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PRIVACY IN EMPLOYMENT

This article examines whether in Singapore an employee has a general right of privacy in the employment context and if there is no such right, whether privacy can nonetheless be enforced through indirect means.

I. INTRODUCTION

PRIVACY may be defined as a right of a person to seclude himself or his property from unauthorized intrusion.[1] English law as such does not recognize the right of privacy[2] and the reasons for this are numerous. Some of these are the possibility of having to award damages for mental distress, the possibility of an onslaught of fanciful claims and the competing need to have freedom of information. The validity of these reasons may be open to question. In relation to awarding damages for mental distress for instance, the courts have not been deterred from awarding such damages in other tort claims. In relation to fanciful claims arising (or the floodgates argument), experience in some other jurisdictions where the right of privacy has been recognized has not borne this out to be true.[3] In relation to the issue of freedom of information, the right of privacy even in jurisdictions where it has been recognized, is not without limits and there are situations where the right to receive information takes precedence. Not surprisingly, the right of privacy has been recognized in jurisdictions such as America,[4] France[5] and Germany.[6] In New Zealand, the courts have begun to recognize this right in limited circumstances.[7] In certain provinces in Canada, the right

1 Winfield, "Privacy", (1931)47 LQR 23 at 24.

2 *Kaye* v *Robertson* [1991] FSR 62; *Malone* v *Metropolitan Police Commissioner* [1979] 1 Ch 344. The same appears to be the position in Australia, see *Victoria Park Racing and Recreation Grounds Company Limited* v *Taylor* (1937) 58 CLR 479 at 496.

3 See Todd, *The Law of Torts in New Zealand*, (2nd Ed, 1997) at 979.

4 See, English Law Commission Report on Privacy and Related Matters (1990), at 13-17.

5 *Ibid*.

6 *Ibid*.

7 See *Tucker* v *News Media Ownership* [1986] 2 NZLR 716; *Bradley* v *Wingnut Films Ltd* [1993] 1 NZLR 415.

of privacy is now recognized by statute.[8] Elsewhere in the Commonwealth, though there does not appear to be a general right of privacy, there is legislation dealing with particular aspects of privacy such as the use of electronic surveillance[9] or data misuse.[10]

In Singapore in the absence of any reported authority on point, it is most likely that the English position would be followed[11] and hence it is likely that there is no right of privacy as such in Singapore. In addition, there does not appear to be legislation dealing with any particular aspect of privacy either.[12]

Though a general right of privacy is not recognized in England and probably not in Singapore, privacy has been recognized and enforced indirectly in a multitude of ways. An action in defamation,[13] trespass,[14] nuisance,[15] negligence,[16] breach of confidence or even an action for the breach of an implied term of the contract, may all in certain circumstances indirectly protect privacy.

The aim of this paper then is to examine to what extent there is protection of a right of privacy in the employment context in Singapore[17] through some of these indirect means, especially from the viewpoint of the employee. Though all these methods are capable of applying to the employment contract, of particular importance are an action for breach of confidence and an action for breach of an implied term of a contract. These two methods, more than the others, are likely to have a greater impact in the employment context. This discussion will be limited to examining these two methods.

8 British Columbia Privacy Act 1979 and Saskatchewan Privacy Act 1979.

9 See, for instance, New Zealand: Crimes Act 1961, New South Wales: Listening Devices Act 1969, United Kingdom: Interception of Communications Act 1985.

10 See, for instance, Australia: Privacy Act 1988, New Zealand: Privacy Act 1993, United Kingdom: Data Protection Act 1998.

11 Pursuant to section 3 of the Application of English Law Act (Cap 7A, 1994 Ed).

12 However, there are statutes which *indirectly* deal with the protection of privacy such as the Defamation Act (Cap 322, 1985 Rev Ed).

13 See, for instance, *Tolley* v *Fry* [1931] AC 333.

14 See, for instance, *Coco* v *R* (1994) 179 CLR 427; Lincoln Hunt v Willesee (1986) 4 NSWLR 457.

15 See, for instance, *Motherwell* v *Motherwell* (1976) 73 DLR (3d) 62.

16 See, for instance, *Furniss* v *Fichett*, [1958] NZLR 396.

17 As there are very few local authorities on point, reference has to be made to cases from other jurisdictions.

II. Breach of Confidence

Though it is not conclusively established whether the basis for an action in breach of confidence arises under tort law[18] or under equitable principles,[19] it is likely that an action for breach of confidence exists in Singapore.[20] Elsewhere in the Commonwealth, the right of an action for breach of confidence clearly exists and it has been applied to such diverse situations such as disclosure of family secrets,[21] disclosure of confidential communication between friends,[22] disclosure of hospital records[23] and the dissemination of photographs taken by the police.[24] Likewise as between employers and employees, such an action for breach of confidence can arise. Though many cases have concerned the obligations of the employee,[25] a similar obligation clearly lies on the employer as well. In *Prout* v *British Gas*[26] for instance, an action for breach of confidence was brought by the employee against the employer. In this case, the plaintiff employee had invented a warning lamp bracket and disclosed that fact to the defendants who were his employers, under an employee's suggestion scheme that promised confidentiality. However, the defendants were not interested in the plaintiff's

[18] *Per* Lord Bridge in *X Ltd* v *Morgan* [1991] 1 AC 1 at 39.

[19] *A-G* v *Guardian Newspapers* (No 2) [1990] 1 AC 109; *X Pte Ltd* v *CDE* [1992] 2 SLR 996; *Attorney General of Hong Kong* v *Zauyah Wan Chik* [1995] 2 MLJ 620. However, in *Zauyah's* case, the court, after holding that the action was part of "equity jurisprudence", likened it to a "tortious wrongdoing" for the purposes of determining private international law issues.

[20] *X Pte Ltd* v *CDE* [1992] 2 SLR 996. In this case, the issue was also raised whether recognising an action for breach of confidence would be a violation of Art 14 of the Constitution of the Republic of Singapore which guarantees the freedom of speech. However, the court following the reasoning of the Malaysian case of *Lee Kuan Yew* v *Chin Vui Khen* [1991] 3 MLJ 494, whilst not deciding the issue, was of the view that common law actions such as breach of confidence which predate the Constitution were still applicable and that it was not the intention of the Constitution to override them. This is likely to represent the correct position and this article would proceed on that assumption. In any event, there could be cases where freedom of speech issues are not involved as in a case where the recipient, instead of seeking to publish the information, wants to make use of it for his own benefit.

