Aldabe Fermin *v* Standard Chartered Bank
[2010] SGHC 119

Case Number : Suit No 174 of 2009

Decision Date : 22 April 2010

Tribunal/Court : High Court

Coram : Steven Chong JC

Counsel Name(s) : Fermin Aldabe (plaintiff in person); Herman Jeremiah, Chu Hua Yi and Wong Wai Han (Rodyk & Davidson LLP) for the defendant.

Parties : Aldabe Fermin — Standard Chartered Bank

Contract

22 April 2010 Judgment reserved.

Steven Chong JC:

Introduction

1 The present dispute has raised several thought-provoking issues on the law of employment that arise from an employment dispute which culminated in the employee being "summarily dismissed" on the very first day he reported for work. One of the key issues is whether an employee may be summarily dismissed because he evinces an intention to resign by serving one-month's notice in accordance with the terms of the employment contract. Related to this issue is whether the employer can subsequently seek to justify the dismissal of the employee on additional grounds even if it was aware of those additional grounds at the time of the dismissal but chose not to rely on them. Finally, this case will also examine the scope of the "minimum legal obligation" rule in the context of an employee's right not to be dismissed without a disciplinary hearing.

In this case, cultural differences, linguistic misunderstandings, communication errors and institutional bureaucracy unfortunately escalated the dispute to a point of no return for both parties. The plaintiff was supposed to attend an induction session aptly named "the Right Start Session" on his first day at work. As things turned out, it was anything but the *right start* for both parties. The employee who was summarily dismissed represented himself in the legal proceedings that he commenced within two weeks after his purported dismissal.

Facts

Background

2 The plaintiff, Mr Fermin Aldabe ("the plaintiff"), is an Italian. In September 2008, the plaintiff was head hunted by a recruitment agent, Mr. Robert Carruthers of Pathway Resourcing Ltd ("Mr. Carruthers"), who was sourcing on behalf of the defendant, Standard Chartered Bank ("the defendant") to fill a senior position as Head of Complex Product Risk Management, Foreign Exchange & Commodities. At that time, he was residing in Argentina. This was a position that required the plaintiff to be based in Singapore but to report to Mr Simon Charles Gurney, the Chief Risk Officer of the defendant for Europe ("Mr Gurney") who was based in London. After a few rounds of interviews, the defendant's Senior Resourcing Manager, Mr Gavin Charles Taylor ("Mr Taylor"), made an initial offer to

the plaintiff on 4 November 2008. The remuneration package offered to the plaintiff was for an annual salary of USD 200,000 with a target bonus of USD 150,000.

The Letter of Offer

3 The plaintiff did not accept the defendant's initial offer. On 5 November 2008, the defendant revised its offer to an annual salary of USD 220,000 with an improved target bonus of USD 170,000. The revised offer was still not sufficiently attractive for the plaintiff. The defendant was made aware by the plaintiff that he was also considering a competing offer from Vontobel Bank in Switzerland. Following the rejection of the defendant's revised offer, Ms Doris Honold, the Group Head of Market Risk of the defendant, then spoke to Mr Carruthers and increased the offer with an additional USD 30,000 in restricted shares in accordance with the defendant's Restricted Share Scheme. The plaintiff then accepted the defendant's revised offer through Mr Carruthers on 6 November 2008. Finally, on 10 November 2008, Mr Taylor sent a scanned copy of the Letter of Offer setting out the terms of his employment to the plaintiff by email. He also handed a hard copy of the Letter of Offer to Ms Jenny Huang, the defendant's Resourcing Coordinator ("Ms Huang"), to courier it to the plaintiff in Argentina for his signature. On 11 November 2008, the plaintiff signed the scanned copy of the Letter of Offer, dated his acceptance to have taken place on 7 November 2008, and returned the signed scanned copy to Mr Taylor by email.

4 Under the terms of the Letter of Offer, the commencement date was expressly stated to be 17 November 2008 subject to the approval of the plaintiff's employment pass. However, it soon became apparent to the defendant that it would not be possible to set up all the information technology systems in time for the plaintiff's arrival. Mr Gurney then suggested to Mr Taylor that the plaintiff's commencement date should be delayed to 1 December 2008 instead.

5 Pursuant to Mr. Gurney's direction, on 14 November 2008, Mr Taylor sent an email ("the 14 Nov Email") to the plaintiff in the following terms:

> Hi Fermin,
>
> Your EP has been approved. Your start date will be 1 Dec '08.
>
> I assure you that we are firm on hiring you, given the time we require to get the logistics done for your laptop and LAN access, this takes some time, hence we have to push back the date.
>
> The dress code in Singapore is business formals, a suit is not required. However, in London, you will need to wear a suit given the climate and also this is a dress code.
>
> The original offer letter and other documents have been sent to your address in Argentina, pls complete and send it back to me to get this processed.

6 The hard copy of the Letter of Offer which Mr Taylor had instructed Ms Huang to courier to the plaintiff on 10 November 2008 was in fact only couriered to the plaintiff on 17 November 2008. Furthermore, the covering letter to the Letter of Offer was dated 16 November 2008. This meant that although the plaintiff had earlier been informed by Mr Taylor that his start date would be 1 December 2008, the Letter of Offer which was sent after the conversation still referred to an unchanged commencement date of 17 November 2008.

A series of unfortunate events

7 Having accepted the Letter of Offer, the plaintiff was looking forward to starting his new career with the defendant. However between his acceptance and his first day at work, the relationship was marred by a "*series of unfortunate events*" which set the stage for the dramatic turn of events on the first day he reported for work.

8 On 6 November 2008, the defendant informed the plaintiff that his annual salary (inclusive of transport allowance of $39,000) in Singapore dollars was $323,400. The agreed salary was in USD. The plaintiff was not pleased with the exchange rate of 1.47 which was applied unilaterally by the defendant. He raised the complaint and the defendant agreed to accept his rate of 1.5 instead.

9 On 17 November 2008, the defendant informed the plaintiff that he would have to purchase his own air ticket to Singapore, and that he could seek reimbursement from the defendant upon his arrival. The plaintiff replied on 18 November 2008 that he was unwilling to pay for the ticket because the Letter of Offer required the defendant to pay for it. After learning of this, Mr Gurney agreed that the defendant would arrange and pay for the plaintiff's air ticket to Singapore.

10 The plaintiff arrived in Singapore on 28 November 2008. He was then informed by the defendant that the crediting of his salary might be delayed because he had not submitted the forms pertaining to his bank account information on time. Furthermore, the plaintiff was also told that he would not be provided with a corporate credit card for the expenses he would incur for the two-week training course which he was required to attend in London following his two-day induction session in Singapore. In response, the plaintiff sought the defendant's confirmation that he would be paid by the end of December. If not, he suggested to "postpone the initiation until January 1st ". This email was copied to the defendant's London office.

11 After receiving the plaintiff's reply, Ms Sandra Box ("Ms Box") from the defendant's London office assured the plaintiff by email on 28 November 2008 that she would "make sure" that he would be paid at the end of December. She told him "don't worry about this, it will be sorted out". Ms Box sent a further email to the defendant stating that it was "imperative" that the plaintiff be paid at the end of December. The plaintiff separately wrote to Ms Box by email on 28 November to impress upon her to explain to Mr. Gurney of his difficulties to support a month of expenses in Singapore without receiving his salary by the end of December. Unfortunately, in spite of the assurance from Ms Box, Ms Phyllis Ang, a Resourcing Manager of the defendant ("Ms Ang"), informed the plaintiff by email dated 29 November that it could only "endeavour" to make payment to him by the end of December if his bank account documentation was handed in on time.

12 The plaintiff was extremely unhappy after reading Ms Ang's email. To him, the use of the word "endeavour" was contradictory to what he believed had been a firm promise by Ms Box that his salary would be paid at the end of December. On 30 November 2008, the plaintiff then wrote an email to Mr Taylor to inform him that he would not attend the induction session unless the defendant could "guarantee in writing that all necessary paperwork is in place and that payment will take place at the end of December". The plaintiff also indicated that he would go to the defendant's Human Resources department at 7.00 am on 1 December 2008 to resolve the payment issues.

13 These episodes obviously left a sour taste in the plaintiff's mouth. It was in this context that the plaintiff's behaviour and reaction on 1 December 2008 should be examined.

Events on 1 December 2008

14 True to his word, the plaintiff arrived at the defendant's Human Resources department at 7.00 am on 1 December 2008. He met Ms Ang at about 8.30 am. She gave him some forms to fill up to

facilitate the crediting of his salary. While the plaintiff was filling up the forms, he expressed his concern to Ms Ang that he might be late for the induction session that was slated to start at 9.00 am that morning. Ms Ang assured him that he need not worry about being late because the first two hours of the induction session was merely an introduction to the defendant. She also assured the plaintiff that she would call the person in charge of the induction session to inform her that the plaintiff might be late.

15 While the plaintiff was filling up the forms, he asked Ms Ang whether he would be paid for the period from 17 to 30 November 2008. Ms Ang replied that she was not aware of the arrangement. Upon hearing this, the plaintiff requested to see Mr Taylor.

16 The plaintiff remained in the meeting room until Mr Taylor arrived at 9.05 am. The plaintiff then raised the issue of his salary from 17 to 30 November 2008 as well as the corporate credit card for the expenses to be incurred in London. Mr Taylor replied that the plaintiff had agreed to change the commencement date from 17 November 2008 to 1 December 2008, and that it was the defendant's policy to reimburse its employees for expenses incurred in their course of work. At this point, the plaintiff demanded to see Ms Ong Soh Ching, the defendant's Head of Resourcing, South East Asia ("Ms Ong").

17 Ms Ong arrived at the meeting room at 9.25 am. Upon her arrival, she informed the plaintiff that different institutions have different practices regarding payment for business related expenses and that it was the defendant's policy for its employees to pay for their expenses first and seek reimbursement thereafter. She also informed the plaintiff that the defendant would only pay his salary from the commencement date of his employment, *ie* 1 December 2008.

18 The plaintiff was displeased to hear Ms Ong's response. He stated that he would tender his resignation with one month's notice if his demands were not met. Mr Taylor and Ms Ong then stepped out of the meeting room to call Mr Gurney to inform him that the plaintiff had threatened to resign unless he was paid for the period from 17 to 30 November 2008. It was then 2.00 am in London and Mr Gurney was woken up from his sleep. After hearing what had happened, Mr Gurney instructed Mr Taylor and Ms Ong to inform the plaintiff to attend the induction session first, and that he would speak to the plaintiff later that morning London time.

