EMPLOYMENT

Workplace Investigations, Disciplinary Hearings and Summary Dismissals – How Should They be Properly Carried Out?

Introduction

Workplace investigations, disciplinary hearings and summary dismissals are deeply contentious, and must be carried out with great care and due process to survive subsequent challenge. This was demonstrated in the case of *Dabbs, Matthew Edward v AAM Advisory Pte Ltd* [2024] SGHC 260 ("***Dabbs v AAM***"), which involved a claim for wrongful dismissal and allegations of the breach of natural justice in respect of a workplace investigation and disciplinary hearing.

In *Dabbs v AAM*, the Court also took the opportunity to set out its views in relation to other issues that frequently plague employers when dealing with the contemplated termination of an employee's employment. How is misconduct even defined? Under what circumstances will disciplinary policies be incorporated into the employment contract? Do employees have a common law right to a hearing prior to the termination of their employment? In privately conducted disciplinary hearings, must employers adhere to the rules of natural justice?

We delve into these issues below, and discuss what employers should bear in mind when conducting workplace investigations, disciplinary hearings and summary dismissals to ensure that their processes are not just legally defensible, but also stand up to public scrutiny and the court of public opinion.

Background

The claimant ("**Employee**") had been employed by the defendant ("**Employer**") as (i) an executive director under an Executive Service Agreement ("**ESA**"), and (ii) as a financial services advisor under an Advisor Agreement ("**AA**"). Upon hearing that the Employee was plotting to engineer a team move to a competitor, the Employer commenced an internal investigation against him. The investigation found that the Employee had sent confidential client information to his personal email account, and sent several vulgar and offensive emails to other staff members. He had also stored sexually explicit photographs and videos (collectively, "**illicit materials**") and conducted inappropriate searches on his company desktop.

The Employer informed the Employee that a disciplinary hearing would be convened against him, giving him two days' notice. The Employee replied with a letter of resignation and stated that he would be unavailable to attend the disciplinary hearing due to his daughter's graduation ceremony. In his absence, the disciplinary panel proceeded with the disciplinary hearing and concluded that he should be summarily dismissed. The Employee appealed, appearing at the appeal hearing. However, the appeal panel affirmed the decision of the disciplinary panel.

The Employee commenced proceedings for wrongful dismissal and the payment of certain sums that were allegedly due to him by way of salary and commissions.

Decision of the High Court

The High Court dismissed the Employee' claim, finding that the summary dismissal was justified based on his misconduct.

Clause 7.3 of the ESA entitled the Employer to summarily dismiss the Employee if he were, among other matters, "guilty of any gross default of misconduct in connection with or affecting the business of the Company... or guilty of conduct tending to bring himself, the Company or any Group Company into serious disrepute". A preliminary issue facing the Court was that the ESA did not define what amounted to "gross default or misconduct".

The Employer pointed to Appendix A of its handbook titled "Disciplinary Procedure & Guidelines" ("**Appendix A**"), which set out a list of non-exhaustive examples of gross misconduct. This gave rise to the question of whether Appendix A, as set out in its handbook, was incorporated into the terms of the employment contracts.

The Court found that Appendix A was not incorporated into the terms of the employment contracts

The Court noted that documents such as staff handbooks and company websites may be incorporated into the express terms of an employment contract. This could occur where the letter of appointment expressly incorporates such documents by reference, through stating that the employment contract is subject to the company's rules and regulations.

However, in this case, the Court found that Appendix A did not appear to fall within the category of rules and regulations. The ESA also contained an entire agreement clause, meaning that the parol evidence rule applied to prevent the admission of extrinsic evidence to contradict, vary, add to or subtract from the terms of the contract under Section 94 of the Evidence Act 1893 ("**EA**").

With regard to the AA, clause 9(iv) of the AA provided that the Employee must "comply with any rules, regulations, policies and procedures of or issued by the Company". Appendix A, being the Employer's "Disciplinary Procedure & Guidelines", fell within such "procedures". However, the clause in the AA did not specifically reference, nor provide that Appendix A was to form part of the contract between the Employer and the Employee.

Nonetheless, the Court noted that Section 94(*f*) of the EA allows extrinsic evidence to be admitted if it is to be used merely to aid in interpreting a term in the contract. It therefore allowed Appendix A to be used as an aid to interpret the phrase "gross misconduct" in the ESA.

Without the saving grace of the Court applying Section 94(f) of the Evidence Act to nonetheless reference the definition of misconduct contained in Appendix A as an extrinsic aid, the employer would have been in a significantly more disadvantageous position in attempting to justify that the employee's conduct amounted to "gross default or misconduct" as a basis for summary termination of his employment.

The learning point for employers here is that definitions of misconduct, and for that matter, any important rule, regulation, policy or procedure that an employer wishes to rely on, must be specifically referenced and expressly incorporated into the terms of the employment contracts. Otherwise, this opens a ripe area for adversarial employees to challenge findings of misconduct made against them in the course of workplace investigations, disciplinary hearings and summary dismissals.

Nonetheless, the Court found that there were justified grounds for summary dismissal

On the facts, the Court found that the Employee had:

1. stored the illicit materials on his work desktop, creating an issue for the business due to the offence and reputation harm that such materials would project and create;
2. conducted sexually inappropriate searches on his work desktop;
3. sent offensive emails to his colleagues; and
4. breached his confidentiality obligations under the ESA in forwarding various confidential documents to his personal Gmail account.

