily terminated for misconduct and insubordination.

In particular, the plaintiff had: (a) failed or refused to attend meetings; (b) failed to report to his primary place of work under the employment contract, or report to Singapore as instructed; (c) actively undermined his superior by alleging that the superior had harassed the plaintiff in retaliation against the plaintiff raising whistleblowing allegations; and (d) destabilised the LCA Group by alleging internal wrongdoing to senior management of LVMH Moët Hennessy Louis Vuitton SE ("**LVMH**"), the then-parent company of the LCA Group, instead of following a directed process to investigate his whistleblowing allegations.

The High Court agreed that such termination for misconduct and insubordination was lawful and justified. Indeed, the High Court found that the plaintiff was in repudiatory breach of the employment contract and was further in breach of the express and implied terms of his employment contract.

The High Court further rejected the plaintiff's claim that he was a whistleblower who learnt of serious wrongdoing within the LCA Group. The High Court found the plaintiff's allegations of wrongdoing exaggerated, contrived and self-serving, and the whistleblowing a mere contrivance.

Finally, a counterclaim for breach of confidence was successfully brought against the plaintiff – the plaintiff had used his LCA Group email account to send emails containing material confidential to the LCA Group to his personal email account, without the LCA Group's consent.

The High Court's Decision

The following are the key points decided by the High Court in relation to the employment law issues.

Termination of employment for misconduct and breach of employment contract

The High Court highlighted that termination of an employment contract is like that of any other contract, and that either party may terminate it: (a) in accordance with its express terms; or (b) for repudiatory breach by the other party.

In the context of an employment contract, an employee commits a repudiatory breach of this contract if he is guilty of misconduct which, as the High Court observed, is conduct that destroys the relationship of trust and confidence which underlies an employer-employee contract and thereby renders the employment relationship untenable. The High Court noted that one type of misconduct which has this effect is insubordination, i.e., wilful disobedience of a reasonable and lawful command from a superior officer (see *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [55(b)], [55]).

Insubordination or wilful disobedience to superiors

The High Court clarified that disobedience is wilful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.

The High Court found that the plaintiff's conduct amounted to insubordination and that, by reason of his conduct, there was breach of the express and implied terms of the employment contract, as well as a repudiatory breach. In particular, the High Court found the plaintiff guilty of misconduct in the following areas:

(a) Refusal to obey superiors' instructions: The plaintiff received repeated instructions from superiors to meet in Singapore, which were both reasonable and lawful, and was insubordinate for refusing to obey those instructions. The High Court rejected the plaintiff's argument that he was entitled to attach pre-conditions to obeying his superior's instructions; that, too, amounted to insubordination – an employee cannot attach unreasonable and irrelevant pre-conditions to obeying reasonable and lawful instructions from a superior officer. In particular, the High Court noted that the plaintiff was unable to cite any authority in support of his arguments:

    (i) that an employee ceases to be bound by his contractual obligation to obey a reasonable and lawful instruction from a superior officer if the employee had accused that superior officer of wrongdoing; and

    (ii) that he owed fiduciary duties directly to the LCA Group's investors which somehow excused him from complying with his superior officer's reasonable and lawful instructions.

(b) Absenteeism from primary place of work: The plaintiff's primary place of work was Hong Kong, and the employment contract provided the second defendant the right to re-designate the plaintiff's place of work. The High Court rejected the plaintiff's argument that his superior provided blanket approval for him to work from Mumbai as and when necessary. In the absence of specific approval from the LCA Group, it was a breach of contract for the plaintiff to remain in Mumbai. The High Court highlighted that absenteeism from one's primary place of work, without specific approval, is misconduct that destroys the employer-employee relationship of trust.

(c) Refusal to work: The plaintiff had been subsequently instructed to stop work on all matters in order to report to Singapore to be assigned to a new place of work and a new work scope. The High Court rejected the plaintiff's argument that this instruction amounted to a stop-work order and found that such refusal amounted to misconduct and insubordination.

(d) Continued insubordination and escalation of whistleblowing allegations: The LCA Group met the plaintiff in a final attempt to reset the relationship. Among other things, the plaintiff was informed that: (i) his insubordination had to cease; (ii) if he wished to raise further whistleblowing allegations, there was to be a designated point of contact at LVMH; and (iii) LVMH would commission an

independent investigation into his allegations. While the plaintiff at first appeared chastened and cooperative, he subsequently resumed his insubordination and, contrary to instructions, made further whistleblowing allegations directly to senior executives at LVMH.