19 Mr Taylor and Ms Ong relayed Mr Gurney's instructions to the plaintiff. After hearing Mr. Gurney's instructions, the plaintiff informed them that he was going to resign and that the defendant was still obliged to make the payments due to him under the Letter of Offer. This included his one month salary, payment for his accommodation in Singapore for one month, the costs of flying the plaintiff's family to Singapore and various other expenses. The plaintiff also stated that after he resigned, he would be willing to do anything which the defendant required him to do during his notice period including attending the induction session. The plaintiff then requested for pen and paper to draft his resignation letter. Halfway through, the plaintiff requested for a laptop computer instead to type his resignation letter. Ms Ong acceded to his request.

20 While the plaintiff was typing out his resignation letter, Mr Taylor and Ms Ong stepped out of the meeting room to discuss this development. After some discussion, they decided that Ms Ong should contact Mr Gurney again to inform him of the plaintiff's behaviour. Ms Ong informed Mr Gurney that the plaintiff had rejected his suggestion to attend the induction session first and was already preparing his resignation letter. Finally, Ms Ong suggested to Mr Gurney that in light of what had happened, the Letter of Offer should be withdrawn. Mr Gurney agreed.

The defendant's withdrawal of the Letter of Offer

21 After obtaining Mr Gurney's approval to withdraw the Letter of Offer, Mr Taylor and Ms Ong went back to the meeting room to inform the plaintiff that the defendant was withdrawing its Letter of Offer. The withdrawal letter stated that the defendant was withdrawing the offer because the plaintiff had expressed his intention to resign. It read as follows:

> Dear Fermin,
>
> Please refer to our letter of offer dated 6 November 2008 and our discussions today (1 December 2008) wherein you have expressed your desire to resign from Standard Chartered Bank. In view of this intention and since today was expected to [be] your first day at work, our offer stands withdrawn.

After hearing that the Letter of Offer had been withdrawn, the plaintiff requested for the return of his passport and all photocopies of it. Ms Ong then stated that the defendant would provide the plaintiff with a one-way business class ticket for his return flight to Argentina. The plaintiff replied that he would prefer to go to London and Ms Ong agreed to provide him with a one-way business class ticket to London instead. At about 11.25 am, Mr Taylor and Ms Ong escorted the plaintiff out of the defendant's premises.

The plaintiff's suit against the defendant

22 On 15 December 2008, the plaintiff commenced an action against the defendant in the District Court for breach of contract. He claimed a total of $123,800 against the defendant, including $44,000 for his salary from 17 November 2008 to 31 December 2008, $79,800 for expenses for his relocation, baggage transport, accommodation in Singapore, and his CPF contributions.

23 By email dated 19 December 2008, the plaintiff informed the defendant that he would take further action against the defendant unless he was paid a sum USD 250,000. The defendant did not reply to the plaintiff's email.

24 On 21 January 2009, the plaintiff amended his Statement of Claim to increase his claim to $540,800. The heads of claim were similar to his original claim, except that the plaintiff had included an additional $2,000 for medical health insurance and a further sum of $415,000 for economic loss. The plaintiff's claim for economic loss was founded on his assertion that the defendant had misled him into believing that it was offering him a permanent job, and that this had resulted in him giving up another job opportunity ("the Vontobel Bank offer"). Thereafter on 12 February 2009, the plaintiff successfully applied to transfer his action to the High Court.

25 On 15 April 2009, the plaintiff amended his Statement of Claim again. On this occasion, he changed his claim for economic loss of $415,000 for loss of the Vontobel Bank offer to a claim for economic loss arising from the employment contract and the failure of the defendant to follow its disciplinary procedure for summary dismissal. The plaintiff added a further claim of $1m for loss of the Vontobel Bank offer as a result of the defendant's fraudulent misrepresentation.

26 In addition, the plaintiff also commenced a claim for unfair dismissal in the English Employment Tribunal on 18 February 2009 which has been stayed pending the outcome of the present action.

Did the plaintiff agree to amend the commencement date from 17 November 2008 to 1 December 2008

27 From the above summary of the material facts, it is apparent that the principal issue which

sparked the dispute between the parties concerned the alleged agreement to change the commencement date of the employment from 17 November to 1 December 2008. It is therefore apposite to first determine whether there was such an agreement.

28 It was not disputed that the commencement date under the employment contract was expressly agreed to be 17 November 2008. It is the defendant's case that the plaintiff agreed at its request to change the commencement date to 1 December 2008. There can be no dispute that the defendant bore the burden to prove the agreement to change the commencement date. Absent such an agreement, the commencement date would remain as 17 November 2008 as stated in the Letter of Offer. It is pertinent to bear in mind that the request for the change came from the defendant as a result of its own administrative difficulties. The commencement date of 17 November 2008 under the Letter of Offer was subject only to the approval of employment pass and that was approved by 14 November 2008.

29 The question whether the plaintiff had agreed to change the commencement date is not to be determined by looking at the plaintiff's subjective state of mind. Rather, the court will take an objective view of the plaintiff's actions to determine if it can reasonably conclude that the plaintiff had indeed agreed to the change. As Lord Reid stated in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 at 128:

> The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.

The defendant raised three main arguments to support its claim that there was an agreement to change the commencement date. First, it had informed the plaintiff through the 14 Nov Email that his "start date" would be 1 December 2008. The plaintiff did not raise any objections, thus showing that he had accepted the change, as well as the defendant's reasons for doing so. Secondly, the plaintiff had presented himself for work at the defendant's premises in Singapore on 1 December, thus proving by his conduct that he had accepted the new commencement date. Thirdly, the defendant referred to two emails which showed that the plaintiff knew that he would not be paid for the period from 17 to 30 November 2008.

30 When the plaintiff was informed by Ms Huang that he would not receive his salary by the end of December, he responded with an email dated 28 November 2008 ("the 28 Nov Email") at 3.19 pm in the following terms:

> Please confirm that you will pay salary by end December. Otherwise we should postpone initiation until January 1st.

31 On 30 November 2008 at 10.20 am, the plaintiff sent another email ("the 30 Nov Email") to the defendant stating that:

> The wording of your last email (see below) does not reflect the mail sent to me by Sandra. Therefore, I will not be attending your induction session Monday until you GUARANTEE in writing that all necessary paperwork is in place and that payment will take place at end of December.
>
> I will be at your office at 7AM (51 Bras Basah Road, Plaza By The Park, #01-01 Singapore 189554) on Monday 1st December as a last attempt to deal with this matter. Otherwise, I will request London that we set a start date of January 1st when you should be able to give me all necessary tools including corporate credit card to deal with yet uncovered expenses in London. I

will also expect you to fly me back immediately to Buenos Aires until the new start date.

32 The defendant argued that these two emails clearly showed that the plaintiff was aware that the commencement date had been changed to 1 December 2008, and that he would not be receiving any salary for the 17 to 30 November 2008 period. That was the reason why the plaintiff suggested a further change of the commencement date to 1 January 2009 if the defendant could not pay his salary by the end of December. The plaintiff even requested the defendant to fly him back to Buenos Aires pending the "new start date". Such a demand, according to the defendant, was entirely incongruent with the plaintiff's assertion that he was already employed from 17 November 2008.

33 In response, the plaintiff contended that the 14 Nov Email only mentioned that his "start date" would be 1 December 2008. This terminology was different from the "commencement date" as used in the Letter of Offer. The plaintiff thought that the terms "start date" and 'commencement date" meant different things. Essentially, he believed that "commencement date" referred to the date when his employment with the defendant would commence, while "start date" referred to the date on which he was expected to physically present himself at the defendant's office in Singapore to start work. Hence, according to the plaintiff, it was entirely logical for him to believe that while the employment contract had already commenced on 17 November 2008, the defendant only required him to start work on 1 December 2008 due to its own administrative issues. This also explained why he presented himself at the defendant's office only on 1 December 2008. Furthermore, in response to the 14 Nov Email, the plaintiff merely said "Thank you for the information" without any indication that he had agreed to change the commencement date.

34 The plaintiff also explained that when he stated in the 28 Nov Email and 30 Nov Email that the defendant should have a new start date on 1 January 2009 if it was unable to pay his December salary on time, he was not suggesting to amend the commencement date further to 1 January 2009. Rather he was referring to the date on which he was supposed to commence his training in London ("the London Training Date'). The plaintiff explained that he was extremely concerned about having to use his own funds to pay for his expenses in London while not receiving his December salary until the end of January 2009.

35 The plaintiff conceded that his demand to be flown back to Buenos Aires if the London Training Date was delayed to 1 January 2009 was inconsistent with his assertion that the start date which he referred to in the 28 Nov Email and the 30 Nov Email referred to the London Training Date. After all, if the employment contract had already commenced on 17 November 2008, and the defendant had acceded to his request to delay the London Training Date, the plaintiff could commence work in its Singapore office in the meantime. The plaintiff was not in any position to demand to be flown back to Buenos Aires just because his London Training Date had been delayed. However, the plaintiff then explained that he did not really expect to be flown back to Bueno Aires, and that his request was merely meant to put pressure on the defendant to pay his December salary by the end of December 2008.

Plaintiff: I had already been engaged with Singapore. I had no choice but to stay in Singapore. And therefore, if I wrote those lines, its to actually put pressure on them and say, "well, why don't you write this one liner?"

Court: So you are basically saying although you said what you said in the last sentence you actually didn't really mean it?

Plaintiff: I—I say—I—I would say that I would seriously cons---reconsider that act---you know, I—I would seriously have to consider before acting on that statement and I would have been, in all probability, very unlikely that I would have acted on that statement. Essentially I could not…

Court: Yes.

Plaintiff: So I doubt very much I would have acted on that if that is the question you have raised.

