

# Implied Term of Mutual Trust and Confidence in Internal Employee Investigations

## *Dong Wei v Shell Eastern Trading (Pte) Ltd and another [2021] SGHC 123*

In conducting internal investigations and suspensions, does an employer owe its employee an obligation of mutual trust and confidence? If yes, when will such a duty be breached? These were some of the questions explored by the High Court in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another [2021] SGHC 123*.

### **Background**

In this case, the plaintiff, Dong Wei, was employed by the first defendant, Shell Eastern Trading (Pte) Ltd (“Shell”), with the second defendant, Lim Ming Way, who was his line manager.

In 2017, a complaint was made against Dong Wei by Lim regarding potential conflicts of interest and alleged breaches of Shell’s code of conduct. Thereafter, Shell’s Business Integrity Department (“BID”) commenced an investigation against Dong Wei, and eventually found that the investigation was inconclusive.

The outcome of the investigation was withheld from Dong Wei, and his employment was subsequently terminated in early 2018. His requests for the investigation outcome to be disclosed to him were also denied. In addition, following the BID’s investigation, an article was published by a news source stating that Shell was investigating an employee for charges of corruption.

Following the termination of his employment, Dong Wei sought employment from other firms in the freight trading industry and claimed that he was rejected by four other companies. He claimed that one company rejected him after coming across certain publications related to his previous employment, while the other three rejected him because Shell did not provide a letter clarifying the outcome of its investigations against him.

Dong Wei proceeded to commence a claim against Shell for, among others, breach of the implied term of mutual trust and confidence in his employment contract.

### **Decision**

The High Court recognised an implied term of mutual trust and confidence can arise in employment contracts, which within bounds, extended to and regulated the conduct of internal investigations and suspensions. However, Shell had not breached the implied term of mutual trust and confidence in the present case.

### **Legal Principles**

The Court set out the following principles on the implied term of mutual trust and confidence in the context of internal employee investigations and suspensions:

- A minimum standard of fairness is required when suspending and investigating allegations against an employee. If an employer's conduct falls below this minimum standard of fairness, this would be a breach of the implied term of mutual trust and confidence.
- The minimum standard of fairness would require that:
- the investigation be carried out in a manner that does not amount to a "hatchet job", i.e. the outcome should not be preordained against the plaintiff;
- investigations should not be carried out in a manner that is so unfair as to destroy the basis of any expected continuation of the relationship of employment;
- allegations put to the employee must be sufficiently clear such that he understands the case made against him and has an opportunity to clarify his position; and
- suspension of employees should only be carried out on the basis of credible sources of information and not as part of a "knee-jerk" reaction to an unclear or unspecific allegation with dubious credibility.
- The implied term of mutual trust and confidence does not import all obligations of natural justice or due process obligations that may apply in other contexts.

## **Key Findings**

Dong Wei claimed that Shell breached the implied term of mutual trust and confidence in various instances, including the following:

### **1. Mismanagement of investigation**

Dong Wei alleged that Shell had conducted the investigation in breach of the implied term of mutual trust and confidence. However, the Court found otherwise, and reasoned as follows:

- There was no improper involvement and influence by Lim;
- There were no indications of pre-judgment in the BID's fact-finding process or in the BID's findings, which the Court found to be sound and logical; and
- Dong Wei had been provided with a fair opportunity to respond to the allegations made against him through an interview and text messages.



## **2. Refusal to inform the plaintiff of investigation outcome**

Further, it was alleged that Shell's non-disclosure of its investigation outcome amounted to a breach of the implied term of mutual trust and confidence.

The Court recognised that Dong Wei must have felt disgruntled by Shell's non-disclosure, especially since it was expressly stated in his suspension notification letter that he would be informed of the investigation outcome. Nevertheless, the Court reiterated that proof of subjective loss of confidence with one's employer is insufficient to establish breach. Thus, Shell's non-disclosure was not a breach of the implied term of mutual trust and confidence as it did not disrupt the proper functioning of the employment relationship. It was also reasonable and appropriate for Shell to withhold the investigation outcome on the basis that it was inconclusive and irrelevant to its decision to terminate Dong Wei's employment.

## **3. Suspension of plaintiff**

Dong Wei also alleged that the suspension of his employment during investigations amounted to a breach of the implied term of mutual trust and confidence. The Court found that no breach had occurred in view of the gravity of the situation and credibility of sources relied on by Shell. In particular, it was reasonable for Shell to pre-emptively protect itself from any further reputational damage by suspending Dong Wei, given his repeated behaviour of placing himself in seemingly compromising positions.

## **4. Failure to correct allegations published in the trade article**

Dong Wei also alleged that Shell failed to correct certain allegations made in a trade publication which had damaged his reputation. The Court disagreed and held that the implied term of mutual trust and confidence does not impose a duty on employers to combat misinformation or to take reasonable care to safeguard an employee's reputation.

## **5. Termination of plaintiff**

Finally, it was alleged that Shell breached the implied term of mutual trust and confidence by terminating Dong Wei's employment without proper and reasonable cause. The Court dismissed this claim and held that Shell was exercising its express contractual right to terminate the employment relationship and that the implied term of mutual trust and confidence did not apply to the termination of the Dong Wei's termination.

## Key Takeaways

This case provides useful guidance on the scope of an employer's obligation to maintain mutual trust and confidence in the course of carrying out internal employee investigations.

While employers are generally at liberty to formulate their own investigation procedures and practices as long as the minimum standard of fairness is met, it is clear that if challenged, their internal investigation procedures and practices will be subject to close scrutiny by the Court.

Therefore, internal investigations procedures, including fact-finding and decision-making processes and reports, should reflect independent, objective, sound and logical evaluation of facts and information collected from various sources of information. A clear policy establishing boundaries between the investigative team, witnesses and complainants is also necessary to prevent any witnesses from improperly dictating the course of investigations or unduly influencing the fact-finding process. Employees must always be provided a fair opportunity to respond to the allegations made against them.

This case is pending appeal before the Court of Appeal.

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*We wish to express our thanks to Megan Low, our practice trainee, for her contributions to this case note.*

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