

Employment Update

The opportunity to defend oneself, a requirement for “due inquiry”?

- *Case Update of Long Kim Wing v LTX-Credence Singapore Pte Ltd [2017] SGHC 151*

I. Introduction

Pursuant to Singapore’s Employment Act¹, a company may dismiss a covered employee on the grounds of misconduct (and therefore without notice) only after conducting due inquiry. The Act does not however set out what is due inquiry. As most companies’ misconduct disciplinary policy features due inquiry as well, this protection applies to non-covered employees too. As such, it is important for a company to know what suffices as due inquiry if it intends to discipline or dismiss an employee for misconduct.

A recent High Court decision of *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 (“*Long Kim Wing*”) considered this once more, with the previous local case on this being decided in 1976. This latest decision suggests that “due inquiry” needs to encompass more than what was earlier decided. In that local case on the same, i.e. *Velayutham M v Port of Singapore Authority* [1974-1976] SLR(R) 307, the High Court had held that the opportunity to present and defend one’s case is not a requirement for “due inquiry”. Insofar that full investigations had been conducted and that sufficient materials were considered by the decision maker, there is “due inquiry”.

With the view of keeping this article focused, we have touched only on “due inquiry”. This case concerns also the claim for director’s fees², reimbursement of expenses³ and the claim for damages for inability to obtain similar employment⁴. Readers may wish to read the entire decision⁵.

II. Key Takeaways

1. Companies should design and set out what their “due inquiry” process entails, ensuring the following:
 - a. The company must be clear on what is the allegation being investigated and the employee’s role in the misconduct⁶;
 - b. The employee must be clearly informed of the allegation and evidence⁷;
 - c. The employee should be given the opportunity to defend himself⁸;
 - d. The inquiry procedure should be formal as much as possible⁹. In this respect,

¹ CAP 91, 2009 Rev Ed, Section 14(1).

² *Long Kim Wing*, [14]- [20].

³ *Ibid*, [21]- [27].

⁴ *Ibid*, [187].

⁵ The decision can be found at “<http://www.singaporelaw.sg/sqglaw/laws-of-singapore/case-law/free-law/high-court-judgments/22864-long-kim-wing-v-ltx-credence-singapore-pte-ltd>”.

⁶ Distilled from *Long Kim Wing*, [165] and [170].

⁷ *Ibid*, [162].

⁸ *Ibid*.

⁹ *Ibid*.

- contemporaneous notes should be recorded and kept¹⁰;
- e. Out of abundance of caution, the employee should also be given the opportunity to mitigate any disciplinary action after the allegations have been proven¹¹; and
 - f. The eventual termination letter should be detailed and drafted well, setting out the facts of the misconduct with sufficient certainty and that due inquiry had been conducted¹².
2. The failure to conduct due inquiry does not negate any misconduct found to have been committed by an employee. Such a failure will however result in the employer being liable to the employee for the remuneration due to him during the period reasonably for due inquiry to be completed¹³.
 3. *Long Kim Wing* suggested that for non-covered employees, a company can simply comply with its customised “due inquiry” procedure, provided it is clearly elaborated in its employment policy¹⁴. Such a procedure need not provide the same level of protection to the employee as required by Employment Act for covered employees. Nevertheless, we discourage having separate “due inquiry” procedures apply to different classes of employees, as this may lead to allegations of unfair employment practices¹⁵.
 4. Out of abundance of caution, companies should abide fully the positions taken by the Ministry of Manpower, even if they are stricter than what the Employment Act requires. In this case, though the High Court found that the Ministry’s guidelines do not have the force of law¹⁶, the High Court found it “useful”¹⁷ and this decision developed the law closer in line with the guidelines. This is notwithstanding that there is already a local case on the same by a court of the same level¹⁸.

III. Brief Facts

On 14 June 2012, Mr Long Kim Wing was dismissed by his employer, LTX-Credence Singapore Pte Ltd on grounds of misconduct, and therefore without notice¹⁹. The employee was alleged to be involved in a forged offer letter relating to the employment of a colleague, and additionally, failed to obtain prior approval from his supervisor when making unauthorised payments to that same colleague²⁰.