(Transcript---Day 1, pages 103 to 104)

36 After examining the evidence and the testimonies of the various witnesses, I find that the defendant has failed to discharge its burden of proof that the plaintiff had agreed to change the commencement date of the employment contract for the following reasons:

(a) First, it was not unreasonable for the plaintiff to make a distinction between the "commencement date" as it was used in the Letter of Offer and "start date" as was used by Mr Taylor in the 14 Nov Email. Any attempt by a party to change the terms of a written contract must be clear and ambiguous, and the defendant bore the risk of using imprecise words that were capable of causing confusion or uncertainty. It was not unreasonable for the plaintiff to believe that although he was to be hired from 17 November 2008, the defendant as his employer preferred for him to start later due to its own administrative issues.

(b) Secondly, according to the defendant, the plaintiff had on 14 November 2008 allegedly agreed to the change as evidenced by the 14 Nov Email. However the hardcopy of the Letter of Offer which was sent over by the defendant on 16 November 2008 still stipulated the commencement date as 17 November 2008. If an agreement had been reached on 14 November 2008 as alleged, the commencement date on the Letter of Offer should have been amended to reflect the agreement. In such circumstances, when the plaintiff received the Letter of Offer accompanied by a covering letter dated 16 November 2008 with specific instructions to sign and return the Letter of Offer, it was entirely reasonable for the plaintiff to believe that while the "start date" had been changed, his commencement date for the purposes of his status as an employee had remain unchanged. The defendant tried to explain that the Letter of Offer was not amended because Mr Taylor thought that it had already been couriered to the plaintiff. However, under cross-examination, when confronted by an email dated 13 November 2008, Mr Taylor accepted that he was aware, contrary to his earlier assertion, that the Letter of Offer had not been couriered to the plaintiff prior to 14 November. It may well be that the defendant genuinely believed that the plaintiff had agreed to the amendment but the fact remains that the Letter of Offer which the plaintiff was specifically required to sign provided otherwise.

(c) Thirdly, when the plaintiff was told that he had to buy his own ticket to Singapore, he replied that he was unwilling to do so because under the terms of the Letter of Offer, the defendant was obliged to do so for its employees. In his mind, he believed that as he was already a n employee from 17 November 2008, the defendant was obliged to pay for his ticket. His understanding was reinforced when the defendant agreed to pay for the ticket directly.

37 I accept the plaintiff's explanation that when he suggested to the defendant in the 28 Nov Email that they should "postpone initiation until January 1st" if the defendant could not pay his December salary on time, he was referring to the London Training Date. The plaintiff was always

concerned about having to pay for his London expenses in addition to not being paid his December salary. By the same token, the reference to the "new start date" in the 30 Nov Email was also to the London Training Date. This was probably why the plaintiff indicated that he would make the request to the defendant's London office, rather than to the defendant's Human Resources department in Singapore.

38 Finally, the plaintiff's behaviour at the defendant's office on the morning of 1 December 2008 was entirely consistent with his understanding that he would be paid from 17 November 2008. When the plaintiff went to the defendant's office on the morning of 1 December 2008, he was already aware that there was a likelihood that he may not be paid his December salary on time, and that he would have to bear his London expenses upfront first. His response was that the London Training Date should be delayed to 1 January 2009. It was only when he heard that the defendant was not going to pay him for the 17 to 30 November 2008 period that he decided to tender his resignation. The plaintiff was genuinely taken by surprise at this turn of events as he had all along thought he was entitled to be paid for that period. Ms Ang accepted that based on the plaintiff's behaviour on 1 December 2008, the plaintiff genuinely believed that he was entitled to be paid from 17 November 2008.

39 The only part of the plaintiff's evidence that was inconsistent with his case was his demand to be flown back to Buenos Aires until the new London Training Date. As I had observed earlier, the plaintiff himself conceded that if he was already employed from 17 November 2008, he was not entitled to make such a demand. Despite this, in my view, this does not alter the objective evidence before me, particularly as he was directed to sign the Letter of Offer with the unchanged commencement date of 17 November 2008 in spite of being told earlier that the "start date" had been changed to 1 December 2008. In any event, it was for the defendant to prove that the plaintiff had agreed to the change and not for the plaintiff to disprove otherwise.

40 Accordingly, I find that the parties were not *ad idem* to change the commencement date of employment from 17 November to 1 December 2008.

Was the plaintiff wrongfully dismissed

41 To determine this issue, it is essential to examine the reasons for the dismissal and whether those reasons were borne out by the evidence.

42 At the outset, it is relevant to highlight that the defendant did not initially purport to dismiss the plaintiff. Instead after the plaintiff stated his clear intention to resign by providing the one-month notice, the defendant purported to withdraw the Letter of Offer. As the Letter of Offer had been duly accepted by the plaintiff, counsel for the defendant conceded that the withdrawal was improper. Instead the defendant sought to justify the termination on the basis that it was entitled to summarily dismiss the plaintiff. This can clearly be seen from the defendant's Defence and Counterclaim:

> 21. By reason of the Plaintiff's conduct …the Plaintiff was refusing and/or had failed to commence work on 1 December 2008 and therefore was refusing and/or had failed to perform his duties under the Contract and/or was refusing and/or had failed to comply with a direction of the Defendant under Clause 10.1(a) of the Contract as the case may be, each entitling the Defendant to terminate the Plaintiff's employment immediately without notice or payment in lieu of notice. *Further and/or in the alternative, the Defendant was guilty of misconduct under Clause 10.1(b) of the Contract entitling the Defendant to terminate the Plaintiff's employment immediately*.

22. The Defendant did exercise its right to terminate the Contract by:-

a. Its letter dated 1 December 3008 to the Plaintiff withdrawing the offer of employment of the Plaintiff. The Defendant says that although worded as a withdrawal, the legal effect of the said letter was to terminate the Contract;

b. Ms Ong's statement on the Defendant's behalf that by the Plaintiff's express intention to resign, the Plaintiff had clearly evinced his intention that he did not wish to work with the Defendant and therefore the Defendant's offer of employment stood as withdrawn. Again though expressed as a withdrawal, the legal effect of Ms Ong's communication to the Plaintiff was to terminate the Contract: and/or

c. The conduct of the Defendant's Mr Taylor and Ms Ong in escorting the Plaintiff out of the Defendant's premises amounted to an exercise of the Defendant's right to terminate the Contract.

43 As can be seen from the defendant's withdrawal letter, its original reason for withdrawing its Letter of Offer from the plaintiff was due to the plaintiff's stated desire to resign from the defendant on his first day of work. However, during the trial, the defendant sought to supplement its reasons for summarily dismissing the plaintiff. In total, it listed four reasons why it was justified to dismiss the plaintiff on grounds of misconduct, namely:

(a) the plaintiff's unreasonable demand to be paid from 17 to 30 November 2008;

(b) the plaintiff's refusal to attend the induction session;

(c) the plaintiff's misconduct in raising his voice at the defendant's employees; and

(d) the plaintiff's intention to resign on the first day of his employment.

44 The plaintiff submitted that the defendant could not rely on grounds which were not stated in its withdrawal letter. The plaintiff submitted that although the defendant was already aware of the additional grounds at the time of termination, it elected not to rely on them. Accordingly by its conduct, the defendant had condoned the plaintiff's action and was thereby precluded from relying on the additional grounds. Further the plaintiff advanced an interesting argument that under the terms of his employment, he was contractually entitled to a disciplinary hearing for the alleged misconduct. The summary dismissal was wrongful since the disciplinary process was not adhered to at all. In this regard, he claimed for damages by reference to the period it would have taken to complete the disciplinary process.

Can the defendant rely on grounds not stated in the withdrawal letter to justify the summary dismissal

45 It is well established that at common law, a party who furnishes a wrong reason for terminating a contract does not deprive himself of other justifications that would have entitled him to do so. In *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267, at 269, Greer J said:

> It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

46 A similar view was echoed by Devlin J in *Universal Cargo Carriers Corp v Citati* (No.1) [1957] 2 QB 401 at 443, when he stated as follows:

> A rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.

47 These cases were cited with approval in *Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR(R) 65 ("*Amixco*") at [20]–[21]. In addition, the law does not draw a distinction between reasons which the terminating party was not aware of at the time he terminated the contract, and reasons which the terminating party was aware of but did not rely on. This much is clear from the judgment of Stamp LJ in *Cyril Leonard & Co. v Simo Securities Trust Ltd. and Others* [1972] 1 W.L.R. 80 at 89, where he stated as follows:

> The law is in my judgment this, that a master in defence of an action for wrongful dismissal brought by a servant may rely on any act of misconduct warranting dismissal notwithstanding that at the time of the dismissal he did not rely on that act. This applies alike whether the act or misconduct was or was not known to the master at the time of the dismissal…
>
> …For my part I can see no good ground for distinguishing between a ground of dismissal known to the master and not relied upon by him at the time of the dismissal and an unknown ground for dismissal discovered subsequently.

48 The general principle is subject to certain exceptions, and these exceptions were succinctly laid out by G P Selvam JC in *Amixco* at [30].

> To the common law rule stated above there are certain recognized exceptions. First, "if the point not taken is one which if taken could have been put right the principle will not apply" — *per* Somervell LJ in *Heisler v Anglo-Dal Ltd* [1954] 1 WLR 1273 at p 1278. Parker J cited this statement with approval in *André et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep 463 at p 469. Secondly, the rule is subject to the qualification that a party may by its conduct preclude itself from setting up another ground at a later date: see *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 and *Cerealmangimi SpA v Toepfer (Alfred C), The Eurometal* [1981] 3 All ER 533. Thirdly, the rule does not apply where a statute as a matter of construction precludes a party from raising other grounds at a later time: see *Davis (W) & Sons v Atkins* [1977] AC 931, an unfair dismissal case made under the Employment Protection Act 1975 [UK].

As alluded to by G P Selvam JC, common law rules may not apply to employment contracts in the UK because of the statutory intervention of the Employment Protection Act 1975 (c 71)(UK) ("the UK Act"). Under the UK Act, an employee can bring an action against the employer for unfair dismissal if he feels that the employer has terminated his employment contract unfairly.

49 This statutory action of unfair dismissal is entirely different from the common law doctrine of wrongful dismissal. The term "wrongful dismissal" has no special legal meaning. It is merely a term

used to describe an employer's repudiatory breach of an employment contract. The courts deal with a claim of wrongful dismissal in the same way as they treat any other claim for breach of contract. See *Port of Singapore Authority v Wallace John Bryson* [1979–1980] SLR(R) 670 ("*Wallace*"). Hence, the common law rule that an employer can rely on any additional reason(s) (whether known to him or not) which existed at the time of dismissal to justify the dismissal applies in Singapore.