[21] *Prince Albert* v *Strange*, 41 ER 1171.

[22] *Stephens* v *Avery* [1988] Ch 449.

[23] *X* v *Y* [1988] 2 All ER 648.

[24] *Hellewell* v *Chief Constable of Derbyshire* [1995] 1 WLR 804.

[25] *X Pte Ltd* v *CDE* [1992] 2 SLR 996. See also cases relating to employees disclosing confidential information after termination of the employment contract such as, *Medivac Int'l Management Pte Ltd* v *John Walter Moore* [1988]1 MLJ 5 and *Tang Siew Choy* v *Certact Pte Ltd* [1993] 3 SLR 44.

[26] [1992] FSR 478.

invention and so the plaintiff went ahead and applied for patent rights. Subsequently the defendants tried to make use of the information and the plaintiff brought an action against them. The court held the defendants liable *inter alia* for breach of confidence.

However, in order to determine the exact parameters of the doctrine in the employment context, the elements necessary to establish a claim in breach of confidence must be examined in greater detail.

(a) *The elements*

In order to establish a claim for breach of confidence, it is necessary to establish three elements:[27]

i) Firstly, the information itself must have the necessary quality of confidence about it.

ii) Secondly, that information must have been imparted in circumstances importing an obligation of confidence and

iii) Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

(i) *The first element*

In relation to the first element, it has been held that if the information is trivial[28] or if it is public knowledge,[29] then there can be nothing confidential about it. However, it would appear that there does not have to be a high degree of confidentiality or secrecy before protection can be sought.[30] Thus among other things information relating to health matters,[31] personal conduct,[32] financial affairs,[33] sexual orientation[34] or even information found in telephone

27 *Coco* v *AN Clark (Engineers) Ltd* [1969] RPC 41; *X Pte Ltd* v *CDE* [1992] 2 SLR 996.
28 *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109 at 282.
29 *Ibid.*
30 This is unlike the cases concerning employees disclosing information after the termination of employment. In those cases, in the absence of express provisions, the information must be capable of being classified as a trade secret or must be highly confidential in nature before it can be protected: *Faccenda Chicken Ltd* v *Fowler* [1987] 1 Ch 117. The reason for the difference may be that in those cases, the livelihood of the employee is at stake and hence the stricter requirement.
31 *X* v *Y* [1988] 2 ALL ER 648.
32 *Prince Albert* v *Strange,* 41 ER 1171.
33 *Ibid.*
34 *Stephens* v *Avery* [1988] 2 All ER 477.

or shopping bills[35] may be protected. Thus, if an employer were to disclose matters such as the salary of an employee to a creditor or landlord, or an employee's health record to an insurance company or to a prospective employer, the first element would be satisfied.

(ii) *The second element*

A. *Expectation of Privacy*

The second element is more complex and needs to be explored in greater depth. For the second element to be met, the information must have been communicated in circumstances where the communicator could have expected his information to retain its confidentiality. Thus in *Coco* v *AN Clark (Engineers) Ltd*,[36] Megarry J stated,

> However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential

Similarly, Sir Robert Megarry VC in *Malone* v *Metropolitan Police Comr*[37] stated,

> It seems to me that a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of communication. Those who exchange confidences on a bus or a train run the risk of a nearby passenger with acute hearing or a more distant passenger who is adept at lip-reading. Those who speak over garden walls run the risk of the unseen neighbour in a tool-shed nearby. Office cleaners who discuss secrets in the office when they think everyone else has gone run the risk of speaking within earshot of an unseen member of the staff who is working late....I do not see why someone who has overheard some secret in such a way should be exposed to legal proceedings if he uses or divulges what he has heard.

[35] *X Pte Ltd* v *CDE* [1992] 2 SLR 996.
[36] [1969] RPC 41 at 47-48.
[37] [1979] 1 Ch 344 at 376.

Interestingly, both extracts talk about situations where the receiver is exposed to the confidential information inadvertently. The position could be different if the receiver had a choice of either receiving or not receiving the information[38] (which he knows is obviously confidential) and then chooses to receive the information. Thus, Lord Goff in *A-G* v *Guardian Newspapers Ltd (No 2)*[39] stated that the circumstances in which the duty of confidence might arise would

> include certain situations, beloved of law teachers, where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place and is then picked up by a passer-by.

The reason for this apparent difference in approaches, though not addressed in any of the decisions, could be that in the latter situation there is a greater degree of culpability on the part of the receiver, and hence it would be justifiable to impose liability. Further, in the former situation, there is more blameworthiness on the part of the provider of the information. This is so because it would be relatively easier for a person to determine or control where he speaks and how loudly he speaks than it would be to run his business or affairs in such a manner that confidential information does not reach the hands of unintended recipients.

Further, it would appear that the test is an objective and not subjective one. The court asks whether a reasonable person would have expected the information to retain its confidentiality in the circumstances. Though this has not been expressly dealt with in any of the cases, it is suggested that this is nonetheless implied. In *Malone's* case for instance, Sir Robert Megarry spoke of what a "realistic person"[40] would expect in the circumstances.[41] However, in determining what a reasonable person could have expected, courts will be influenced by various factors and culpability, as suggested, could be one of them. However, this has not been expressly articulated in any of the judgments.

[38] In the examples given by Sir Robert Megarry VC in *Malone's* case, it is suggested that there was no real choice: see, *infra*, note 49.

[39] [1990] 1 AC 109 at 281.

[40] *Supra*, note 37, at 376.

[41] See also *Coco* v *AN Clark (Engineers) Ltd* [1969] RPC 41at 48 where the concept of a reasonable man was used in relation to a related but slightly different issue.