The High Court found that the plaintiff's insubordination had caused an irretrievable rupture in the relationship of trust and confidence that must subsist between employer and employee, and that the LCA Group had terminated the plaintiff's employment strictly in accordance with the employment contract and common law, so as to part ways lawfully with a demotivated and disruptive employee who was raising (baseless) whistleblowing allegations and unreasonably demanding carried interest without legal justification. In short, the plaintiff's employment was not wrongfully terminated.

Whistleblowing allegations factually and legally distinct from employment issues

Having considered the substance of the plaintiff's whistleblowing allegations, the High Court found that his allegations of wrongdoing within the LCA Group were exaggerated, contrived and self-serving. The High Court further considered that the LCA Group and LVMH had taken the plaintiff's allegations seriously and did not engage in any cover up or try to suppress the plaintiff. Indeed, LVMH had, in light of the plaintiff's allegations, appointed auditors to conduct an independent investigation, but no wrongdoing was found.

The High Court clarified that the plaintiff's whistleblowing allegations were both factually and legally distinct from his obligations under the employment contract in three ways:

(a) The plaintiff's status as whistleblower gave him no legal basis to disregard his contractual obligations under the employment contract, and gave him no legal excuse for any breach of the employment contract (i.e., for his misconduct and insubordination).

(b) The LCA Group had kept the plaintiff's performance or non-performance of his contractual obligations under the employment contract entirely separate from the action taken to investigate the plaintiff's allegations of wrongdoing.

(c) The LCA Group's decision to terminate the plaintiff's employment was not in any way motivated by a desire to suppress his whistleblowing allegations or to retaliate against them. Termination of the plaintiff's employment would not in any way prevent him from continuing to whistleblow.

Misconceived claim for "stigma loss" for employment termination

The plaintiff argued that the LCA Group's termination of his employment was a breach of an implied term of mutual trust and confidence in the employment contract, and he had suffered "stigma loss" as he was unable to find new employment.

Even assuming that a term of mutual trust and confidence was implied in every employment contract governed by Singapore law (a point which the High Court did not decide), the High Court found that the plaintiff's claim for "stigma loss" was misconceived and doomed to fail.

The High Court found, in particular, that if an employer simply (without more) terminates an employee's employment in breach of an implied term of mutual trust and confidence, "*the only damages recoverable by the employee will be damages for premature termination losses flowing from the employer's failure to give proper notice or pay salary in lieu of notice*" (see *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("***Wee Kim San***") at [34] and [36]). In such a situation, there is no scope for the employee to recover "stigma loss".

On the issue of the implied term of mutual trust and confidence, we would flag that in the recent case of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] SGHC(A) 8, the Appellate Division of the Singapore High Court highlighted that the Court of Appeal in Wee Kim San had *not* accepted the implied term of mutual trust and confidence into Singapore law and its status had been left open for decision in a future case. In particular, the Appellate Division noted in *obiter dicta* that the implied term of mutual trust and confidence had developed in the UK under a different legislative framework and the implication of such a term may not be necessary for the effective operation of employment contracts governed by Singapore law.

Breach of confidence – issues of proof

The High Court observed that there appeared to be a division of opinion in two Court of Appeal decisions as to who bears the burden of proof for a breach of confidence. In *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 ("***LVM***"), the Court of Appeal's decision appeared to proceed on the basis that the burden rests on the person who is owed the obligation of confidence in equity (i.e., Party Y). In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("***I-Admin***"), the Court of Appeal's decision proceeded on the basis that the burden rests on Party X (i.e., the person who owes the obligation of confidence), and it is for Party X to establish that his conduct has his conscience unaffected.

The High Court reconciled LVM and I-Admin, noting that:

(a) In *LVM*, Party X was a law firm and first acquired the confidential information in the course of representing Y's opponent in litigation against Party Y. Party Y therefore knew full well that Party X was acquiring the information when Party X first acquired it. Party Y's consent to that acquisition was irrelevant because Party Y had no contractual or other nexus to Party X.