50 In contrast, unfair dismissal under the UK Act focuses on the employer's state of mind. Under the UK Act, the employer is required to give the dismissed employee a letter documenting the reasons for which he has been summarily dismissed. Should the employee make a claim of unfair dismissal, the employer must justify the dismissal with reference only to the reasons laid out in that letter.

51 The UK Act has no equivalent in Singapore. Accordingly, the UK decisions cited by the plaintiff dealing with unfair dismissal are not directly relevant.

Did the defendant condone the plaintiff's actions

52 The plaintiff's case that the defendant is precluded from relying on reasons that it chose not to rely on at the time of the dismissal is essentially grounded on estoppel. This doctrine was recognized by G P Selvam JC in *Amixco* as an independent exception to the common law rule that a terminating party can rely on any reason that existed at the time the contract was terminated.

53 In *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, the plaintiff was supposed to sell certain goods to the defendant. After the goods had to been shipped to the defendant, the master of the ship issued an inaccurate bill of lading to the defendant. This was a breach of contract that entitled the defendant to refuse to take delivery of the goods. However, the defendants decided to accept the bill of lading. Subsequently, the defendants recanted, and decided to reject the goods instead. Their attempt to rely on the plaintiff's breach of contract was rejected by Lord Denning:

> It is well settled that if a buyer rejects and gives one ground for it, he is not confined to that ground. If he afterwards finds out another ground on which he was entitled to reject, then in the ordinary way he can rely on that ground also. That is clear from Taylor v. Oakes, Roncoroni & Co., (1922) 38 T.L.R. 349. It is similar to the rule that if a man dismisses a servant on one ground, he is not confined to that ground. If he afterwards finds another ground justifying his dismissal, he can rely on that too. But this rule is subject to the qualification that a man may by his conduct preclude himself from setting up the later ground.

54 In my view, the court should not be too quick to find estoppel merely because an employer did not dismiss an employee immediately after the employee's single act of misconduct. It is important to recognise that an employment contract is not a commercial contract. It involves a continuing relationship of trust and confidence between the employer and the employee. The employer's impression of an employee's conduct, competence and loyalty is something that has to be observed over a period of time. An employer who does not dismiss an employee for any single act of incompetence or misconduct, may, with good reason, dismiss him after taking into account the cumulative effect of other acts done over a period of time. Finding estoppel in such a situation would, in effect, compel an employer to dismiss an employee in circumstances when he otherwise would not have done so in order to preclude an estoppel from being raised.

55 In the present case, the plaintiff's alleged acts of misconduct (making a claim for salary for the 17 to 30 November period, refusing to go for the induction session, raising his voice at the defendant's employees) took place within a matter of hours on his first day at work. Regardless of

whether the plaintiff was right in making the demands he did, it was clear to me that the defendant was caught off guard by the plaintiff's reaction. It is simply unrealistic for the plaintiff to claim that the defendant condoned his acts merely because he was not dismissed immediately after each alleged act of misconduct.

56 Hence, I find that the defendant was not precluded from relying on the additional grounds to justify the dismissal notwithstanding the fact that they were not cited in the withdrawal letter.

Did the plaintiff's acts amount to misconduct

57 The question whether the plaintiff had acted in a manner sufficient to justify the summary dismissal is to be determined objectively by the courts. In *Wallace*, the employee was a harbour pilot who was dismissed by his employer for misconduct after being convicted for negligent driving. The court examined the facts and found that this did not amount to misconduct allowing the employer to summarily dismiss him. It stated at [8]:

> The misconduct alleged against the respondent is that he was the driver of a motor vehicle involved in a hit and run accident in which a person was killed. It was misconduct outside the course of the respondent's employment as a harbour pilot. It was misconduct in no way connected with the business of the appellants who are the authority responsible for the safe navigation of vessels entering or leaving the port of Singapore. It was not misconduct incompatible with the due or faithful discharge of the respondent's duty qua his employment as a harbour pilot. It was not the kind of misconduct which could reasonably be said to seriously prejudice or interfere with or affect the interests of the appellants to its detriment.

58 In *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739, the court laid down at [39] to [40] the general approach for determining whether an employee had misconducted himself to justifify the summary dismissal:

> In each case, it is a matter of degree whether the act complained of is of the requisite gravity. It has been said that it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract: Jackson v Invicta Plastics [1987] BCLC 329 at 344, per Peter Pain J.
>
> The relevancy and effect of any misdeed complained of must, it seems to me, be judged by reference to its effect on the employer-employee relationship. It also seems to me that in judging the relevancy and effect of the acts complained of, account must be taken of the habits and attitude of the employer at the relevant time. They cannot be judged totally in a vacuum.

Intention to resign on the first day of work

59 Based on the objective evidence before me, it is clear that the defendant's decision to withdraw the Letter of Offer was entirely due to the plaintiff's intention to resign. It was not the defendant's intention to dismiss the plaintiff. After failing to convince the plaintiff not to resign, the defendant purported to withdraw the Letter of Offer. This was apparent from the cross-examination of Ms Ong, where she admitted that she would not have issued the withdrawal letter had the plaintiff not started to write his resignation letter.

60 At this juncture, I should perhaps make a few observations about the plaintiff's decision to resign on his first day of work lest he be viewed as being over-impulsive or even capricious. First, his decision must, of course, be viewed with reference to the *"series of unfortunate events"* which

preceded his first day of work. Secondly, the plaintiff explained in his Affidavit of Evidence in Chief that he was working primarily for his bonus and not his base salary, bonus being a large component of his total remuneration. He said that he could not continue to work for an organisation which, in his view, was not prepared to fulfill the terms of a written agreement when his discretionary bonus was riding entirely on his oral understanding with its management.

61 The defendant recognised that the withdrawal was improper. Accordingly it was agreed between the parties at the outset of the trial that the withdrawal would be treated as summary dismissal for misconduct. Counsel for the defendant also submitted that the plaintiff had committed a repudiatory breach of his employment contract by threatening to resign within the first few hours of his first day at work, because this deprived the defendant substantially of what it had bargained for under the employment contract. In support, the defendant relied on the cases of *Speechly Bircham LLP v Nsaba* UKEAT/0186/07/MAA ("*Speechly*")and *Allan Trevor Gould v St George Area Intellectual Disability Services* [2007] NSWDC 166 ("*Allan Trevor*").

62 Neither of these cases offered any assistance to the defendant. In *Speechly*, the plaintiff employee had brought an action against the defendant employer for breaching the employment contract in failing to pay her the required notice money after it dismissed her. The employer claimed that it was the employee herself who had committed a repudiatory breach of the employment contract by failing to attend certain required hearings, and sending emails to the employer saying that her employment had been terminated. The court held that the employee's conduct in failing to attend work and to attend meetings amounted to a repudiatory breach of her employment contract, which the employer was entitled to accept. Accordingly, the employee's claim against the employer for breach of contract failed.

63 In *Allan Trevor*, the plaintiff employee had brought an action against the defendant employer for wrongful dismissal. The court found that just before the employee left the employer's premises, he had stated that "I've had enough, I am out of here, I resign". The court held that this was a clear renunciation of the employment contract by the plaintiff, and that the employer had accepted this renunciation and terminated the employment contract. Accordingly, the employee's claim for wrongful dismissal failed.

64 Both of the above cases involved situations where the employees had expressly indicated that they were unwilling to perform their contractual obligations in repudiatory breach of their employment contracts, and where the employers had accepted the repudiation. Hence, the employees could not claim the benefit of any rights they had under their employment contracts. By contrast, in the present dispute, the plaintiff's resignation was intended to conform to the terms of his employment. He was planning to tender his one-month notice in accordance with clause 10.3 of the Letter of Offer. The defendant could well have accepted the plaintiff's resignation and pay him his salary during the one month period. Instead, it chose to pre-empt the plaintiff's resignation by summarily dismissing him for misconduct. Having made its choice, it bore the burden of showing that it was entitled to summarily dismiss him on grounds of misconduct.

65 Counsel for the defendant, however, submitted that an intention to resign with the requisite notice was still a repudiatory breach. If this submission is right, it would render otiose the notice provisions commonly found in all employment contracts. An employer can dismiss an employee without notice and without compensation whenever an employee serves notice to resign in accordance with the employment contract. Such an audacious submission has to be rejected.

66 Furthermore, the question whether a party was substantially deprived of what he had bargained for under a contract is only relevant if such deprivation was due to the counterparty's breach of

contract. In the absence of such a breach, the fact that the party has been deprived of his bargain can only be attributed to him having made a bad bargain.

67 In this case, the defendant was no doubt aggrieved that it has to pay substantial relocation fees and one month's salary to an employee who has indicated on his first day of work that he intended to resign. However, the plaintiff's right to resign was specifically provided for in clause 10.3 of the Letter of Offer. An employee cannot be regarded as having misconducted himself merely because he chooses to exercise his contractual right under the employment contract. The risk that an employee may resign on the first day of work is present whenever such a right is contractually provided for in the employment contract. This was the risk the defendant accepted when clause 10.3 was inserted into the Letter of Offer. Just to be fair, the plaintiff took the same risk as well since the defendant had a corresponding right under clause 10.3 to terminate his employment. Obviously the likelihood of such a risk materialising on the first day of work is extremely rare. However, the present dispute was unfortunately such a rare occasion.

Making a demand for his salary from 17-30 November 2008

68 As I have already found that the plaintiff did not agree to amend the commencement date, it necessarily follows that he was entitled to make a claim for that period. Accordingly his demand to be paid cannot constitute an act of misconduct. Furthermore, even if the plaintiff was not entitled to be paid during the 17 to 30 November period, that *per se* does not transform the conduct into misconduct. In this regard, the defendant's Ms Ong admitted during trial that there was a *bona fide* dispute between the plaintiff and the defendant as to the actual commencement date. It cannot be suggested that an employee's attempt to enforce his rights in a *bona fide* dispute with his employer can be construed as misconduct without more.

Refusal to attend the induction session

69 This ground is not supported by the evidence. The evidence is clear that the plaintiff was informed by Ms Ang that he had to submit certain forms to the Human Resources department to facilitate the crediting of his salary. That was the reason why the plaintiff went to the defendant's Human Resources department instead of attending the induction session straight away.