These then are the general principles. How would these principles apply to work place situations, and in particular, to the monitoring of telephone conversations or e-mail communication made by employees?

a. *Telephone conversations*

The issue of whether telephone conversations can be considered confidential arose in *Malone* v *Metropolitan Police Comr*.[42] In this case the prosecution service had intercepted the telephone conversation of the plaintiff on the authority of the Secretary of State. The plaintiff then issued a writ claiming that the interception was unlawful. In the course of the judgment Sir Robert Megarry VC stated,[43]

> As the Younger Report points out at p.168, those who use the telephone are "aware that there are several well understood possibilities of being overheard. A realistic person would not therefore rely on the telephone system to protect the confidence of what he says because, by using the telephone, he would have discarded a large measure of security for his private speech." Extension lines, private switchboards and so called "crossed lines" for example, all offer possibilities of being overheard. The report then pointed out that what would not be taken into account would be an unauthorised tap by induction coil or infinity transmitter. The report, which was dealing only with incursions into privacy by individuals and companies, and not the public sector, said nothing about tapping authorised by the Home Secretary.

In the circumstances, the court held that there was no confidentiality, and that even if there was confidentiality, the public interest defence[44] had been made out. The issue also arose for consideration in *Francome* v *Mirror Group Newspapers Ltd.*[45] In this case, unidentified persons tapped the telephone conversations of the plaintiff, a well known jockey. The conversations revealed that certain breaches of the racing rules had taken place. The unidentified persons then sold the tapes to the defendants who were journalists. The plaintiff brought an action against the defendants *inter alia* restraining them from using the information. In an interlocutory application, the court granted an injunction and stated,[46]

42 *Supra*, note 37.
43 *Ibid*, at 360.
44 See below.
45 [1984] 1 WLR 892.
46 *Ibid,* at 895.

> they [the defendants][47] go on to say that there is no cause of action against them or the eavesdroppers for breach of an obligation of confidentiality. The authority for this rather surprising proposition is said to be *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344. Suffice it to say that Sir Robert Megarry VC expressly stated at p 384, that he was deciding nothing on the position when tapping was effected for purposes other than the prevention, detection and discovery of crime and criminals or by persons other than the police. This is a live issue.

It would appear that confidentiality cannot be expected over a telephone conversation as matters such as crossed lines or extension lines are common knowledge. In this regard, if a person is inadvertently exposed to confidential information through a crossed line or extension line, it may be that, given the lesser degree of culpability, it would not be justifiable to state that a reasonable person would expect confidentiality in the circumstances.[48] However, what about the case where the recipient either deliberately or inadvertently comes across a crossed line or more likely an extension line and, realizing that the information is obviously confidential, continues to listen when he could have put down the telephone.[49] There would certainly be more culpability in such a situation and this would be more akin to Lord Goff's illustrations in *A-G* v *Guardian Newspapers (No 2)*.[50] In such a case it may be argued that liability should be imposed. Nonetheless, since the instances of hearing confidential information through such means are going to be relatively rare, this point may not be of much practical importance.

Tapping of the telephone on the hand is more likely occur, especially with increasing technological advancements and with easier access to such services. In this regard, the court in *Malone's* case draws a distinction between tapping of the telephone by the police or officials of the state and tapping of the telephone by individuals or companies. In relation to the former, no cause of action will arise, whereas in relation to the latter, the matter has not been conclusively determined. However, it is suggested that since a deliberate act is involved and there is a greater degree of culpability,[51]

47 Words in parenthesis added.

48 Similar principles should apply to a case where, while the speaker is speaking on the telephone, someone else in the vicinity overhears it.

49 This is quite unlike the passenger in the bus or train who could not have just left the bus or train, or the neighbour or office worker who could not be expected to leave the work they are doing so as not to hear the information.

50 *Supra*, note 39.

51 In fact, in some countries, the unauthorised tapping of the phone is a criminal offence; see *supra*, note 9.

it be might justifiable to hold that a reasonable person would have expected confidentiality in both situations. However, in the former situation the public interest defence[52] could later be raised to defeat any imposition of liability.

Similar principles should apply when the employer deliberately taps or uses an extension to overhear telephone conversations made by employees. However, the problem in relation to employees is further exacerbated by the fact that the telephone in the office is the property of the employer and is there to be used in the course of the business. Nonetheless, since most, if not all, employers allow employees to use the office telephone for personal conversations, it is suggested that the employee could reasonably expect confidentiality at least in relation to private or personal conversations[53] as opposed to business or official conversations, and thus an employer who taps the private or personal telephone conversation of the employee should *prima facie*[54] be liable for an action in breach of confidence. The position might be even clearer in relation to voice mail. Since the employee is likely to have a password to access these messages, it might be even more reasonable to expect confidentiality in such circumstances, at least in relation to private or personal messages.

There could also be cases where it is the policy of the employer not to allow the employee to use the telephone for private purposes (other than in the case of an emergency) or where the employer expressly retains the right to monitor calls including personal calls. In such a situation as Megarry J stated in *Coco* v *AN Clark (Engineers) Ltd*,[55] this might fall under "other circumstances which negative any duty of holding it confidential". If the employer particularly informs the employee of these matters it may not be reasonable for him to expect confidentiality.

To summarise, the question of whether an employee can reasonably expect confidentiality in relation to a telephone conversation should depend on factors such as whether the employer allowed the telephone to be used for private purposes, whether the employee was informed that such monitoring may be carried out, and whether the message relates to a private or business matter.

[52] See below.

[53] This also appears to be the position in America, see for instance, *Watkins* v *LM Berry & Co* 704 F. 2d 577.

[54] There could be defences; see below.

[55] *Supra*, note 36.

b. *E-mail communication*

In relation to e-mail, there is no reported decision in Singapore or in England dealing with the issue of employee confidentiality. However, there have been several American cases dealing with the issue. Whilst some of these authorities will be considered here, caution must be exercised when referring to them as some of them are decided on basis of American Constitutional provisions, others on the basis of Federal statutory provisions, and yet others on the basis of State statutory provisions or case law. As such the following discussion on American cases can only be taken as an illustration at best.

One such American case in which the issue arose was *Smyth* v *Pillsbury Co.*[56] In this case, the company in question had an internal e-mail system that allowed employees to communicate with one another. The company also assured its employees that all such communications would remain confidential. Smyth who was an at-will employee in a reply to an e-mail received from a fellow employee, stated *inter alia*, "kill the backstabbing bastards". The company later obtained copies of this e-mail and as a result terminated Smyth's employment. Pennsylvania law allowed an at-will employee to be dismissed at any time, except for very narrow exceptions such as when it violates a "clear mandate of public policy". The court held that what had taken place did not fall within that narrow exception and thus upheld the termination. Further, the court also pointed out that as the communication was between employees in the office, it would have been difficult to expect confidentiality notwithstanding the assurances given by the company to the contrary.