The employee (“Plaintiff”) denied the misconduct and claimed for wrongful dismissal against his employer (“Defendant”)²¹. The Plaintiff claimed for payment in lieu of notice, a severance package, encashment of leave and a proration of his 13th month bonus²².

¹⁰ *Ibid*, [169].

¹¹ Distilled from *Long Kim Wing*, [171]- [172], read with [182]. It is acknowledged that the High Court expressed reservation, at [182], on whether the Defendant would be obliged to give this opportunity to the Plaintiff. However, this is because there is a lack of evidence and submission on this point. Where there are proper evidence and submission, the thrust of this decision makes its plausible that other judges may require this opportunity to be part of “due inquiry”. For completeness, the referenced Malaysian case is *Said Dharmalingam Bin Abdullah (formerly known as Dharmalingam A/I Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352.

¹² *Ibid*, [170].

¹³ *Ibid*, [183].

¹⁴ Distilled from *Long Kim Wing*, [126]- [132].

¹⁵ The Tripartite Guidelines for Fair Employment Practices impose obligations on companies to adopt fair employment practices.

¹⁶ It is telling that the High Court, on its own initiative, invited parties to submit on the guidelines after closing submissions have been filed, even though these are not court cases. See [171].

¹⁷ *Ibid*, [161].

¹⁸ [134]- [138], where the High Court summarised the facts of *Velayutham M v Port of Singapore Authority* [1974-1976] SLR(R) 307. Usually, a local case law by a court of the same level is often highly persuasive and determinative.

¹⁹ *Ibid*, [1].

²⁰ *Ibid*, [29].

²¹ *Ibid*, [2].

²² *Ibid*, [2].

Further and/or in the alternative, the Plaintiff argued that the Defendant failed to undertake due inquiry as required by Clause 5(1) of the Defendant's General Service Terms²³ ("GST"), which reads²⁴:

"The Company may after due inquiry dismiss without notice an employee on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his/her service."

As proper investigation and procedures would take 2 months to be conducted, as argued by the Plaintiff, the Plaintiff claimed for 2 months' worth of salary, including car allowance²⁵.

The Defendant responded that because the Plaintiff was afforded multiple opportunities to present his case over the course of the Defendant's inquiries, there was "due inquiry"²⁶. Specifically, there were many conversations between the Defendant and the Plaintiff seeking to uncover how the forged letter came into being²⁷. The Plaintiff was also given all the relevant documents and his comments and/or explanations were sought²⁸.

It is to be noted that the Plaintiff was not covered under the Employment Act²⁹, and therefore his claims are purely contractual. Aside from the above claims, the Plaintiff also claimed for other losses³⁰. However, these are outside the scope of this article.

IV. Holdings

In respect of the misconduct allegations, the High Court held that they have been made out and therefore justified the Plaintiff's dismissal. Specifically, the Plaintiff had intentionally tried to deceive the Defendant with the forged letter, regardless if he was involved in the forgery³¹ and that he had authorised advance payment without obtaining the proper approval³².

The High Court subsequently analysed if there was due inquiry conducted. First, the GST did not elaborate on what amounts to due inquiry³³. While the Defendant sought to rely on another policy in its closing submissions, the "Business Conduct and Ethics Policy", which provided a process on handling allegations of non-compliance to the policy, this was rejected as the Defendant had failed to plead it in its Defence³⁴. In any case, the High Court went on to hold that this policy also did not elaborate what amounted to due inquiry³⁵. As Clause 5(1) of the GST was similar to Section 14(1) of the Employment Act, the High Court applied existing case law for what amounts to due inquiry³⁶.

The High Court held that "due inquiry" means something more than just the making of inquiries and the

²³ This formed part of the employment agreement between parties.

²⁴ *Ibid*, [9].

²⁵ *Ibid*, [10].

²⁶ *Ibid*, [143].

²⁷ *Ibid*, [31] to [59].

²⁸ *Ibid*, [145].

²⁹ *Ibid*, [133].

³⁰ *Ibid*, [11].

³¹ *Long Kim Wing*, [107].

³² *Ibid*, [121].

³³ *Ibid*, [132].

³⁴ *Ibid*, [130].

³⁵ *Ibid*, [132].