70 It was clear to me that the plaintiff had every intention to attend the induction session. In fact, he was so concerned about being late for the session that he asked Ms Ang whether there would be sufficient time for him to attend the session. Ms Ang testified that she reassured the plaintiff that it did not matter if he missed the first two hours of the induction session.

71 Under cross-examination, Ms Ong conceded that the plaintiff only expressed his refusal to attend the induction session after he had rejected Mr Gurney's instruction to attend the induction session first and to deal with the pay issues later. However, it is important to examine his refusal in its proper context. Right after the plaintiff refused to follow Mr Gurney's instruction, he informed Ms Ong and Mr Taylor that he was going to tender his resignation letter. More importantly, he stated very clearly that he was willing to do anything the defendant required him to do, including attending the induction session during his notice period. Most revealingly, Mr Gurney himself conceded during cross- examination that if he had known that the plaintiff was resigning with the required one month notice, and that he was willing to obey all instructions during the one month notice period, he would not have dismissed the plaintiff, but would simply have allowed him to serve out the one month notice period. This suggested that Mr Gurney himself did not regard the plaintiff's reaction as misconduct.

Raising his voice at the defendant's personnel

72 This ground is equally unsupported by the evidence. In this context, it is necessary to review and examine the plaintiff's conduct during the meeting on 1 December 2008 with reference to the above "*series of unfortunate events*".

73 This contention was, in a large part, based on the evidence of Ms Ang and Ms Ong, both of whom testified that the plaintiff was agitated and raised his voice at them during the meeting on 1 December 2008. However, a different story actually unfolded during cross-examination.

74 As regards Ms Ang, she agreed during cross-examination that although the plaintiff was "red in the face", he was not rude. In fact, she agreed that the plaintiff acted in a polite and respectful manner. Similarly, Ms Ong agreed that the plaintiff acted in a professional manner up till the time when she informed him again that he would not be paid for the 17 to 30 November 2008 period. Although the plaintiff did become agitated at that point and threatened to resign, Ms Ong agreed that he did so with some amount of decorum, and was not shouting.

75 In any event, it is important to understand the context under which the plaintiff became agitated. It was a culmination of a series of unfortunate misunderstandings coupled with the obvious fact that the plaintiff had just arrived in Singapore following a very long flight from Argentina. He was in an unfamiliar country ready to start work only to be told that he would not be paid by the end of December and worst still, contrary to his understanding, he would not be paid for the period from 17 to 30 November 2008.

76 In the circumstances, I find that none of the grounds relied on by the defendant justified the summary dismissal. Accordingly, I hold that the plaintiff was wrongfully dismissed by the defendant. As regards the quantum of damages payable to the plaintiff for the wrongful dismissal, its determination would entail an examination of the "minimum legal obligation rule". In that context I will also determine whether the plaintiff was contractually entitled to a disciplinary hearing and how that right, if any, was to be reconciled with the other terms of the Letter of Offer. The latter inquiry is relevant because if there was such a contractual right, the plaintiff's damages may be assessed by reference to the period to carry out the disciplinary process.

The minimum legal obligation rule

77 It is the defendant's case that if damages are found to be payable to the plaintiff for wrongful dismissal, such damages should be limited to one month's salary plus other accrued contractual benefits. The defendant relied on clause 10.3 of the Letter of Offer which provides as follows:

> 10.3 Either the Bank or you may at any time terminate this agreement by giving the other party one (1) months notice in writing. The Bank may in lieu of such notice pay to you a sum equal to the amount of salary that would have accrued to you during the term of such notice. For the avoidance of doubt, all service benefits associated with your employment will cease on your last day of work with the Bank, whether or not there has been a waiver of the said notice period or payment of monies in lieu thereof by either party.

78 The principle of law which the defendant is relying on is often described as the minimum legal obligation rule. It seeks to limit the recovery of damages by assessing it in a manner which is the least disadvantageous or most beneficial to the defaulting party. The leading case which is frequently cited in support of this principle is *The Mihalis Angelos* [1971] 1 QB 164 ("*The Mihalis Angelos*"). In that case, the vessel was fixed to sail to Haiphong to load a cargo for delivery in Europe. The charterer was entitled to terminate the charter party if the vessel was not ready to load by 20 July 1965. However, on 17 July 1965, the charterer purported to cancel the charter party on the ground

of *force majeure*. In fact there was no *force majeure*. The owner accepted the repudiation and claimed damages. Although the charterers were found to be in breach, only nominal damages was awarded to the shipowner because the court found (at 203B) that the charterers would have legitimately terminated the charter party in any event:

> In the light of the arbitrators' finding, it is beyond dispute that, on the belated arrival of the Mihalis Angelos at Haiphong, the charterers *not only could* have elected to cancel the charterparty, *but would* actually have done so. The rights lost to the owners by reason of the assumed anticipatory breach were thus certain to be rendered valueless. It follows from this that, in my judgment, the arbitrators were right in holding that, in the circumstances, the claim of the owners for damages should be dismissed.
>
> [emphasis added]

79 This principle has also been applied in employment contracts to limit the quantum of damages payable to an employee for wrongful dismissal. If the principle applies, the quantum of damages would be based on the amount he would have obtained had the employer dismissed him in the manner least costly to the employer. This principle was succinctly articulated by Buckley LJ in *Gunton v Richmond-upon-Thames London Borough Council* [1981] 1 Ch. 448 ("*Gunton*") at 469:

> Where a servant has been wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date the contract came to an end must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so:.see *McGregor* on *Damages*, (13th Edn,1972), paras 884, 886 and 888.

80 This principle was approved and adopted in *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1992] 3 SLR(R) 933 ("*Alexander Proudfoot*") at [13]

> The normal measure is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment. If the contract expressly provides that it is terminable upon say a month's notice, the damages will ordinarily be a month' s wages.

81 It is however important to note that the mere fact that the defendant *could have* furnished the one month notice to terminate the employment contract does not automatically operate to restrict the damages payable to the plaintiff. It is still necessary for the court to determine on the facts whether the defendant *would and not merely could* have exercised that right which was least disadvantageous to the defendant. In this respect, an interesting legal question arises as to who bears the burden of proving that the defaulting party would have exercised the right least disadvantageous to him.

Who bears the burden of proof to displace the application of the minimum legal obligation rule

82 The approach by the courts on this issue has been varied. Some have proceeded on the *assumption* that the defaulting party would exercise a right which is the least disadvantageous to minimise the damages. Others have examined the evidence to determine whether the exercise of that right by the defaulting party would accord with the objective evidence. At least, one decision appeared to have placed the burden on the defaulting party. Some of these decisions are reviewed

below.

83 In *Alexander Proudfoot*, the defendant employer had dismissed the plaintiff employee pursuant to a defective termination letter. The court found that although the defendant's letter of termination was ineffective, its conduct of excluding the plaintiff from its premises amounted to a repudiatory breach of the employment contract. The question then, was over the quantum of damages. Under the employment contract, the defendant was allowed to either dismiss the plaintiff without cause by giving one month's notice (or salary in lieu), or to summarily dismiss the plaintiff for misconduct. The court held that the proper quantum of damages was the one month's salary in lieu of notice that the defendant was required to give to the plaintiff under the employment contract. Although the issue of burden of proof was not specifically considered, it would seem that the court proceeded on the assumption that the employer would have taken the route least disadvantageous to him to minimise the level of damages.

84 Likewise the approach by the English courts appear also to proceed on the assumption that the defendant would always exercise the right least disadvantageous to him, unless proven otherwise. *Cockburn v Alexander* (1848), 6 C.B. 791 ("*Cockburn*") at 814, *Withers v General Theatre Corp* [1933] 2 K.B. 536 at 548–549. In *The Mihalis Angelos*, although the case was decided on the basis of the arbitrator's finding that the charterers would have exercised their right to terminate the charter party, two out of the three judges expressly stated that they would have proceeded on the basis of such a presumption even without the arbitrator's finding. Lord Denning opined at 196 that "if the defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it." Similarly, Edmund Davies LJ spoke of the assumption (at 203) that "had there been no anticipatory breach, the defendant would have performed his legal obligation and no more."

85 This approach of placing the burden on the plaintiff to show that the defendant would not have chosen the most advantageous method of performing or terminating the contract has also received judicial affirmation in other common law countries as well. *Cockburn* has been cited with approval by Blanchard J in the New Zealand case of *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 N.Z.L.R. 169, This position was also echoed by the Canadian decision in *Hamilton v Open Window Bakery Ltd* (2002) 211 D.L.R. (4th) 443 where the court held that the assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract.

86 The application of the rule can be displaced if there is evidence before the court to show that the facts belie the possibility of the defaulting party's adopting such a route. This was rightly observed in *Engineering Construction Pte Ltd v The Attorney General & Anor* [1997] 2 SLR(R) 392 at [19]:

> In making this assumption, however, the Supreme Court held that regard must be given to the facts and relevant circumstances as to avoid the assessment of damages based on a fiction that a defendant would have adopted one method of performance when the facts belie that possibility.

In similar vein, Diplock LJ (as he then was) observed in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 295 that the court "must not assume that he will cut off his nose to spite his face and so control the events as to reduce his legal obligation to the plaintiffs by incurring greater loss in other respects".

87 The decision in *The Commonwealth of Australia v Amann Navigation Pty Ltd* [1991] 174 C.L.R. 64 appeared to have expressed a contrary view on the burden of proof. Brennan J stated

at 114 that:

> [T]he Commonwealth has failed to discharge that onus of showing that the Secretary would have terminated Amann's contract under cl.2.24. If the Commonwealth cannot establish that that contingency would have occurred, it cannot discharge the onus of proving that the net profits to which Amann would have been entitled under the contract would not have covered the expenditure it had incurred in reliance on the contract prior to rescission.

88 However, this issue was not addressed at all by the parties. I therefore did not have the benefit of full submissions from counsel on this vexed question of law. Although it is a nice point of law to pronounce, I have decided to refrain from expressing a definitive view. It would be apparent below that for the purposes of this decision, it is strictly not necessary for the issue to be decided.

