

“I got fired without any reasons!” – Guarding against wrongful dismissal claims by employees

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Who is protected from Wrongful Dismissal

Following amendments to the Employment Act in 1 April 2019, all employees, regardless of salary, now receive protection against wrongful dismissal by the employer. Previously, this protection was limited to employees earning less than S\$4,500. Today, even C-level employees may seek protection against wrongful dismissal.

Most employers will agree that if an employee is dismissed on the whim and fancy of the employer, this should be considered wrongful dismissal.

However, it may come as a surprise that even if the employee was:

- a. dismissed with notice (the employee serves out the notice period and is paid during the notice period);
- b. dismissed without notice but paid salary in lieu of notice; or
- c. dismissed without notice and without salary in lieu of notice,

it is possible for the employee to bring a claim for wrongful dismissal against the employer.

The only exception is for an employee employed in a managerial or an executive position who has not served the employer for at least 6 months in any position and is dismissed with notice or without notice but paid salary in lieu of notice. This is in recognition of the fact that the employers need a trial period for managers and executives.

What is Wrongful Dismissal

Wrongful dismissal is defined under the Employment Act as dismissal “without just cause or excuse”. What then is “without just cause or excuse”?

The Tripartite Guidelines on Wrongful Dismissal published pursuant to the Employment Claims Acts illustrates wrongful dismissal as follows:

- a. dismissal due to unsubstantiated misconduct or poor performance
- b. dismissal due to discrimination
- c. dismissal to deprive employee of benefits/entitlements employee would have otherwise earned
- d. dismissal to punish employee for exercising employment rights
- e. dismissal due to a false reason
- f. involuntary resignation – the employee is forced to resign

Most employers will agree that if an employee is dismissed in any of the above scenarios, the dismissal was wrongful.

Employee who is not a good fit

What about other more common scenarios, such as when an employer has assessed an employee during the probation period and feels that the employee will not be a good fit for the organisation and decides to dismiss the employee?

It would be difficult to say that the employee is guilty of misconduct – usually this refers to serious matters such as theft, dishonesty, insubordination, or bringing organisation into disrepute. It may also be difficult to show poor performance; the employee may be a good performer but is not a team player or has a personality clash with fellow colleagues. What if the employee makes a claim for wrongful dismissal and alleges there was discrimination in the workplace or that this was to deprive benefits that would have been earned after probation?

The fact that the employee is dismissed during or after probation does not insulate the employer against a claim for wrongful dismissal. Employees who are under probation (except managers and executives that have served for less than 6 months) can make a claim for wrongful dismissal.

While the allegations may ultimately be unproven, the employer would have been put through the stress and effort to respond to the allegations.

Most Wrongful Dismissal claims unfounded

Wrongful dismissal claims are to be made to the Employment Claims Tribunal. The Tribunal may order that the employee be reinstated and be paid salary that would have been earned, or compensation for the wrongful dismissal. Before a wrongful dismissal claim can be made to the Employment Claims Tribunal, it must first be sent for mediation by the Tripartite Alliance for Dispute Management.

In the period 1 April 2019 to 30 June 2020, of the claims made by employees against employers for wrongful dismissal, 19% were found to involve wrongful dismissal; 59% were found not to involve wrongful dismissal; and the remainder were privately settled.

Assuming the settled claims have the same ratio of invalid claims of wrongful dismissal, this means that about 73% of all wrongful dismissal claims are unfounded.

Avoiding allegation of Wrongful Dismissal

Does this mean that an employer who hires a mediocre employee is forced to keep on the employee just to avoid the hassle of fighting or settling an alleged wrongful dismissal claim? Seeing through a wrongful dismissal claim and hopefully being vindicated by the Tribunal is a time consuming process that will take months and an unproductive use of management resources.

Fortunately, no.

The safe harbour provided by the Tripartite Guidelines on Wrongful Dismissal is dismissal by invoking the contractual right to terminate.

The Guidelines state that as both employee and employer have a right to contractually terminate employment with notice, dismissals with notice are presumed not to be wrongful. The Guidelines provides the following illustration:

“C was dismissed with notice. His employer did not give any reason for the dismissal. When C asked for a reason, the

employer continued to not give a reason, and explained that it was termination in accordance with the contract. C is unable to point to any facts, incidents or situations which could suggest that the employer's intention was anything other than termination in accordance with the contract. The dismissal with notice was not wrongful."

What this means in practical terms is that when employers issue a letter of termination, they should only cite and invoke the contractual provision of the employment agreement for termination with notice. No other reasons should be specified. Human resources personnel and supervisors of the employee should always refer back to the contractual provision when asked by the employee for a reason for the termination.

If the employee wishes to allege wrongful dismissal, the employee will not be able to point to any false reason or unsubstantiated misconduct or poor performance since no reasons were cited. Instead, the onus will be on the employee to prove that the dismissal was due to discrimination, to deprive of benefits or to punish for exercising employment rights.

Another practical step employers may wish to consider is to hire new employees on a short-term employment contract (with an option to convert to a regular employment contract) instead of a traditional employment contract with a probation period. This is because dismissal during or after probation period may be the subject of a wrongful dismissal claim, but the cessation of employment due to the expiry of a fixed term employment contract is not. If the employee turns out to be suitable for the organisation, the employee can then be hired on a traditional employment contract. Naturally, a disadvantage is that a short-term employment contract may not be as attractive to prospective (and sometimes good) employees.

Conclusion

In November 2020, the Ministry of Manpower reported that wrongful dismissals claims lodged in 2Q 2020 were higher than in previous quarters in line with the decline in local employment during the period. Given ongoing structural changes in the employment market, accelerated by the pandemic, wrongful dismissal claims will be a challenge to be met by employers. Employers should take practical steps to insulate themselves from them.

Dentons Rodyk thanks and acknowledges Associate Elias Arun for his contributions to this article.

Your Key Contacts



Melvin See

Senior Partner, Singapore

D +65 6885 3701

melvin.see@dentons.com