Another case in which the issue arose for consideration was *Restuccia* v *Burk Technology, Inc.*[57] In this case too there was in place an e-mail system which allowed employees to communicate with one another. Personal messages were allowed, but excessive chatting was discouraged. The system required a password to log on and each of the employees were given a password. All e-mail messages were saved on a back up file and technically it was possible for the management to have access to it. However this was not disclosed to the employees. One of the employees had informed the owner of the company that Restuccia and LoRe, another employee, had been spending an excessive time on the e-mail. The owner then got access to the their e-mails and spent nearly 8 hours reading them. In the e-mails, the owner had been described by various nicknames and his extra-marital affairs were also the subject of much discussion. Not surprisingly, three

[56] 1996 WL 32892 (ED Penn Jan 23, 1996).
[57] 5 Mass L Rptr 712 (1996).

days later the employment of Restuccia and LoRe was terminated. Restuccia and LoRe then brought an action against the company. The company sought to strike out their claim but the court refused to accede to the company's demand stating that there were genuine issues to be tried as to whether the employees had a reasonable expectation of privacy in the circumstances.

Thus it would appear that the matter is not finally settled even in America. In Singapore, it is suggested that, just as with a telephone, even though the employer owns the computer and the e-mail exists for a business purpose, there would be a reasonable expectation of confidentiality on the part of the employee depending on factors such as:

- Whether the employer expressly or impliedly allowed the employee to use the e-mail for private purposes[58]
- Whether the employer expressly or impliedly informed the employee that e-mail communications were not confidential and may be monitored[59] and
- Whether the employer seeks to have access to personal messages or business messages.[60]

B. *Means by which Information is Obtained*

There could be other work place situations other than e-mail and telephones that give rise to similar concerns. An example is where the employer reads an employee's diary which is lying on the office desk. It would appear in this and all other such situations, the question to be asked is whether the employee could have reasonably expected the information to retain its confidentiality in the circumstances. However, there is yet another aspect to the second element. In most of the cases concerning breach of confidence,

[58] This was one of the relevant factors in *Restuccia's* case. See also the American case of *Bourke* v *Nissan Motor Corp*, Cal App 2d 1993.

[59] This was also one of the relevant factors in *Restuccia's* case. See also the American case of *Bourke* v *Nissan Motor Corp*, Cal App 2d 1993. Interestingly, in cases concerning employees disclosing information after the termination of the employment contract, one factor used in determining whether the information is indeed confidential is whether the employer impressed upon the employee the confidentiality of the information: *Faccenda Chicken Ltd* v *Fowler* [1987] 1 Ch 117. Similarly, if the employer impressed upon the employee that e-mail communications were not confidential, it would be difficult for the employee to expect confidentiality. However, it is suggested that the emphasis should be on the word "impressed". If there was a mere statement somewhere in some company handbook that stated that such information was not confidential and could be monitored, the employee may still reasonably expect confidentiality.

[60] In relation to business messages, there is most unlikely to be an expectation of privacy.

the information was passed to the confidee who made use of it for his own benefit,[61] or who passed on the information to another recipient.[62] Can an action for breach of confidence lie if the information is taken away from the information provider directly, without going through the confidee, by improper or surreptitious means?

In both *Malone's* case and *Francome* v *Mirror Group Newspapers Ltd* the recipient got hold of the information directly from the information provider by tapping his phone and not from a person to whom the information provider had passed on the information. However, the issue of whether this made a difference was not raised in those cases. Nonetheless, there have been several cases dealing with privileged documents which have expressly dealt with this issue. In *Lord Ashburton* v *Pape*,[63] for instance, Swinfen Eady J stated, "The principle upon which the court of chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained". Both *Francome's* case and *Lord Ashburton's* case were cited with approval in this connection in the local case of *X Pte Ltd* v *CDE*[64] where it was said that the cases indicate "that the second element is not limited to information being imparted in confidence. It will satisfy the second element if the information is received or learned in such circumstances that it is clear that a duty of confidentiality arises". *Francome's* case did not expressly deal with the issue. *Lord Ashburton's* case dealt with privileged documents. In *X Pte Ltd* v *CDE*[65] the matter was only discussed at an interlocutory stage. Nevertheless there seems to be no reason why the fact that the information was obtained directly from the information provider by improper or surreptitious means should make a difference. In fact, since there might be greater degree of culpability, it would seem that there is more reason for liability to attach.[66]

61 See, for instance, *Prout* v *British Gas* [1992] FSR 478; *Coco* v *AN Clark (Engineers) Ltd* [1969] RPC 41.

62 See, for instance, *Stephens* v *Avery* [1988] 1 Ch 448, *Lion Laboratories Ltd* v *Evans* [1985] QB 526.

63 [1913] 2 Ch 469 at 475. See also, *ITC Film Distributors Ltd* v *Video Exchange Ltd* [1982] 1 Ch 436.

64 [1992] 2 SLR 996 at 1008.

65 *Ibid*.

66 See also the unreported Hong Kong case of *Koo & Chiu* v *Hing*, (April 14 1992) as cited in the Hong Law Reform Commission's report on the law relating to information privacy, 1993 at 43.

(iii) *The third element*

Whilst there must be an unauthorized use of the information, it is not yet settled whether detriment must actually be suffered.[67] As Megarry J stated in *Coco* v *AN Clark (Engineers) Ltd*,[68]

> Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him as when the confidential information shows him in good light but gravely injures some relation or friend of his whom he wishes to protect.

Though the matter is yet to be settled, going by the reasons given above, it is suggested that detriment need not be established. Thus for instance, if the an employee keeps a diary in the office which contains references to his wife's health, and for some reason these references are of interest to his employer (as could perhaps be the case where the employee's wife is a local celebrity), it is difficult to see why the employee should be barred from bringing an action just because he does not suffer detriment himself.[69]

(a) *Defences*

It is a defence if the defendant can establish that it is in public interest that the information should be disclosed.[70] But in determining this issue, the courts should "carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest

67 *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281-282.