89 In most cases involving wrongful dismissal, the operation of the minimum legal obligation rule would apply to limit the employee's quantum of damages to the minimum notice period under which the employers could properly dismiss him. The reason for this is that in such cases, the employer has already evinced a clear intention to terminate the employment relationship. In such circumstances, it is usually extremely difficult for the employee to show that the employer would not have chosen to terminate the employment contract in the least disadvantageous manner. However, this is not to say that the employee will never be able to prove otherwise. In cases where the employer has in fact elected to terminate the employment by a route which was not the least disadvantageous to himself, the quantum of damages may not necessarily be constrained by the minimum legal obligation rule but may instead be based on the consequences of his election.

90 The case of *Gunton* is a striking illustration of this principle. In that case, the plaintiff was appointed by the defendant council under a contract of service terminable with one month's notice. Regulations, which prescribed a procedure for the dismissal of employees on disciplinary grounds, were subsequently adopted by the council and formed part of the plaintiff's contract. Several years later, the defendant council wrote to the plaintiff to convey its intention to dismiss him and gave him notice of his right to appeal against the decision. Instead of following the disciplinary procedure to the letter, the defendant council truncated the process and proceeded straight to the appeal. An appeal hearing was duly convened and the plaintiff was permitted to present his arguments on the merits. Subsequently, the council gave notice to the plaintiff by way of a letter dated 13 January 1976 that his contract was terminated on 14 February 1976 on disciplinary grounds. It was apparent that the procedure prescribed by the regulations was not complied with. However, effectively, the defendant council did provide the one month's notice to the plaintiff after the appeal. The plaintiff brought an action for wrongful dismissal.

91 In *Gunton*, the court had to reconcile the contractual provision for termination by one-month's notice with the disciplinary code for misconduct. Buckley LJ, (Shaw LJ dissenting), held at 462 that the incorporation of the disciplinary regulations into the employment contract was not inconsistent with the continued power of the council to dismiss the plaintiff on a month's notice upon grounds other than disciplinary grounds, because it merely disenabled the council from dismissing the plaintiff on disciplinary grounds until the procedure prescribed by the regulations had been carried out.

92 Although the council was entitled to dismiss the plaintiff with one-month's notice, once it had decided to dismiss on disciplinary grounds, it was required to comply with the disciplinary procedure. As it had failed to do so, the damages would not be limited to just one month salary. Instead, the court ordered that damages should be assessed by reference to a reasonable period for carrying out the disciplinary procedures, plus one month less anything earned in other employment during that period.

93 For completeness, I have also examined the dissenting decision by Shaw LJ in *Gunton*. Although he agreed with the eventual decision, Shaw LJ disagreed with the majority on the effect of the interplay between the express contractual right to terminate by a month's notice and the need to comply with the disciplinary code. He held (at 457) that to hold that the code had varied the contractual right where the council purported to dismiss on disciplinary grounds "would produce a grotesque result, for it would mean that the council could, without assigning any reason, terminate the plaintiff's employment by a month's notice, but could not, if it complained of misconduct on his part, determine that employment save by what might prove a long and protracted process."

94 With respect, I do not agree with Shaw LJ and preferred the reasoning of the majority. First, it is not in every case that an employee has a contractual right not to be dismissed without going through a disciplinary process. That is a matter of contract between the parties and if it is contractually provided for, I can see no reason in principle why it should not be accorded its full contractual effect. Secondly, I do not accept that such a construction would necessarily produce a "grotesque" outcome. If an employer who has the right to terminate by serving a month's notice without the need to ascribe any reason chooses instead not to invoke that right, *ie* a route which is the least disadvantageous, but opts to dismiss the employee for misconduct, in my view, there is nothing inherently unfair or "grotesque" to require the employer to ensure that the employee's contractual right to a proper disciplinary hearing is respected. It is not without significance that a dismissal for misconduct carries a stigma and would almost inevitably form an indelible stain on the employee's career record that may adversely impact on his future employability.

95 In the present case, the defendant could well have accepted that the withdrawal was wrongful in that it had failed to give the one-month's notice to the plaintiff in breach of clause 10.3 of the Letter of Offer. Instead, the defendant has accepted that the withdrawal would be treated as summary dismissal and has elected to justify it on disciplinary grounds. Counsel for the defendant stated in his oral opening statement that:

> Your honour, essentially the defendant's case against the plaintiff is that he has not been wrongfully dismissed because there were reasons to justify his dismissal. He was summarily dismissed under contractual provisions clause 10(1)(a) and (b) of the contract.

This is consistent with paragraphs 21 to 22 of the Defence (see [42] above).That being the case, it leaves me to examine the question whether the plaintiff was contractually entitled to a disciplinary hearing for the alleged misconduct and if so, how that right was to be reconciled with the defendant's express right under clauses 10.1(a) and 10.1(b) to terminate the employment without notice or payment in lieu of notice for the plaintiff's refusal to comply with the defendant's orders or for his misconduct. The determination of these two issues will have a direct bearing on the defendant's right to limit its liability under clause 10.3. If such a right was either not contractually provided for or was displaced by clauses 10.1(a) or 10.1(b), then the damages would indeed be restricted to one month salary under clause 10.3.

Was the plaintiff contractually entitled to a disciplinary hearing for the alleged misconduct

96 During the trial, the plaintiff produced a copy of the defendant's Group Employee Discipline Policy updated as of 5 January 2008 ("the Group Discipline Policy"). The Group Discipline Policy mandated each of the defendant's country branches to adopt disciplinary procedures in compliance with the minimum standards set out therein. The plaintiff then applied for discovery of the defendant's disciplinary procedures specific to Singapore. A copy of the defendant's Human Resource Policy Manual on disciplinary procedures updated as of 16 August 2007("the defendant's disciplinary procedures") was provided to the plaintiff as requested.

97 The relevant parts of the Group Discipline Policy provide, as follows:

(a) The discipline policy shall apply to all Group employees.

(b) Minor conduct or performance issues should normally be dealt with informally between employees and their managers as part of a performance improvement process, without reference to formal disciplinary procedures. Where conduct or performance issues are more serious, the formal disciplinary process will be applied.

(c) The employee should have the right to present and discuss evidence and state his or her case at any disciplinary proceeding.

(d) The employee should have the right and opportunity to make a single appeal against any decision made at or following a disciplinary hearing.

98 The principles laid down in the Group Discipline Policy were largely mirrored in the defendant's disciplinary procedures. There was, however, a material difference in that the defendant's disciplinary procedures unlike the Group Discipline Policy expressly stated that they are "non-contractual and for guidance only" the significance of which I will elucidate below.

99 The plaintiff submitted that the Group Discipline Policy and the defendant's disciplinary procedures were incorporated into the employment contract pursuant to clause 20 of the Letter of Offer which reads as follows:

20 Other Terms and Conditions

20.1 These are laid down in the Bank's SCyBernet, Human Resources Homepage, the terms of which may be amended from time to time.

In its written closing submissions, the defendant initially submitted that neither the Group Discipline Policy nor the defendant's disciplinary procedures were incorporated by express reference into the Letter of Offer. However during oral closing submissions, it was accepted by counsel for the defendant that the Group Discipline Policy and the defendant's disciplinary procedures were incorporated into the employment contract pursuant to clause 20 of the Letter of Offer. It was acknowledged that the Group Discipline Policy and the defendant's disciplinary procedures were published on SCyBernet and the Human Resources Homepage as expressly referred to under clause 20 of the Letter of Offer.

100 Notwithstanding the incorporation by reference, counsel for the defendant, nonetheless, submitted that the plaintiff was not contractually entitled to a disciplinary hearing since under the terms of the defendant's disciplinary procedures, it was expressly stated to be "non-contractual and for guidance only".

101 Before dealing with the law on this issue, I pause here to observe that Ms Ong testified on behalf of the defendant that both the Group Discipline Policy and the defendant's disciplinary procedures were applicable to the plaintiff.

Court: Yes. So now you've been provided a copy of P2, is there anything you want to say which by reference to P2 would change or in any way affect your answer or support your answer that the grievance policy would not apply to someone like Mr Aldabe who started on the first day and unfortunately left the employment on the first day as well?

Witness: From the point of view that he is an employee of the bank there, I suppose yes, this would apply to Mr Aldabe.

Court: P2 or P1?

Witness: Both, I guess.

The defendant relied on *Arokiasamy Joseph Clement Louis v Singapore Airlines* [2004] 2 SLR(R) 233 ("*Arokiasamy*"). In that case the court held that since the employer's Personnel Procedures Manual, which set out the disciplinary process, was not incorporated into the contract, the employee was not entitled to a disciplinary hearing. Furthermore, the court also held that the principles of natural justice, including the right to be heard, do not apply to employment contracts. However, the present case is quite different from *Arokiasamy*. The question is whether the defendant's disciplinary procedures, which have been incorporated into the contract, ceased to have any contractual force merely because it was stated to be non-contractual in the disciplinary procedures itself.

102 Both parties did not adequately address this issue during oral closing submissions. My own research led me to the decision in *Marley v Forward Trust Group* (1986) I.C.R.891 ("*Marley*"). In that case, the contract of employment referred, *inter alia*, to the terms and conditions as stated in the personnel manual. The employee sought to rely on the redundancy provision in the personnel manual in aid of his claim for constructive dismissal. The employer relied on clause 11 of the personnel manual which expressly provided that it was only binding in honour and was not intended to create any legal obligation. At first instance, the English High Court held that the employee was not entitled to rely on the redundancy provision in the personnel manual on account of clause 11. On appeal, the decision was reversed. Dillon LJ stated at 896–897 that:

> Section A25 sets out the terms of the collective agreement between the employers and the trade union A.S.T.M.S to which Lawton L.J. has referred. It sets it out verbatim and that includes 11: "This agreement is binding in honour only and it is not intended to give rise to any legal obligation." That may, no doubt, have been so as between the employers and the union, but the terms of the agreement are incorporated into the personnel manual in section A25 and they must have legal effect between the employee and the employers.