As such, his conduct as a whole amounted to "gross misconduct" or conduct tending to bring himself into "serious disrepute", justifying his summary dismissal. The Employer in this case was fortunate that the Employee's conduct was palpably wrongful and inappropriate, and would have arguably amounted to misconduct by any standard. However, it would also be entirely possible in future cases where employees would be able to successfully argue that even if their conduct were possibly inappropriate, the impropriety was insufficient to justify summary dismissal. The devil, then, would be in the details, with the starting point being how clearly the employer has articulated its own definitions of what amounts to misconduct — and whether such definitions were then properly incorporated into the employment agreement to be used against the employee.

The conduct of the summary dismissal was justified

Another interesting point that arose from *Dabbs v AAM* was that the Employee argued that the Employer had breached the rules of natural justice, Appendix A, and the implied duty of mutual trust and confidence in its manner of terminating his employment. Specifically, the complaint was that the Employer had refused the Employee's request to postpone the disciplinary hearing by one day and proceeded in his absence, notwithstanding his explanation that he had to attend his daughter's graduation that day.

It was pertinent to note that the Court agreed with the Employee that the two-day notice was too short – rather, it would have been reasonable for the Employer to have postponed the hearing by a day. Although the Employer had acted within the letter of the law, the Court commented that "*if [the Employer] is painting itself as a modern employer that takes equitable and holistic views of employment practices (bearing in mind its views on the [Employee's] behaviour), it [had] not followed the spirit of those practices by insisting on a critical hearing on such short notice and on the day which the [Employee] had clearly indicated was an important family occasion.*"

Nonetheless, the Court held that the Employer's conduct of the summary dismissal was justified as:

1. The rules of natural justice do not apply to privately conducted disciplinary hearings.

    - Under Singapore law, an employee does not have a common law right to a hearing prior to the termination of his employment. It therefore follows that there is no automatic right for an employee to be given adequate notice and opportunity to be heard on dismissal. There was no clause in the ESA to indicate that the rules of natural justice would apply to the disciplinary and appeal hearings.
    - The Employer was legally entitled to insist that the Employee attend the disciplinary hearing on that day, noting that on the specific facts of this case, the disciplinary hearing had taken place two hours after the Employee and his family had left the graduation ceremony. As such, nothing turned on the Employer's behaviour in this regard.
    - The disciplinary and appeal hearings should be viewed together as a whole when determining whether the summary dismissal was wrongful, as the appeal panel had the power to overturn the

results of the disciplinary hearing. The Employee had been given the opportunity to attend the appeal hearing, present his defence, and respond to all key allegations and evidence of misconduct.

Based on the Court's careful caveats in this case, employers should not take the position that they are thus entitled to impose arbitrary or unreasonable notice periods during an investigation or a disciplinary hearing. Instead, a learning point from this case is that if the employer had acted more reasonably towards the employee, it would have deprived the employee from this entire ground of argument to begin with in the first place, potentially saving significant time, resources and legal costs in contesting this issue.

2. There was no implied term of mutual trust and confidence either in law or in fact.

- The law remains unsettled in Singapore as to whether employment contracts contain an implied term of mutual trust and confidence.
- In the present case, the Court found that this implied duty should not be imported into Singapore's context. Among other reasons, this term arose within the context of the UK's legislative employment framework, which differs from Singapore's legislative framework. There is also a lack of clarity as to what this duty encompasses, which would engender significant uncertainty in employment relationships.
- The Court also emphasised that the implication of this duty was a legal issue for the Court's determination. The fact that the Employer's letters mentioned that the claimant had "breached an implied duty of mutual trust and confidence" did not mean this duty was implied into the Employee' employment contract.

Employers should thus be careful in how they frame their allegations right from the onset in their communications with the employee. In this case, the Employer's inclusion of the phrase "breached an implied duty of mutual trust and confidence" in pre-litigation correspondence provided sufficient leeway for the Employee to argue that the Employer accepted that there was this implied duty to begin with — thereby requiring the Employer to deal with this at the trial of the matter.

Concluding Remarks

Dabbs v AAM highlights several learning points for consideration.

- **Incorporation of disciplinary policies or other documents into the employment contract**: While specifically referencing and incorporating definitions, rules, regulations, policies or procedures that an employer wishes to rely on will reinforce that they are part of the employment contract and can be enforceable as against the employee, this may be a double-edged sword. In turn, employers will become legally obligated to conduct their investigations, disciplinary proceedings or summary dismissals in the same strict manner as expressly provided for in their policies. Employers should thus obtain legal advice to understand the possible legal implications and ensure that their employment contracts are drafted appropriately to achieve the desired result.

- **Complying with the spirit of responsible employment practices:** Although the Court ultimately found in favour of the Employer in this case, employers should comply with the spirit of responsible employment practices (in this case, by postponing the disciplinary hearing by a day). Doing so would avoid giving grounds for (i) an employee to attack the employer's conduct, and (ii) the Court to give redress.

- **Implied duty of mutual trust and confidence**: While it is well established in UK law that an implied duty of mutual trust and confidence exists in the employment relationship, the Singapore courts seem to have moved away from finding such an implied duty. While this avoids inadvertent breaches of this nebulous

duty, it also means that employers should ensure that grounds for disciplinary action or dismissal are appropriately scoped out, given that reliance on an employee's breach of such duty is unlikely to be fruitful.

Investigations, disciplinary proceedings and summary dismissals tend to be heavily contested, adversarial, and prone to being challenged. Employers facing the prospect of such proceedings should be cognisant of the possible issues and pitfalls and seek legal advice before taking action. Importantly, employers should also ensure the proper groundwork is laid – with regard to the terms in their employment contracts and related documents – *before* any employment disputes rear their head.

Rajah & Tann Singapore's Employment Practice stands ready to assist in this regard, whether in relation to drafting employment contracts or advising on the best course of action vis-à-vis an errant employee. Should you have any queries on the matters raised above, or any other questions on the employment landscape in Singapore, please feel free to contact our team below.

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