68 [1969] RPC 41 at 48.

69 However, if no detriment is required, the question could arise whether this could lead to abuse. For instance, what would be the position where the employee's health record is released to his insurance company without his consent, but as the record states his health is fine, the insurance company agrees to give the insurance cover on the original terms. Should the employee be able to bring an action against the employer? The question might be purely theoretical as since no detriment is suffered, it is most unlikely that the employee would want to bring an action. Even if he decides to do so, he may not be able to get damages (see below). Thus, not requiring detriment to be established is unlikely to lead to abuse.

70 *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109; *Hellewell* v *Chief Constable of Derbyshire* [1995] 1 WLR 804.

favouring disclosure".[71] Thus if the information reveals a commission of fraud or crime[72] on the part of the employee, the employer may disclose it to the competent authorities[73] or vice-versa if the court determines it is in public interest to do so. However, the defence is not limited to the disclosure of fraud or crime. The case in point is *Lion Laboratories Ltd* v *Evans*.[74] In this case, the plaintiffs were manufactures of electronic breathalyser machines which were used by the police to measure the alcohol levels of vehicle drivers. The defendants were technicians who worked for the plaintiffs. When the defendants left the employment of the plaintiffs they took with them some confidential documents which they alleged cast doubts on the accuracy of the breathalyser machines. The court held it was in the interest of the public that they have access to this important information and allowed its publication in the newspapers.

However, what if the information is not of public interest but is of private interest? The issue arose for consideration in *Weld-Blundell* v *Stephens*.[75] In this case the plaintiff employed the defendant who was an accountant to audit certain accounts belonging to third parties. In his instructions to the defendant he had made certain defamatory remarks about those third parties. Due the defendant's negligence, the information eventually reached the hands of the defamed parties. They sued the plaintiff for libel and recovered damages against him. The plaintiff then brought an action against the defendant alleging breach of confidence and the issue arose whether there was any defence for the breach. In this regard, the court stated,

> The disclosure of which serves no useful purpose, except to enable the person libelled to recover damages for libel, the existence of which but for the defendant's neglect, might never have been known to

[71] *Per* Lord Goff, in *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109 at 282. See also, *X Pte Ltd* v *CDE* [1992] 2 SLR 997 at 1009.

[72] See, for instance, *Malone* v *Metropolitan Police Comr* [1979] 1 Ch 344, though the case did not involve employers or employees. For cases in the employment context, see *Gartside* v *Outram* 26 LJ (Ch) 113; *Re A Company's Application* [1989] 1 Ch 477.

[73] This could refer *inter alia* to the police, a regulatory body or even the media. However, courts will generally be more cautious of allowing the disclosure to the media if it could prejudice the trial proceedings: *Francome* v *Mirror Group Newspapers* [1984] 1 WLR 892. See also *X Pte Ltd* v *CDE* [1992] 2 SLR 997, where the court held that the alleged wrongdoings by the employee in question were only to be disclosed to his company and the police, and that there was no public interest in disclosing the wrongdoings to anyone else at that stage.

[74] [1985] QB 526.

[75] [1919] 1 KB 520. *Cf Lady Percival* v *Phipps* 2 V & B 19.

> anyone....On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by the principal.

Thus the case would seem to suggest that if two private interests are at stake, one should not be preferred over the other. While on the facts of the case the decision may have been fair, such a broad statement may not always produce a fair result. Take the case of an employee who makes a defamatory remark regarding his employer[76] in a confidential document such as in a personal letter. If this confidential document eventually reaches the employer, shouldn't the employer be able to resist any action that may be brought by the employee for the delivery up of the letter or copies of it, so as to prevent the employer from taking proceedings against him?[77] Even clearer would be the case where the employer gets hold of a confidential document relating to the employee and while perusing it comes to know that the employee is passing highly confidential information or trade secrets to a competitor. Justice would suggest that the employer be able to make use of the information to stop the employee from doing so. It is suggested that, just as with the case where there is a public interest involved, where there are two competing private interests involved, the court should perform a balancing act and arrive at a decision. For instance, in the example of the employee leaking confidential information, since the business interests of the employer (and hence indirectly the interests of many others such as employees) will be affected, balancing the two interests, disclosure should be permitted.[78]

Perhaps there might be another way in which the same result can be arrived at. As stated earlier, it is yet to be settled if breach of confidence is based on equitable or tortious principles. In so far as it may be classified as an action in equity, it is possible to make use of the doctrine that those who seek the aid of equity need to come to it with clean hands. In *Hubbard* v *Vosper*,[79] for instance, a breach of confidence case, at least one of the judges, Megaw LJ, expressly referred to this doctrine and permitted dis-

[76] It may be noted that *Weld's* case did not concern defamatory remarks between the parties themselves.

[77] See, for instance, *Lord Ashburton* v *Pape* [1913] 2 Ch 467. See also, *ITC Film Distributors Ltd* v *Video Exchange Ltd* [1982] 1 Ch 431.

[78] This is the position in America; see for instance, *Briggs* v *American Filter Co* 630 F 2d 414. See also the American Federal Electronic Communications Privacy Act 1986 and the business purpose exception.

[79] [1972] 2 QB 84 at 101.

closure, though on the facts of the case, the disclosures were clearly in public interest as well. If this line of reasoning is accepted,[80] the employee in the above example who leaked confidential information, may not be able to bar the employer from holding on to the confidential documents for the purposes of any proceedings that might ensue.

The case of *Tournier* v *National Provincial & Union Bank of England*[81] is also of relevance here. This case not only suggests that the private interest defence could apply but also that there could also be other defences. The case involved banking secrecy and in the course of judgment, Bankes LJ stated[82] that there were certain exceptions for breach of banking secrecy, namely situations where,

- the disclosure was made under the compulsion of law;[83]
- the disclosure was in public interest;[84]
- the disclosure was in the interests of the bank;[85] or
- the disclosure was made with the express or implied consent of the customer.[86]

Though the case involved banking secrecy, it is suggested similar principles should apply to a breach of confidence action.[87] If banks should be given such protection, *a fortiori*, individuals and companies should also have access to such defences.

[80] Warrington LJ referred to this doctrine in *Weld's* case, but did not use it to permit the disclosure. However, as to why this was so, was not explained.