103 It would appear from *Marley* that terms which may be expressed as guidelines or non-binding in nature may acquire contractual effect upon incorporation into the contract. I then invited the parties to address me on the relevance of the decision in *Marley*. The defendant promptly responded with detailed submissions. In summary, the defendant accepts as a matter of principle that non-binding guidelines can acquire contractual effect upon valid incorporation. However, the defendant sought to distinguish *Marley* from the present dispute on several fronts. First, where there is an inconsistency between an express clause and the incorporated term the express term should prevail. Clauses 10.1(a) and 10.1(b) expressly entitled the defendant to terminate the plaintiff's employment contract without notice or payment in lieu of notice for the plaintiff's refusal to comply with the defendant's orders or for his misconduct. As these clauses would be inconsistent with the defendant's right not to be dismissed without a disciplinary hearing, these clauses should prevail. Secondly, it was contended that the principle in *Marley* should only apply if the incorporated term was not inconsistent with an

express term. In *Marley*, unlike the present case, there was no express provision which permitted the employer to summarily dismiss the employee for misconduct without notice or payment in lieu of notice. Thirdly, the defendant alleged that there was no evidence that the plaintiff was aware of the Group Discipline Policy and/or the defendant's disciplinary procedures at the time when the employment contract was entered into. Hence, it was submitted, the plaintiff could not rely on them.

104 Separately, the defendant submitted that the plaintiff failed to plead the material facts to support his claim for damages arising from the defendant's alleged failure to conduct the disciplinary hearing.

Pleading point

105 The only reference in the Statement of Claim on the issue of the plaintiff's right not to be dismissed without disciplinary proceedings is in the relief. The plaintiff claimed a sum of $415,000 arising *inter alia* from the defendant's failure to carry out the disciplinary proceedings. It is apparent that this claim is bereft of particulars. Notwithstanding the lack of particulars, I do not think that the defendant was prejudiced or embarrassed by the deficiencies in the pleadings:

(a) A copy of the defendant's disciplinary procedures was only provided on the third day of the trial. Although it was provided at the request of the plaintiff, the fact remains it was a relevant and hence discoverable document.

(b) The defendant was afforded the opportunity to fully address the court on all the issues arising from the plaintiff's claim for damages based on the defendant's failure to conduct a disciplinary hearing. The defendant's witnesses were cross-examined by the plaintiff on the disciplinary process.

(c) The defendant alleged that they were prejudiced in that it did not cross-examine the plaintiff as to when he became aware of or knew about the Group Discipline Policy and the defendant's disciplinary procedures. Given the nature of the cross-examination of the defendant's witnesses on the disciplinary process, if the defendant felt that knowledge was relevant, it could have applied for leave to cross-examine the plaintiff on this issue but did not do so. In any event, in my view the issue of knowledge would only be relevant if the plaintiff was relying on implied incorporation. It is not relevant in the present case because the incorporation was *expressly* provided for in clause 20 of the Letter of Offer.

Express term must prevail over any inconsistent term by incorporation

106 Clauses 10.1(a) and 10.1(b) provide, *inter alia*, as follows:

10.1 The Bank shall have the right to terminate your employment immediately without notice or payment in lieu of notice if:

(a) you neglect, refuse or for any reason become unable to perform any of your duties under this agreement or to comply with any order or direction of the Bank or

(b) you are guilty of any misconduct whether or not in the performance of your duties or commit any act which in the opinion of the Bank is likely to bring the Bank into disrepute whether or not such act is directly related to the affairs of the Bank or

…

As the disciplinary hearing would invariably take time, the defendant submitted that such a right would be inconsistent with the above mentioned clauses.

107 In support, the defendant cited several authorities. A number of them relate to incorporation of arbitration clauses. In my view, those cases are not entirely relevant or helpful because arbitration clauses are always treated *sui generis* for incorporation purposes. In *T.W.Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C 1, the court held that as a matter of sound construction, an arbitration clause in a charter party should not be incorporated into a bill of lading without specific words. The court reasoned that a bill of lading is essentially a negotiable instrument and the arbitration clause was not germane to the receipt and carriage of the goods. Equally the court observed in *Hong Kong Borneo Services v Pilcher* [1992] 2 Lloyd's Rep 593 at 595 that:

> There is some support for the view that this line of authorities has established a special rule for the bill of lading/charter-party provisions, at least where charter-party arbitration clauses are concerned (The Annefield per Lord Justice Cairns at p. 6, col. 2; p. 187F; The Varenna per Lord Justice Oliver at p. 597, col. 1; p. 621 and Lord Justice Tasker Watkins at p. 599, cols. 1 and 2; p. 623). It may also be relevant that an arbitration agreement is properly regarded as an ancillary contract and therefore is not incorporated by a general reference to the charter-party terms.

The effect of these cases is that the arbitration clause in the charter party was not incorporated. I have already determined both as a matter of evidence and the law that the Group Discipline Policy and the defendant's disciplinary procedures were incorporated into the employment contract. The issue is not whether the disciplinary procedures were incorporated but rather whether clauses 10.1(a) and 10.1(b) prevailed over them.

108 Nevertheless, there is merit in the defendant's submission that the express term should prevail over any inconsistent incorporated term. I agree with the defendant that clauses 10.1(a) and 10.1(b) were indeed inconsistent with the right to a disciplinary process. As a matter of construction, these clauses should prevail. In *Izzard v Universal Insurance* [1937] A.C 773, an express term in the insurance policy was inconsistent with the warranty in the insurance proposal which was incorporated into the policy. The House of Lords in holding that the insurance company was not entitled to rely on the warranty in the proposal stated at 779–780:

> [T]hough the warranties and conditions expressed in the proposal are declared to be basic conditions of the policy, that must be subject to their being overridden by any express terms to the contrary effect in the actual policy. No doubt the proposal conditions and the express conditions of the policy must be read together and, as far as may be, reconciled, so that every part of the contract may receive effect. But if there is a final and direct inconsistency, the positive and express terms of the policy must prevail. If the proposal by itself is read as negating absolutely any cover of passenger risk, the policy which incorporates the proposal must be construed as limiting that generality to the extent expressly provided by (c) which must pro tanto prevail.

109 A similar view of this rule of construction was expressed in *Kumagai-Zenecon Construction Pte Ltd (in liquidation) and Another v Arab Bank plc (Low Hua Kin, Third Party)* [1997] 1 SLR(R) 277. In that case, the court had to consider the effect of an express clause in the letter of credit which conflicted with a provision of the UCP–500 which was incorporated by reference. The court held at [25]:

> It has to be remembered, however, that the provisions of UCP-500 were not expressly repeated in the credit. Instead they were incorporated by reference. It is a well known principle of

construction of contracts that the express terms of the contract are capable of overriding terms incorporated by reference if inconsistent with such incorporated terms.

110 In *Gunton*, there was no equivalent express clause which permitted the employer to dismiss without notice for misconduct. The court was tasked to reconcile the contractual provision for termination with a month's notice with the right not to be dismissed for misconduct without a disciplinary hearing. Significantly, the court held that the two rights were not inconsistent with each other (see [90] above) unlike clauses 10.1(a) and 10.1(b) which on their face are inconsistent with the plaintiff's right to **a** disciplinary hearing for misconduct.

111 The defendant correctly pointed out that in *Marley* the personnel manual which was incorporated was not inconsistent with any express term in the employment contract. Therefore there was no issue before the court whether the express term prevailed over the personnel manual or otherwise.

112 In response to the defendant's arguments, the plaintiff relied on the cases of *W&S Pollock & Co v Macrae* [1922] S.L.T. 510 and *Smith v UMB Chrysler (Scotland) Ltd* [1978] 1 W.L.R. 165 to contend that any ambiguity in an exclusion clause that exempts a defendant from a well known common law liability would be construed in favour of the claimant. I do not see how that principle has any remote relevance in the present case. First, clauses 10.1(a) and 10.1(b) are not exemption clauses that purport to exempt or limit the defendant's liability for breach of contract. They are commonly seen clauses that allow the defendant to immediately dismiss an employee for cause. Secondly, the plaintiff's right to a disciplinary hearing is derived solely from the Group Discipline Policy and defendant's disciplinary procedures, which were incorporated into the employment contract. Any inconsistency between the two is governed by a different principle of construction that favours the express term over the incorporated term. Thirdly, clauses 10.1(a) and 10.1(b) state unequivocally that the defendant has the right to immediately dismiss an employee for his refusal to comply with the defendant's orders or for his misconduct. There is no ambiguity in them to begin with. Accordingly, I accept the defendant's submission that a non-binding document may acquire contractual force when incorporated into the contract *provided* the terms of the incorporated document are not inconsistent with the express terms of the incorporating contract.

113 The defendant also relied on two alternative arguments that the damages should not be assessed by reference to the period for the disciplinary hearing. The defendant cited *Integrated Systems South East Asia Pte Ltd v Zhang Yiguang (suing by the committee and estate of his person, Tong Wen Li)* [2005] 1 SLR(R) 255 for the proposition that for an employee to rely on terms of a personnel handbook by incorporation, there must be evidence that the employee was aware of it and had intention to rely on it. In that case, the employee was relying on implied incorporation and in that regard, knowledge and intention would be relevant. However, in the present case, there was express incorporation by virtue of clause 20 of the Letter of Offer.

114 Furthermore, the defendant also relied on clause 10.2 of the Letter of Offer under which it could suspend the plaintiff from service and withhold his salary and other benefits pending investigation into any alleged act of misconduct. Further, since there was no provision to reinstate such withheld salary and benefits even if the plaintiff should prevail at the disciplinary hearing, no loss was suffered by the plaintiff as he would not have been paid in any event during the period of his suspension.

115 I do not accept that the defendant was entitled to rely on clause 10.2 to oust the effect and consequences of its own failure to comply with its contractual obligation to conduct the disciplinary hearing. First, there is no evidence that the defendant would have and not merely could have

suspended the plaintiff during the investigation particularly given the nature of the alleged misconduct. Secondly, the withholding of salary and benefits would only be for the period of the investigation and not during the disciplinary proceedings. Finally, although there is no specific provision to repay the withheld salary should the outcome of the disciplinary process be favourable to the plaintiff, I would have thought that since the salary was merely "withheld" and not "forfeited", it should follow that it would be repaid to the plaintiff. To hold otherwise would mean that the defendant could benefit from its own wrong. I would be surprised if that was the intention of clause 10.2.

116 As I have accepted the defendant's submission that clauses 10.1(a) and 10.1(b) prevailed over the incorporated terms, I determine that the damages payable for the wrongful dismissal are to be limited to the period that the defendant could and would have lawfully terminated the employment, *ie* one month's notice pursuant to clause 10.3 of the Letter of Offer.

