

Bird & Bird ATMD

Employment Update



Is Silence Always Golden?

April 2019

The "Tripartite Guidelines on Wrongful Dismissal" released on 1 April 2019 are aimed at providing a useful reference point for all parties in the context of wrongful dismissal claims. We examine some of the illustrations proffered in the guidelines and highlight the challenges for HR in actual termination scenarios.

Comparing two of the illustrations in the guidelines – in both illustrations, an employer had terminated an employee with notice but without giving reasons for the termination. The difference was that in the first illustration, the absence of reasons worked to the employer's favour – because the employee was unable to point to any facts, incidents or situations to suggest that the employer had any wrongful intentions behind the termination, the termination was not wrongful. In the second illustration, the absence of reasons did not quite achieve the same result – the employee was subsequently able to prove that the employer had adopted a discriminatory attitude towards him during his employment and the termination was wrongful in light of such proof.

Several observations arise:

- Choosing to keep silent on the reasons for termination is no longer a fail-safe form of legal risk mitigation;
- On one hand, these illustrations, considered together with the applicable statutory burden of proof (if the employer gives reasons for termination with notice, the employer bears the burden of proving these reasons)¹, suggest that it may still be better for employers to keep silent on the reasons for termination, since the burden of proving wrongful reasons on claimant employees is higher;
- On the other hand, keeping silent on the reasons for termination leaves it wide open for employees to argue or suggest that there is a hidden, wrongful reason for the termination.

However, what is clear from the illustrations in the guidelines is that an employer's actions *before, during and after* termination are relevant in determining a wrongful dismissal claim. For example, a quick backfill of the vacated role would be relevant in considering whether the purported reason given of termination (i.e. company restructuring) was genuine. By way of another example, an employer's previous statements expressing dissatisfaction at an employee's refusal to work overtime would also be relevant in considering whether there could be any suggestion that the employee's termination was, in reality, punishment for his refusal to work overtime.

The changes to the Singapore Employment Act have, no doubt, necessitated a shift in thinking – not just in relation to employee exits, but also to employee relations throughout the employment relationship. Going forward, PIPs, appraisal forms, HR records, internal memos and communications (previously considered "optional" from a legal perspective) are now likely to have a significant impact in wrongful dismissal claims.

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¹ Section 27(2)(b) of the Employment Claims Act 2016.

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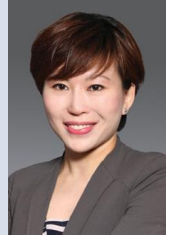
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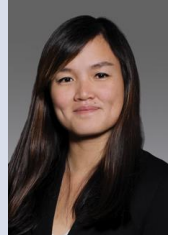
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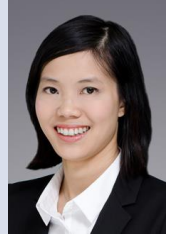
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