[81] [1924] 1 KB 461. *Tournier's* case was followed in Singapore in *Lee Kuan Yew* v *Vinocur & Ors* [1995] 3 SLR 477, albeit on a different point.

[82] *Ibid*, at 473.

[83] Interestingly no case relating to breach of confidence has expressly dealt with this defence; nonetheless it must surely apply. For instance, under the Income Tax Act (Cap 134, 1994 Ed) employers are required to furnish the details of the employee's remuneration to the Inland Revenue Authority (see s 68).

[84] As discussed above this is clearly established as a defence in relation to breach of confidence.

[85] This, it is suggested, establishes a private interest defence and it should be extended to breach of confidence actions.

[86] Though this was considered as a defence, in the context of breach of confidence, it may relevant at an even earlier stage as discussed above, that is, to determine whether the plaintiff can expect confidentiality to begin with if he had expressly or impliedly consented to the information being disclosed.

[87] *Supra*, notes 83-86.

(b) *Remedies*

The usual remedies for a breach of confidence action are damages, injunction and an order for delivery up.[88]

In relation to damages, where pecuniary loss is suffered, damages can clearly be claimed. Thus in *Prout* v *British Gas*,[89] where the employer had made use of confidential documents relating to an industrial design belonging to the employee, the court ordered an inquiry into as to the amount of damages suffered. As to how such damages will be calculated will depend on the facts of each case, but it can take the form of lost profits[90] or lost royalties[91] or an account for profits made.[92] But it is difficult to envisage in what other circumstances an employee would be able to claim for pecuniary loss. Take, for instance, the case where the employer discloses the employee's health records to an insurance company or a prospective employer. If the insurance company or prospective employer decides to provide insurance cover or employment respectively, no loss would have been suffered. On the other hand, even if the insurance cover was not granted or the employment was not offered, it might be difficult for the employee to claim for pecuniary loss. This is because he could have in all likelihood gone to another insurance company or employer who would not have asked his current employers for the employee's health records.[93] The same is true of the disclosure of financial matters (such as salary) to creditors or landlords. The employee who fails to undertake such measures would have failed in his duty to mitigate[94] and it will be unlikely that he will be able to claim.

Loss suffered by an employee more often than not, in the employment context is going to be non-pecuniary in nature, such as anxiety, embarrassment and mental distress. Though there is no breach of confidence case in which such losses were awarded, there is some academic support for

[88] *Saltman Engineering Coy Ld* v *Campbell Engineering Coy Ld* [1948] RPC 203 (delivery up of the confidential documents); *Peter Pan Manufacturing Corporation* v *Corsets Silhouette Ltd* [1964] 1 WLR 96 (delivery up of goods made using confidential information).

[89] [1992] FSR 478.

[90] *Dowson & Mason Ltd* v *Potter* [1986] 1 WLR 1419.

[91] *Seager* v *Copydex* (No 2) [1969] 1 WLR 809.

[92] *Peter Pan Manufacturing Corporation* v *Corsets Silhouette Ltd* [1964] 1 WLR 96.

[93] Further, it might be difficult for the employee to establish that but for the disclosure, the insurance cover or employment would have been given; see for instance, *Barnett* v *Chelsea and Keningston Hospital Management Committee* [1969] 1 QB 428.

[94] *Brace* v *Calder* [1895] 2 QB 253; *Chua Keng Meng* v *Hong Realty Pte Ltd* [1994] 1 SLR 73. Though mitigation arises usually in the context of breach of contract actions, similar principles apply to tort actions; see WVH Rogers, *Winfield & Jolowicz on Tort* (1998) at 468.

such damages to be awarded.[95] Further, since such damages are also awarded in other tort actions[96] that may also indirectly be concerned with privacy (such as defamation)[97] there is no good reason why such damages should not be awarded for a breach of confidence action. Similarly, aggravated[98] or exemplary damages[99] (which may be awarded in other tort actions) should in principle be applicable on similar grounds.

However, it does not mean that in all cases such damages will be awarded. Even in the example involving the disclosure of an employee's salary or health records, one cannot say with confidence that damages for matters such as anxiety, embarrassment or mental distress will be awarded. But there could be other cases where such damages are justified. Take, for instance, the unreported American case involving a McDonald's employee.[100] The employee was a manager of a McDonald's outlet and he was having an affair with another employee in another outlet. The two employees left romantic messages in each other's voice mail. The owner of the McDonald's outlet somehow managed to get hold of these messages and played them out to the manager's wife! The action brought by the manager against the owner was settled out of court on terms that are not publicly available. But it would be justified to award damages for anxiety, embarrassment and mental distress (and even perhaps aggravated damages) as the employer had no business to inform the employee's wife of these matters.

Another remedy is that of an injunction. Injunctions, have been granted to prevent a vast array of actions, such as to stop the publication of the information in the newspapers,[101] the communication of the information to anyone else,[102] or making use of the information for a business[103] or other

[95] See, for instance, WVH Rogers, *Winfield & Jolowicz on Tort* (1998) at 757-758.

[96] See, for instance, *Fedak* v *Yorkton Auto Haus Ltd* (1983) 28 Sask R 275 at 279.

[97] *McCarey* v *Associated Newspapers Ltd* [1965] 2 QB 86 at 107; *Carson* v *John Fairfex* [1993] 178 SLR 44 at 60.

[98] *Rookes* v *Barnard* [1964] AC 1129 at 1221; *Lee Kuan Yew* v *Vinocur & Ors* [1995] 3 SLR 477.

[99] *Rookes* v *Barnard* [1964] AC 1129; *Cassell & Co Ltd* v *Broome* [1972] AC 1027. See also *A-G (UK)* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129, which recognises the possibility of exemplary damages in breach of confidence cases.

[100] However an extract of it is cited in Ellen Alderman & Caroline Kennedy, *The Right of Privacy*, (1995), at 318.

[101] *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109, *Lion Laboratories Ltd* v *Evans* [1985] QB 526.

[102] *Duchess of Argyll* v *Duke of Argyll* [1967] 1 Ch 302; *X Pte Ltd* v *CDE* [1992] 2 SLR 996.

