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TERMINATION OF EMPLOYMENT CONTRACTS FOR MISCONDUCT: PRACTICAL GUIDELINES

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The observations of the Singapore Court of Appeal (“CA”) in a coda to their judgment in *Phosagro Asia Pte Ltd v Piattachanine, Iouri* [2016] 5 SLR 1052 (“**Phosagro**”) raise some *practical considerations for employers to bear in mind when drafting their employment contracts*.

The facts of *Phosagro* are straightforward. By a letter dated 28 February 2014, Phosagro Asia Pte Ltd (the “**Appellant**”) purported to terminate Iouri Piattachanine’s (the “**Respondent**”) employment pursuant to the terms of the Respondent’s employment contract (the “**Employment Contract**”). Pursuant to the terms of the Employment Contract, the Respondent was entitled to payments of certain sums in connection with the termination.

Subsequently, by a letter dated 18 March 2014, the Appellant wrote to inform the Respondent that he was guilty of serious misconduct and/or in breach of his fiduciary duties as he had allegedly made wrongful expense claims. Accordingly, the Appellant put the Respondent on notice that he had been summarily dismissed and stated that he was not entitled to the payments due to him under the Employment Contract. The Respondent claimed for payment of the sums he was contractually entitled to under the Employment Contract while the Appellant counterclaimed for the allegedly unauthorised payments.

One issue before the High Court as well as the CA was whether or not the Respondent was guilty of serious misconduct and/or wilful breaches of the Employment Contract. While the High Court judge found that the Respondent had breached Clause 3 of the Employment Contract¹, he held that it did not amount to serious misconduct within the meaning of Clause 20 of the Employment Contract. However, the CA held that the Clause 3 was a condition of the Contract, and that the Respondent’s breach of the same amounted to “serious misconduct” which entitled the Appellant to terminate the Employment Contract.

However, what is more interesting are the CA’s observations in *obiter dicta* as to whether an employer, having first terminated an employment contract pursuant to an *express term* of the employment contract, may be permitted to subsequently terminate the employment contract for *breach at common law* instead, if it is *subsequently* discovered that there was wrongdoing amounting to serious misconduct on the part of the employee.

Although the CA did not decide this issue definitively, it first affirmed that an employer who purported to terminate the employment contract pursuant to the terms of the contract without relying on any particular clause ought to be permitted to *subsequently* specify and rely upon a clause which justifies summary dismissal without compensation even if the employer was not aware of its right to do so at the time of termination.

Second, the CA considered the decision of the English Court of Appeal (the “**English CA**”) in *Cavenagh v William Evans Ltd* [2013] 1 WLR 238 (“**Cavenagh**”). In *Cavenagh*,

¹ Clause 3 provided that the Respondent must “*well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company*”.

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the employer had summarily terminated the employee's appointment as managing director pursuant to an express term of his service agreement and agreed to give him six months' pay in lieu of notice. The employer subsequently learnt that the employee was guilty of misconduct pre-termination and refused to give him the six months' pay. The English CA held that having chosen to terminate the service agreement pursuant to an express term, it was not open to the employer to later terminate the same under common law. It reasoned that the termination pursuant to a term of the contract resulted in an accrued debt that is due to the employee which the employer was obliged to pay, whereas a termination under common law resulted in an award for damages which was for an unliquidated sum.

While the CA observed (*obiter dicta*) that there were reasons to commend the English CA's approach, it did not necessarily follow that the same approach ought to be adopted. In particular, the CA queried that: "...if the focus is on whether the employer is justified in terminating the employee's employment, why should it (the employer) not be afforded the opportunity to rely on new facts that justify the said termination (albeit on a different legal basis?)". The CA however left this issue open to be decided conclusively should it arise for decision in future cases.

In light of the CA's observations in *Phosagro*, there are some practical points that employers should consider taking note of when drafting their employment contracts, to try and avoid possible protracted litigation in this regard:

- a. First, it may be useful to expressly state which of the terms in the employment contract are conditions, which breach, regardless of the actual consequences of such a breach, would entitle the employer to summarily dismiss the employee and/or terminate the employment contract;
- b. Second, employers should make it a condition of any severance payments due to an employee that the employee has not been guilty of any serious misconduct, and that if it transpires that the employee had been in fact guilty of such misconduct, any severance payment which is otherwise payable will be voided and any severance payment already made would be repayable to the employer on demand.

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