(b) In *I-Admin*, on the other hand, Party X first acquired the confidential information surreptitiously, without Party Y's knowledge and without Party Y's consent. Further, Party X did so in a situation where Party X was an employee of Party Y, thereby establishing the necessary nexus between them to make both Party Y's knowledge and Party Y's consent relevant.

The High Court clarified that, where Party X owes an obligation of confidence in equity to Party Y, the burden of proving a breach of such obligation rests on Party Y where Party X had acquired the confidential information with Party Y's knowledge and consent. Here, since the plaintiff had first acquired the LCA Group's confidential information with knowledge and consent, he had no burden to disprove breach.

The breach of confidence by the plaintiff was nevertheless proven at trial. In this regard, the plaintiff had forwarded the confidential information to his personal email account, which was discovered after the plaintiff commenced this action. The High Court found such conduct to be a direct infringement of the LCA Group's wrongful loss interest, in that the plaintiff: (a) deprived the LCA Group of the exclusive power to control access to and prevent disclosure of its confidential information; and (b) acquired for himself an unrestricted power to access the LCA Group's confidential information and disclose it for his own purposes.

Breach of confidence – not excused by protection of legal rights or use in legal proceedings

The plaintiff argued that he did not breach his obligation of confidence in equity because his purpose in copying and disclosing the confidential information to his lawyers was to seek legal advice on his claims against the LCA Group and to preserve and protect those claims.

The High Court rejected the plaintiff's argument, observing that:

(a) First, the law now recognises that the full extent of Party Y's legitimate interest in confidential information goes beyond simply preventing detriment in the sense of misuse or disclosure. It extends to eliminating a real and sensible possibility that the confidential information will be misused, and eliminating an improper threat to the confidentiality of the information. On this basis, the High Court clarified that conduct by Party X which infringes upon Party Y's legitimate interest amounts to a breach of confidence, whether or not Party X's conduct is taken in the context of litigation against Party Y.

(b) Second, the High Court noted and agreed with English authority to the effect that it is a breach of confidence for an employee to forward confidential information from his employer to his personal email account in order to deploy that information in litigation by or against an employer. The High Court accepted that the proper course for an employee in that position is not to breach his obligation of confidence, but to honour the obligation, and to use the proper procedural machinery to compel disclosure of the confidential information from the employer, e.g., *via* pre-action or in-action discovery.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally deal with or any of the following Partners:

TAN Chee Meng, SC
Deputy Chairman
d: +65 6416 8188
e: cheemeng.tan
@wongpartnership.com
Click here to view Chee Meng's CV.

Jenny TSIN
Joint Head – Employment
d: +65 6416 8110
e: jenny.tsin
@wongpartnership.com
Click here to view Jenny's CV.

Alma YONG
Partner – Commercial & Corporate Disputes
d: +65 6416 6864
e: alma.yong
@wongpartnership.com
Click here to view Alma's CV.

CHANG Qi-Yang
Partner – Commercial & Corporate Disputes
d: +65 6517 3754
e: qiyang.chang
@wongpartnership.com
Click here to view Qi-Yang's CV.

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Does Implied Term of Mutual Trust and Confidence Form Part of Singapore Law? Not Clear That It Does, Singapore Appellate Division Clarifies

The Appellate Division of the Singapore High Court ("**Appellate Division**") has clarified that it is not yet settled by the Singapore Court of Appeal that a term of mutual trust and confidence is implied by law into a contract of employment under Singapore law, and that this remains an open question for the Court of Appeal to resolve in a future case*: Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] SGHC(A) 8.

Our Comments

The Appellate Division's clarification on the status of the implied term of mutual trust and confidence under Singapore law is certainly a welcomed one. While the implied term (which originated from the United Kingdom) appears to have been accepted and applied previously in numerous first instance decisions in Singapore, a thorough review from the local perspective should be conducted to assess the necessity and appropriateness of importing (by operation of law) such an implied term into all employment contracts governed by Singapore law.

The existence of such an implied term has broad implications for both the drafting of employment contracts, and the resolution of employment disputes, given the term's potentially malleable and pervasive nature. In this regard, the implied term entails that parties will not, without reasonable cause, engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages, and may import a wide range of obligations on the employer, including the avoidance of premature termination losses or other financial losses flowing from the loss of employment prospects.