[103] *Coco* v *AN Clark (Engineers) Ltd* [1969] RPC 41.

purpose,[104] and using the information during trial.[105] Interlocutory injunctions are also available on the usual principles enunciated in *American Cynamid* v *Ethicon*.[106]

(c) *Other matters*

What is the effect of a breach of confidence on the employment contract? If there is repudiatory breach of contract by the employee (as for instance the employee is found to have leaked confidential information) the employer may terminate the contract without notice.[107] On the other hand, if the employer has committed a repudiatory breach of the contract by disclosing confidential information,[108] the employee may leave at once without having to give notice.[109]

Before leaving the topic of breach of confidence, it must be mentioned, that an action in breach of confidence as an alternative route to enforce privacy is largely limited as it only applies to situations where there is confidential information. There could be many other issues concerning workplace privacy such as surveillance, searches or forced medical examinations which do not deal with confidential information. However, in such circumstances an action for breach of an implied term of the contract of employment may provide some redress.

III. Implied Term of Trust and Confidence

Another way in which privacy may be indirectly enforced is by finding an implied term in the contract to this effect. The case in point is *Pollard*

[104] *Hellewell* v *Chief Constable of Derbyshire* [1995] 1 WLR 804.

[105] *ITC Film Distributors Ltd* v *Video Exchange Ltd* [1982] 1 Ch 431.

[106] [1975] AC 396. See also, *X Pte Ltd* v *CDE* [1992] 2 SLR 996.

[107] See, for instance, *Laughton* v *Bapp Industrial Supplies* [1986] ICR 634.

[108] However, breaching confidence *per se* would not automatically result in the employer repudiating the contract. Thus if the employer innocently discloses the employee's health record or salary on request, it is difficult to see how this can amount to a repudiatory breach on the part of the employer. Thus the breach of confidence has to take place in such circumstances that the employer's actions clearly demonstrate that he longer wishes to be bound by the contact; see *Western Excavating (ECC) Ltd* v *Sharp* [1978] IRLR 27 at 29; *Bracebridge Engineering Ltd* v *Darby* [1990] IRLR 3.

[109] In such circumstances the employee will also be able to bring a claim for the breach of the employment contract and the damages are likely to be the amount the employee could have earned during the period it would have taken the employer to lawfully terminate the contract; see *Addis* v *Gramophone Co Ltd* [1909] AC 488.

v *Photographic Company*.[110] In this case, the plaintiff went to the defendant's shop to take some photographs. The defendant later, without the authority of the plaintiff, used the photographs to make christmas cards. The court held that in the contract between the plaintiff and the defendant, it was an implied term that the defendant would not make use of the negatives in any way which was not authorized by the plaintiff. The defendant was held liable.

The question that arises is whether similarly in the employment contract, privacy can be indirectly enforced by the mechanism of the implied term.

An implied term of trust and confidence in all contracts of employment has recently been endorsed by the House of Lords in *Malik* v *BCCI SA*.[111] Lord Steyn in *Malik* v *BCCI SA* stated,[112]

> The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties....The reason for this development is part of the history of the development of employment law in this century. The notion of a 'master and servant' relationship became absolute....The evolution of the implied term of trust and confidence is a fact...It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence a sound development.

This implied term of mutual trust and confidence is "apt to cover the great diversity of situations".[113] *Malik* v *BCCI SA* itself concerned a bank where those controlling it had perpetrated a massive fraud. After the fraud came to light and the bank collapsed, two innocent employees who had difficulties finding a job because of their association with the bank, brought an action against the bank claiming that the bank had breached the implied term of trust and confidence imposed on it by carrying on its business in a fraudulent manner. The court upheld the claim. In *United Bank* v *Ahktar*,[114] there was an express clause in the contract allowing the employer to transfer the employee to another location in the United Kingdom. The court held that this was subject to an implied obligation of mutual trust and confidence

[110] (1888) 40 Ch D 345.
[111] [1997] 3 All ER 1.
[112] *Ibid*, at 15-16. See also, Lord Nicholls of Birkenhead, *ibid*, at 9.
[113] *Supra*, note 111, at 15.
[114] [1989] IRLR 507. See also, *French* v *Barclays Bank plc* [1998] IRLR 646.

and hence the employer could not request the transfer unless reasonable notice and financial assistance was given. In *Imperial Group Pension Trust Ltd* v *Imperial Tobacco Ltd,*[115] the defendant company had a right under its pension fund rules to give or withold consent to increases in pension benefits above the guaranteed minimum. However, the court held that this was subject to an implied duty of trust and confidence and thus if the discretion was not exercised in good faith, the company would be in breach. This term has also been held to have been breached in a vast array of other perhaps more predictable situations, such as when the employer uses abusive language on the employee,[116] when the employer does not investigate a complaint of sexual harassment made by an employee,[117] when the employer unjustifiably accuses the employee of theft[118] and when the employee is "humiliated, intimidated and degraded" by the employer.[119] In fact the scope of this implied term is potentially so wide that it has been argued that eventually there might come a time when the dismissal of an employee may be made subject to rules of natural justice.[120]

This concept of mutual trust and confidence is not restricted to the United Kingdom. There have been cases in New Zealand[121] and Canada[122] as well giving recognition to this dynamic and ever growing principle. Though the matter has not arisen in Singapore, it is difficult to see why the position here should be any different. Since there is clear duty in Singapore on the part of the employee to observe fidelity[123] it would only seem justifiable that the employer too should owe the employee a duty of trust and confidence as both concepts are related.[124]

Thus, one can say with some confidence that the implied obligation of trust and confidence is likely to be applicable in Singapore and is likely to be broad enough to embrace concepts of privacy.[125] However, the exact

[115] [1991] ICR 524. See also, *Clark* v *Bet* plc [1997] IRLR 348.
[116] *Palmanor Ltd* v *Cedron* [1978] IRLR 303; *Isle of Wight Tourist Board* v *Coombes* [1976] IRLR 413.
[117] *Bracebridge Enginnering Ltd* v *Darby* [1990] IRLR 3.
[118] *Robinson* v *Crompton Parkinson Ltd* [1978] IRLR 401.
[119] *Hilton International Hotels (UK) Ltd* v *Protopapa* [1990] IRLR 316.
[120] Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 ILJ 79.
[121] *Auckland Shop Employees Union* v *Woolworths (NZ) Ltd* [1985] 2 NZLR 372; *Telecom South Ltd* v *Post Office Union* [1992] NZLR 275.
[122] *Greenberg* v *Meffert* (1985) 18 DLR 548; *Vorvis* v *Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 at 214.
[123] See, for instance, *Tang Siew Choy* v *Certact Pte Ltd* [1993] 3 SLR 44.
[124] See *per* Lord Steyn in *Malik* v *BCCI SA* [1997] 3 All ER 1 at 15.
[125] See Simon Deakin & Gillian S Morris, *Labour Law* (2nd Ed), at 350.