Was there any fraudulent misrepresentation by the defendant

117 Apart from his claim for wrongful dismissal, the plaintiff has also brought a claim for fraudulent misrepresentation against the defendant. It is trite that a claimant cannot recover damages for both breach of contract and for misrepresentation simultaneously. During oral closing submissions, the plaintiff confirmed that his claim for misrepresentation is framed as an alternative to his contractual claim.

118 The plaintiff alleged that the defendant had fraudulently misrepresented to him in four allegedly material respects:

(a) that the commencement date of his employment would be 17 November 2008;

(b) that it intended to hire the plaintiff on a permanent basis;

(c) that it would pay the plaintiff his salary at the end of the month; and

(d) the defendant's concealment of its reimbursement policy in respect of the plaintiff's training expense claims.

The Law

119 The requirements that have to satisfied for a claim based on fraudulent misrepresentation were laid down by Lord Maugham in *Bradford Building Society v Borders* [1941] 2 All ER 205 and adopted by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435.

(a) First, there must be a representation of fact made by words or conduct.

(b) Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff.

(c) Third, it must be proved that the plaintiff had acted upon the false statement.

(d) Fourth, it must be proved that the plaintiff suffered damage by so doing.

(e) Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

Commencement date

120 It is common ground the Letter of Offer expressly stated the commencement date of the plaintiff's employment to be 17 November 2008. That being the case, it is strictly irrelevant whether at the time the defendant issued the Letter of Offer, it intended to honour that particular term. If the defendant honoured that term, all would be fine. If it did not, it would be liable for breach of contract but not for fraudulent misrepresentation.

Hiring on a permanent basis

121 This aspect of the plaintiff's claim was framed in his Statement of Claim in the following manner:

15. The Defendant embarked on a second act of misrepresentation by fraud. The Defendant told the Plaintiff that it would hire the Plaintiff on a permanent basis. This was also stated on the job description. However, on the 25 November 2008 the Defendant knowingly renewed the advert of the Plaintiff job position with the purpose of hiring somebody within their budget.

16. The Defendant continued this advert because in making the offer to the Plaintiff it was well beyond the 120,000 GBP budget it had originally allocated to the position.

The defendant submitted that the existence of such a representation would be inconsistent with the express term in the Letter of Offer that the employment contract could be terminated by either party by giving one month's notice. Although it was not drafted in precise terms, the plaintiff's reference to "permanent" basis was not a reference to permanent in the absolute sense of the word but rather his understanding that the defendant actually intended to hire him only for a short term. In support, he relied on the advertisement that was placed by the defendant for a similar position but for a lower pay after he was employed.

122 Mr Taylor testified that the job advertisement which the defendant placed was to hire someone for another position within the defendant. This position was that of Commodities Exotics Option Risk Manager/FX Exotics Options Risk Manager, and the successful candidate would have been required to report to the plaintiff, who carried the more senior position of Head Complex Product Risk Management, Foreign Exchange & Commodities. This evidence was not seriously challenged by the plaintiff during cross examination. In any case, there was simply no evidence to show that the defendant only intended to hire the plaintiff on a short term basis. On the contrary, the steps that the defendant took to prepare for the plaintiff's commencement, and its intention of sending the plaintiff to London for a two-week training course, all suggested that the defendant was serious about giving the plaintiff a "permanent" job.

Payment of the plaintiff's salary at the end of the month

123 The plaintiff's third claim for fraudulent misrepresentation is framed as follows in his Statement of Claim:

17. The Defendant embarked on a third act of misrepresentation by fraud. The Defendant refused by email on the 28 November to pay in the terms agreed when entering the contract.

It is far from clear what was the exact representation that was allegedly made by the defendant. No details were provided as to when such representation was made, or by whom it was made. The Letter of Offer itself was silent as to when the plaintiff was supposed to be paid his salary though in the normal course of events, salary is typically paid at the end of each month. However, the practice may vary from company to company.

124 It should be emphasised that this issue only pertained to the first month salary. There was no evidence that the defendant was *unwilling* to pay the plaintiff his salary at the end of the month. The only thing that can be discerned from the exchange of correspondence was that the defendant's employees had expressed concern that the defendant might not be able to pay the plaintiff's salary by the end of December due to the late submission of the plaintiff's bank account information. By email dated 28 November 2008, the defendant informed the plaintiff that "your salary crediting will be affected due to the Bank Account form is not handed over to me in advance of your join date." The defendant sent a further email to the plaintiff on 29 November 2008 to advise him that "as long as the documents are duly completed and signed we will endeavour to expedite the account opening and arrange necessary payment of salary by month end." I cannot see how the email of 28 November 2008 can remotely support the plaintiff's case. An expression of concern that there might be a delay in crediting the December salary could never amount to a misrepresentation let alone a fraudulent misrepresentation.

Concealment of its reimbursement policy

125 Finally, the plaintiff's fourth claim for fraudulent misrepresentation is expressed in the following manner in his Statement of Claim:

18. The Defendant embarked on a fourth act of misrepresentation by fraud. The Defendant concealed the requirement that the Plaintiff's own credit lines to finance training and travel expenses when entering the agreement.

The difficulties faced by the plaintiff in establishing this claim are even more formidable. In the first place, the alleged fraudulent act was not any particular representation (or even half truth), but an omission to inform what the plaintiff felt was a material and important fact. The requirements that have to be met before an omission to state a particular fact can amount to a misrepresentation are very high. They were clearly spelt out by Justice Belinda Ang in *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [66]–[68]:

66 Misrepresentation by silence entails more than mere silence. A mere silence could not, of itself, constitute wilful conduct designed to deceive or mislead. The misrepresentation of statements comes from a wilful suppression of material and important facts thereby rendering the statements untrue.

67 In an action in deceit, the plaintiffs have to prove, to use the language of Lord Cairns in *Peek v Gurney* [1861-73] All ER Rep 116 at 129:

... some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false.

The statement made must be either in terms, or by such an omission in the sense stated by Lord Cairns, an untrue statement.

68 When silence on the part of Slater or a failure to speak is alleged to constitute misleading conduct or deception, the proper approach to take is to assess silence as a circumstance like any other act or statement and in the context in which it occurs. Hence, it is necessary to examine the silence with reference to the charge that is made against the defendants.

126 Secondly, the plaintiff did not indicate to the defendant at any time before he accepted the Letter of Offer that he regarded the defendant's reimbursement policy as an issue that would materially affect his decision to join the defendant. If indeed it was so vital to him, the plaintiff should have sought clarification. He did not make any inquiries about the defendant's reimbursement policy, and the defendant could not have possibly known that it was so critical to him. The defendant's reimbursement policy was merely one facet of its corporate and human resources policy. It would be unreasonably onerous to expect the defendant to explain every single detail of these policies to the plaintiff particularly since such a reimbursement policy was not so unusual or extraordinary to warrant bringing it specifically to the plaintiff's attention.

127 In the circumstances, I find that the plaintiff's alternative claims for fraudulent misrepresentation fail *in limine*. Each of them was a non-starter. There was absolutely no evidence whatsoever that any of the alleged representations were made by the defendant in the knowledge that they were false or in the absence of any genuine belief that they were true.

Conclusion

128 In the result, the plaintiff's claim for wrongful dismissal is allowed. By reason of my findings, the damages are limited only to the period from 17 November to 31 December 2008 in addition to other accrued benefits under the Letter of Offer. This was precisely what the plaintiff wanted from Day 1 when he expressed his intention to resign. The matter should have been resolved there and then but the defendant reacted to the intended resignation by wrongfully withdrawing the Letter of Offer and then compounded the dispute further by seeking to justify the termination on grounds of misconduct. The plaintiff was also not altogether blameless in escalating the dispute. He amended his claim on several occasions thereby increasing it from an initial amount of $123,800 to an astronomical and outrageous sum of $1,540,800. The bulk of the plaintiff's exaggerated claim was premised on the tort of fraudulent misrepresentation in circumstances when it was plain and obvious that there was neither a factual nor legal basis to support it.

129 The plaintiff is accordingly awarded the following amounts:

(a) His salary from 17 November 2008 to 30 November 2008 amounting to $12,833 [14/30 x $27,500 (inclusive of car allowance of $3250)];

(b) One month salary of $27,500 (inclusive of car allowance of $3250) pursuant to clause 10.3;

(c) Under clause 5.3, the defendant was obliged to pay to the plaintiff a monthly sum of money equivalent to what it would have contributed to the plaintiff's Central Provident Fund (CPF) account had the plaintiff been a Singaporean or Singaporean PR. Accordingly, the plaintiff is entitled to this payment on a pro-rated basis (from 17 November 2008 to 31 December 2008), to be calculated by reference to the prevailing employer contribution rates under the Central Provident Fund Act (Cap 36, 2001 Rev Ed), using a base monthly income of $24,250 (excluding

the car allowance of $3250).

(d) Under the Appendix of the employment contract, the defendant was obliged to:

(i) provide one way business class air tickets for the plaintiff and his immediate family (spouse and children) to travel from Argentina to Singapore;

(ii) reimburse the plaintiff and each of his immediate family members for the costs of bringing up to 20 kilos of excess baggage per person;

(iii) provide the plaintiff and his immediate family with assistance in packing, unpacking and shipping their personal effects up to a 40 foot container;

(iv) pay for the plaintiff's expenditure on temporary housing up to a maximum of 1 month.

The above mentioned benefits are rights that accrued to the plaintiff the moment the employment contract commenced on 17 November 2008, and the defendant remains liable to make payment notwithstanding that the plaintiff is no longer its employee. Accordingly, the plaintiff is to provide evidence of his expenditure under the above mentioned benefits (except para (d)(i) which is payable without proof of expenditure), and the total sum due to him under para (d) is to be assessed by the Registrar if the parties are unable to reach an agreement.

(e) Interest at 5.33% per annum on paras (a) to d) above from the date of the writ to the date of this judgment.

130 The plaintiff as a litigant in person is entitled to claim for compensatory costs under O 59 r 18A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) , for the time expended by him for the action, together with other reasonable expenses. However, as the plaintiff has only partly succeeded in his claim which will be below $250,000, I will hear the parties on the appropriate cost order.

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