The Appellate Division's observations are also a timely reminder that, even in the employment context, the fundamental principles of contract upholding the sanctity of parties' freedom to contract by way of express terms should be at the forefront. Even if there exists an implied term of mutual trust and confidence under Singapore law, parties should be allowed to exclude or modify the content of such implied term by express agreement.

In the context of an employer's conduct of an internal investigation into potential wrongdoing by employees, employers should take heed of the Appellate Division's reminder for all employers to consider the employees' perspective with greater circumspection and to treat their employees with dignity and respect even upon the parting of ways, as a matter of good practice and fairness even if there is no legal obligation to do so.

This update takes a look at the Appellate Division's decision.

Background

The appellant employee pursued, both at trial before the General Division of the Singapore High Court ("**High Court**") and on appeal to the Appellate Division, a litany of causes of action against the first

respondent (the appellant's former employer) and the second respondent (also an employee of the first respondent and the appellant's former line manager).

The causes of action related to:

(a) numerous alleged breaches of a contract of employment between the appellant and the first respondent, which included the first respondent's misuse of its power to place the appellant on mandatory leave (with salary), mismanagement of an internal investigation into the appellant's alleged misconduct, failure to disclose the outcome of the investigation to the appellant, failure to protect the confidentiality of the investigation, and wrongful termination of the appellant's employment;

(b) the first respondent's alleged negligence in protecting the confidence of the investigation against the appellant;

(c) the second respondent's alleged inducement of the first respondent to breach the appellant's contract of employment as well as malicious falsehood; and

(d) both respondents' alleged participation in an unlawful means conspiracy to cause the appellant harm.

The High Court dismissed all of the appellant's claims.

The appellant appealed to the Appellate Division against the bulk of the High Court's decision.

The Appellate Division's Decision

The Appellate Division dismissed the appellant's appeal in its entirety on the facts.

It pointed out from the outset that, even if the appellant had been able to prove the commission of the wrongs allegedly perpetrated against him (which he could not), he did not suffer any loss as he was paid a full salary for the entire period he was placed on mandatory leave and he received pay in lieu of notice pursuant to an express right of termination in his contract of employment.

In its grounds of decision, the Appellate Division emphasised that it had, in approaching the appellant's case, been careful not to address the appellant's allegation that the first respondent had breached the term of mutual trust and confidence said to have been implied by law in the appellant's contract of employment. It wished to disentangle the failure of the appellant's case on the facts and the existence of that implied term at law.

The Appellate Division then took the opportunity to state in no uncertain terms that it has not yet been settled by the Court of Appeal that a term of mutual trust and confidence forms part of, or is implied by law into a contract of employment under, Singapore law.

While the Appellate Division noted that a number of High Court cases have alluded to or implicitly accepted the implied term of mutual trust and confidence, it highlighted that, in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357, the Court of Appeal:

(a) did not formally endorse the implied term of mutual trust and confidence; and

(b) was asked only to decide whether the employee's claim for damages which relied on breach of the implied term ought to be summarily struck out, and on that basis, analysed the boundaries of the implied term and concluded that the heads of damages which the appellant sought to recover were legally unsustainable.

The Appellate Division therefore took the view that the Court of Appeal's discussion of the implied term of mutual trust and confidence in *Wee Kim San Lawrence Bernard* was substantially limited by the factual and procedural context of the case before it, that there was no "firm conclusion" that the Court of Appeal had accepted the implied term of mutual trust and confidence into Singapore law, and that *Wee Kim San Lawrence Bernard* is not clear authority for the acceptance of the implied term. It further observed that the Court of Appeal itself in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 indicated that *Wee Kim San Lawrence Bernard* left the status of the implied term open for decision in a future case.

In addition, the Appellate Division highlighted that the implied term of mutual trust and confidence was developed in the specific context of the United Kingdom's legislative framework for unfair dismissal, and that the High Court of Australia, in *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 considered that:

(a) it was unnecessary (outside of the United Kingdom's legislative framework) to imply such a term to secure the effective operation of employment contracts; and

(b) the implication of such a term was "a step beyond the legitimate law-making function of the courts".

While the Appellate Division was of the preliminary view that the implied term of mutual trust and confidence – being a term implied in law – can exist in and of itself (independent of its historical origins and the unique United Kingdom legislative backdrop against which it was developed) as long as the court is able to precisely delineate the scope of the implied term and articulate the appropriate remedial consequences which should follow from a breach, it could not rule out the possibility that the Court of Appeal might, in an appropriate case, revisit these and other issues relating to the implied term in a future case.