³⁶ *Ibid*, [133].

conduct of an investigation³⁷. The employee should be informed clearly of the allegations and the evidence against him, so that he has an opportunity to defend himself by presenting his position, with or without evidence. The High Court further noted that it was also the Defendant's position that the Plaintiff should be afforded an opportunity to present his case. In this case and as part of the inquiry and investigation, while the main witness of the Defendant did show the Plaintiff some documents, he testified at trial that he was uncertain as to what was shown to the Plaintiff and exactly what was said to him³⁸.

Furthermore, and at the point of dismissal, the Defendant remained uncertain about the exhaustive reasons for dismissing the Plaintiff, as seen from the termination letter³⁹. Though the termination letter set out four specific reasons, they were referred to as a "partial list" of the specific reasons. Further, the termination letter also did not mention that "due inquiry" had been undertaken.

Therefore, the High Court concluded that the Defendant had not conducted "due inquiry" in respect of the alleged forgery as there was inadequate evidence to establish what the Defendant had in fact said to the Plaintiff about his alleged misconduct.

In respect of the allegations of unauthorised payments, the High Court found that it seems clear that the Plaintiff was not specifically informed about these until he was presented with the letter of termination⁴⁰. Therefore, the High Court held that there was no "due inquiry" about any of these payments⁴¹.

Having found that there was no "due inquiry", the High Court went on to consider the Plaintiff's claim that 2 months were required for the Defendant to conduct proper inquiry and investigation. Unfortunately, no evidence on this was adduced. Based on existing evidence that the Defendant had in fact conducted inquiries and investigation, even if informally, the High Court held that the Defendant only needed to clearly specify to the Plaintiff each specific allegation in respect of the misconduct and corresponding supporting evidence, and give him the opportunity to respond⁴². It would unlikely take more than 7 days and it was further unlikely that the Plaintiff would need more time to respond. The High Court felt that the Plaintiff would have simply denied the allegations. Consequently, the High Court awarded the Plaintiff 7 days' worth of remuneration⁴³.

In deciding the aforesaid period, the High Court also considered if the Plaintiff should be given the opportunity to mitigate any resulting disciplinary actions, relying on the Malaysian case of *Said Dharmalingam Bin Ab dullah (formerly known as Dharmalingam A/I Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352. While the High Court eventually expressed reservation on whether such an opportunity was required for "due inquiry", this was based on the lack of evidence and submission on this point⁴⁴. With proper evidence and submission, the thrust of this decision makes it arguable that other judges may decide otherwise.

Additionally, it is noted that the High Court also referenced the guidelines of the Ministry of Manpower on "Termination due to employee misconduct" and "Holding an inquiry"⁴⁵, even though the High Court makes

³⁷ *Ibid*, [161].

³⁸ *Ibid*, [150].

³⁹ *Ibid*, [170].

⁴⁰ *Ibid*, [175].

⁴¹ *Ibid*.

⁴² *Ibid*, [181].

⁴³ *Ibid*, [183].

⁴⁴ *Ibid*, [182].

⁴⁵ *Ibid*, [142].

clear that these do not have the force of law. In fact, the High Court found them useful for this case⁴⁶. Notwithstanding the earlier decided case of *Velayutham M v Port of Singapore Authority* [1974-1976] SLR(R) 307, the High Court's decision appears to have developed the applicable law closer in line with these guidelines.

V. Conclusion

This High Court decision appears to have expanded the requirements for a valid “due inquiry”. Though this case is in respect of a non-covered employee, the basis of the High Court's analysis remains that of Section 14 of the Employment Act. Therefore, this is equally relevant to employees who are covered under the Employment Act. While the High Court implied that companies can set out clearly its own due inquiry procedure for non-covered employees that is different to what the Employment Act requires, doing so may lead to allegations of unfair and discriminatory employment practices since 2 classes of employees are treated differently. Another interesting aspect of this decision is that the drafting of the termination letter largely influences on whether “due inquiry” has been complied with. Companies should therefore consider and adopt the above identified key takeaways, so that they are not caught off guard in similar situations.

The views expressed in this article are those of the author. This article is not intended to be comprehensive nor should it be construed as legal advice. Please contact the author below if you need legal advice or you wish to discuss the above article. This article is written on 6 November 2017.



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⁴⁶*Ibid*, [161].