In its final analysis, the Appellate Division was of the view that the status of the implied term of mutual trust and confidence has not been clearly settled in Singapore, and that it remains an open question for the Court of Appeal to resolve in a more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the implied term.

Apart from the Appellate Division's observations on the status of an implied term of mutual trust and confidence, it is important to note that the Appellate Division affirmed the primacy of express terms under an employment contract. In particular:

(a) The Appellate Division re-affirmed the "well-established" position under Singapore law that *"employers may terminate employees without cause, in accordance with an express right of termination, so long as sufficient written notice or pay in lieu of notice is given*", and that this "*imposes a limit on a claim for damages for wrongful termination … as the normal amount of damages [the employee] can claim [for wrongful termination (as opposed to dismissal with cause)] is that which he would have been able to earn under his contract of employment, for the period it would take for his employer to lawfully terminate it. Typically, this is the amount of notice which the employee is entitled to receive.*"

(b) It also observed that the express contractual right to terminate without cause and with notice or pay in lieu of notice should *not* be limited by a requirement that the employer not act arbitrarily, capriciously, or in bad faith in exercising such right. Insofar as there may be an implied term of mutual trust and confidence underlying such a limitation on the right to terminate (which is not a settled issue), this was to be only an *implied* term, which is subject to express terms to the contrary, or parties' agreement to exclude or modify the content of such implied term.

(c) Further, where the *termination* of a contract is concerned, especially where there is an express clause permitting termination by way of notice, the Appellate Division highlighted that considerations of the parties' freedom of contract (and conversely, to exit contracts) come into play. In the case of employment contracts, the right to terminate with notice or pay in lieu of notice tends to cut both ways – if the *employer's* express right to terminate is subject to restrictions, it would be difficult to see why the *employee's* contractual discretion to quit would not likewise be limited. That, however, would seem to be a particularly unpalatable proposition in the field of employment law, where it is trite that employers cannot be compelled to hire or retain, but more importantly, that employees cannot be forced to work.

Lastly, the Appellate Division discussed the (non-legal) shortcomings of the first respondent's conduct and approach to the internal investigation it had conducted against the appellant. In particular, despite the appellant's repeated requests to be informed the outcome of the investigation, the first respondent had insisted on not disclosing to the appellant the outcome of the investigation, and maintained that it was under no legal obligation to do so, having terminated the appellant's employment without cause and with pay in lieu of notice. This was in spite of the fact that the first respondent's own notice to the appellant had provided that the appellant would be informed of the outcome. While the Appellate Division found that such non-disclosure did not give rise to any legally remediable claim, the Appellate Division commented on the manner in which the first respondent approached this issue, as the focus was only from the first respondent's point of view and what it had considered its legal obligations to be, without pausing to think what the appellant (as the employee) might have found meaningful, productive or cathartic. In the Appellate Division's view, it would only be fair for the first respondent to inform the appellant of the outcome of the investigation, since he was the subject of the investigation, whether or not the first respondent was legally obliged to do so. The Appellate Division added that employers will do well to consider with greater circumspection, how to treat their employees with dignity and respect even upon the parting of ways.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally deal with or any of the following Partners:

Jenny TSIN
Joint Head – Employment
d: +65 6416 8110
e: jenny.tsin@wongpartnership.com
Click here to view Jenny's CV.

Vivien YUI
Joint Head – Employment
d: +65 6416 8009
e: vivien.yui@wongpartnership.com
Click here to view Vivien's CV.

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LEGISLATION

COMPASS – Additional Criteria to Qualify for Employment Pass

On 4 March 2022, the Ministry of Manpower ("**MOM**") announced that foreigners intending to apply for an Employment Pass ("**EP**") will, in addition to meeting the minimum qualifying salary threshold, also have to meet a minimum score of 40 under the Complementarity Assessment Framework ("**COMPASS**") from 1 September 2023 onwards. COMPASS will apply to EP renewals from 1 September 2024.

To ensure that the EP qualifying salary keeps pace with local wage growth, it was announced on 18 February 2022, that the minimum qualifying salary for EPs will be raised from S$4,500 to S$5,000[1]. For the financial sector, the salary benchmark will be increased from S$5,000 to S$5,500. The higher wage benchmark will apply to new EP applications from 1 September 2022, and to renewal applications from 1 September 2023. Employers should expect MOM to regularly update this minimum qualifying salary to reflect local Professionals, Managers, Executives and Technicians ("**PMET**") wage trends. The EP qualifying salary will be benchmarked to salaries of the top one third of the local PMET workforce.

The new COMPASS framework, which imposes criteria in addition to the minimum qualifying salary, is intended to balance the ability of employers to select high-quality foreign professionals against the important goals of improving workforce diversity and building a strong Singaporean core. We set out below a summary of the COMPASS points system[2].

COMPASS Criteria

EP applications are scored on four foundational criteria and two bonus criteria. These criteria are split into two categories, individual and firm-related attributes, as set out in the table below:

	Individual Attributes	Firm-Related Attributes
Foundational Criteria	C1. Salary	C3. Diversity
	C2. Qualifications	C4. Support for local employment
Bonus Criteria	C5. Skills Bonus (Shortage Occupation List)	C6. Strategic Economic Priorities Bonus

1 In line with the increases to the minimum qualifying salary for EPs, the minimum qualifying salary for S Pass applications will also be raised from S$2,500 to S$3,000. For the financial sector, the salary benchmark will be increased from S$3,000 to S$3,500. As in the case of EPs, the higher wage benchmark will apply to new S Pass applications from 1 September 2022, and to renewal applications from 1 September 2023. This wage benchmark will be raised incrementally thereafter.

2 Please refer to the MOM website for additional information, including case studies on how EP applications may be scored on COMPASS: https://www.mom.gov.sg/passes-and-permits/employment-pass/upcoming-changes-to-employment-pass-eligibility/complementarity-assessment-framework-compass.

For each of the foundational criteria C1 to C4, applications earn 10 points if they meet expectations, 20 points if they exceed expectations, and 0 points if they do not meet expectations. Applications can also earn additional points on the bonus criteria C5 and C6 if they meet relevant qualifying conditions.

A minimum of 40 points is required to pass COMPASS.

COMPASS scoring for each criterion

The details of each COMPASS criterion are set out in this section.

C1. Salary

All applications must meet the EP minimum qualifying salary. COMPASS further accounts for sectoral differences in salary norms. Each EP application earns points by meeting sector-specific and age-adjusted benchmarks for local PMET salaries.

Fixed monthly salary compared to local PMET salaries in sector by age	Points
≥ 90th percentile	20
65th to 90th percentile	10
< 65th percentile	0

Firms will be grouped into relevant sectors and subsectors based on their principal business activity, as declared on the Accounting and Corporate Regulatory Authority ("**ACRA**") website. Sectors refer to broad industry groupings based on the Singapore Standard Industry Classification, such as the financial services sector, while those sectors admitting of more variation are split into subsectors for the purpose of benchmarking of local PMET share. More information on sector and subsector classification for the purposes of COMPASS will be made available before September 2023.

C2. Qualifications

The qualifications of the EP applicant are relevant to COMPASS.

Candidate's qualifications	Points
Top-tier institution	20
Degree-equivalent qualification	10
No degree-equivalent	0

Top-tier institutions include: (a) top 100 universities based on international rankings, and other highly-reputed universities across different regions; (b) Singapore's Autonomous Universities; or (c) vocational institutions that are highly recognised in a particular field.

Degree-equivalent qualifications generally refer to: (a) foreign qualifications that are assessed to be comparable to a bachelor's degree in the UK system (MOM determines this with reference to international recognition bodies, e.g., the UK National Information Centre for recognition and evaluation of international qualifications and skills); or (b) professional qualifications that are well recognised by the industry and endorsed by a relevant sector agency.

C3. Diversity

Diversity is a relevant consideration to COMPASS. A diverse mix of nationalities enriches firms with new ideas and networks, and contributes to a more inclusive and resilient workforce. COMPASS will award more points to applications where the applicant's nationality forms a small share of the firm's PMET employees.

Share of candidate's nationality among firm's PMETs	Points
< 5%	20
5 to 25%	10
≥ 25%	0

For the purposes of this criterion, MOM will consider all employees earning at least S$3,000 per month as PMETs. Additionally, an application will score 10 points by default if the employer firm employs fewer than 25 PMET employees.

C4. Support for Local Employment

COMPASS recognises firms that make efforts to create opportunities for the local workforce and build complementary teams comprising both local and foreign professionals. An EP application earns more points if the employer firm has a relatively larger share of locals among PMET employees compared to peers in the same subsector.

Share of local PMETs within subsector	Points
≥ 50th percentile	20
20th to 50th percentile	10
< 20th percentile	0

For the purposes of this criterion, MOM will consider all employees earning at least S$3,000 per month as PMETs. Additionally, an application will score 10 points by default if the employer firm employs fewer than 25 PMET employees.

To avoid penalising firms in subsectors which have a relatively large share of local PMETs, EP applicants to be employed at firms with a local PMET share of at least 70% will earn at least 10 points.

More information on sector and subsector classification for the purposes of COMPASS will be made available before September 2023, according to the MOM website.

C5. Skills Bonus (Shortage Occupation List)

The **Shortage Occupation List** ("**SOL**") recognises EP holders in occupations requiring highly specialised skills that are currently in shortage in the local workforce. As an indication, this could include niche infocommunications-related roles supporting Singapore's digitalisation drive. EP applicants for jobs on the SOL will be awarded 20 points. This will be reduced to an award of 10 points if the share of the candidate's nationality among the firm's PMETs is one third or higher.

The SOL will be developed through a comprehensive evaluation process involving tripartite partners and accounting for quantitative evidence of labour shortages and qualitative assessments made by sector agencies in consultation with industry partners.

A tripartite evaluation panel will be appointed to assess relevant proposed occupations and provide a final recommendation for the SOL. The first SOL will be announced when this panel has completed its review by March 2023. Thereafter, the SOL will undergo regular review to respond to changing industry needs.

C6. Strategic Economic Priorities Bonus

COMPASS recognises companies undertaking ambitious innovation, or internationalisation activities in partnership with the Government, in line with Singapore's economic priorities to enhance the innovative capacity of the economy, enhance global linkages and strengthen economic competitiveness. A firm which meets specific assessment criteria on innovation or internationalisation activities will qualify for the Strategic Economic Priorities Bonus and the EP applications tied to these firms will be awarded 10 points.

In order to qualify, firms must participate in selected programmes or meet specific assessment criteria carefully curated by participating economic agencies. Examples of programmes that MOM suggests could be included are Enterprise Singapore's Scale-up SG or the Economic Development Board's Research and Innovation Scheme for Companies.

A finalised list of government programmes, eligibility criteria and application process will be announced by March 2023.

COMPASS Exemptions

EP applicants will be exempted from COMPASS if they fulfil any of the following conditions:

(a) Earn a fixed monthly salary of at least $20,000;

(b) Apply as overseas intra-corporate transferees under the World Trade Organisation's General Agreement on Trade in Services or an applicable free trade agreement that Singapore is party to; or

(c) Fill a role on a short-term basis, i.e., one month or less.

Pre-Assessment Tool

When COMPASS takes effect, MOM will offer a Pre-Assessment Tool ("**PAT**") so that employers can get an indicative COMPASS score for their prospective EP candidate before submitting an EP application. The PAT will be available by September 2023.

Concluding Comments

In light of the upcoming implementation of COMPASS and the increase in the minimum qualifying salaries for EP and S Pass holders, it may be timely for companies to take a closer look at their projected foreign manpower needs and to prepare for these changes.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally deal with or any of the following Partners:

Jenny TSIN
Joint Head – Employment
d: +65 6416 8110
e: jenny.tsin@wongpartnership.com
Click here to view Jenny's CV.

Vivien YUI
Joint Head – Employment
d: +65 6416 8009
e: vivien.yui@wongpartnership.com
Click here to view Vivien's CV.

Connect with WongPartnership.

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11 Jan 2022	LegisWatch: Update on SGX's Responses to Comments on Consultation Papers: (1) Climate and Diversity: The way forward (2) Starting with a Common Set of Core ESG Metrics ("SGX Responses to Consultation Papers")
10 Jan 2022	Special Update: Data Protection Quarterly Updates (October - December 2021)

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-
WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

-
Al Aidarous Advocates and Legal Consultants
Oberoi Centre, 13th Floor, Marasi Drive, Business Bay
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw

wongpartnership.com