parameters are yet to be determined and that is what this discussion will now attempt to do. In particular, specific instances where the employee's privacy may be at stake will be examined. These instances, though not exhaustive of the type of privacy related problems that can arise at workplace, are as follows:

a) Off-premises Surveillance

b) On-premises Surveillance

c) Medical Examination and

d) Searches

(a) *Off-premises surveillance*

An employer may want to monitor the movements of his employee outside his place of work for numerous reasons and for that purpose he may hire the services of private investigator. The private investigator may watch, photograph or video-tape what the employee does and the question naturally arises whether this will result in a breach of the implied term of trust and confidence.

The English case of *Berstein of Leigh (Baron)* v *Skyviews General Ltd*,[126] suggests that there is no cause of action in such circumstances. In this case, the defendant flew over the plaintiff's land for the purpose of taking an aerial photograph of the plaintiff's country house. The plaintiff claimed damages, alleging trespass and invasion of privacy. The court dismissed both claims stating that there was "no law against taking a photograph".[127] Similarly, in the Australian case of *Bathurst City Council* v *Saban*,[128] the court held that except in cases involving tortious conduct,[129] there was no right of action for merely taking a photograph or video-taping.

As none of these cases involved employees, reference may also be made to American decisions, though as stated earlier, caution must be exercised when making such references.[130] In *McLain* v *Boise Cascade Corp*,[131] for instance, an employee who was claiming workmen's compensation was referred to medical experts. The medical experts were of the view that the

[126] [1978] QB 479.
[127] *Ibid*, at 488. See also *Kaye* v *Robertson* [1991] FSR 62.
[128] (1985) 2 NSWLR 704.
[129] See below.
[130] See above.
[131] 533 P 2d 343.

employee could do light work. However, the employee disputed this. The employer hired a private investigator who took pictures of the employee's off-work activities which suggested that he was capable of doing light work. When the employee discovered what had happened, he sued for invasion of privacy. However, the Oregon Supreme Court dismissed the claim. Similarly, in *Pemberton* v *Bethlehem Steel Corp*,[132] where the employers had hired private investigators who had followed and watched the employee in public places, the Maryland Appeals Court held that there was no invasion of privacy. These cases suggest that when the employee is engaged in some act that is open to the public to see, there is no reason why the employer should be barred from seeing it. The employee cannot expect privacy in such circumstances.

Thus, if the employer hires a private investigator who watches or takes photographs or video-tapes what the employee does in public, it would be difficult for the employee to suggest that the employer has breached the implied term of trust and confidence. However, the matter may be different if the employee is engaged in some private act. Thus in *Hellewell* v *Chief Constable of Derbyshire*,[133] the court stated *obiter* that "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in a private act, his subsequent disclosure of the photograph would as surely amount to a breach of confidence".[134] However, the court did not elaborate on what was meant by the term "private act". Photographing or filming what the employee does in the privacy of his bathroom or bedroom might be considered as a private act,[135] but what about the situation where the employee is giving away confidential information to a competitor at the competitor's office – would that amount to a private act? Even if that amounts to a private act and not an act done in public, it must be recalled that the duty of trust and confidence is *mutual* and in determining whether this term has been breached, the courts have to balance the legitimate interests of the employee and that of the employer.[136] Thus, in the above example, it would be difficult for the employee to suggest that the employer has broken this term without at the same time suggesting that he too has broken

[132] 502 A 2d 1101.
[133] [1995] 1 WLR 804.
[134] *Ibid,* at 807.
[135] If the employee is a woman, this *may* also amount to an offence under s 509 of the Penal Code (Cap 224, 1985 Rev Ed).
[136] *Per* Lord Steyn in *Malik* v *BCCI SA* [1997] 3 All ER 1 at 15; *per* Richardson J in *Telecom South Ltd* v *Post Office Union (Inc)* [1992] NZLR 275 at 285.

the very same term.[137] It is unlikely that the employee would succeed in suing his employer in such circumstances.[138]

However, it must also be mentioned that if the employer actually enters into the premises of the employee to carry out such surveillance, the position could be different. As stated by Lord Scarman in *Morris* v *Beardmore*,[139] every person has a "fundamental right of privacy in one's home" and this right would be infringed when the employer enters into the premises of the employee to carry out such surveillance. Quite apart from any action for breach of contract, an action for trespass would lie in such circumstances. Thus planting listening devices[140] in the employee's home or entering his home without his permission to take photographs[141] would give rise to such an action in trespass.

(b) *On-premises surveillance*

The employer may also carry out on premises surveillance or monitoring for various purposes such as to ascertain whether an employee is doing work or whether the employer's property is being misappropriated by the employee. Such surveillance or monitoring may take various forms, such as watching the employee, tapping the office telephone used by the employee, reading his e-mail, checking the sites he has visited on the internet or installing hidden or visible cameras in the premises of the office.

In relation to watching the employee, it is certainly a legitimate business of the employer to look at what the employee is doing however annoying it might be for the employee. As Lord Steyn stated in *Malik* v *BCCI SA*, a "balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited". Even in America where the right of privacy is well entrenched, this is also the position.[142] Thus, this kind of monitoring is most unlikely to be give rise to any form of action.

In relation to tapping of the telephone used by an employee in the office or reading an employee's e-mail, it is suggested similar principles as discussed in relation to breach of confidence should apply. Thus the relevant factors would include whether the employer allowed the telephone or e-mail to

[137] This could also be seen as a defence available to the employer, see below.
[138] It is unlikely that a breach of confidence action will succeed either, based on the private interest defence discussed earlier.
[139] [1981] AC 446 at 465.
[140] *Coco* v *R* (1994) 179 CLR 427.
[141] *Lincoln Hunt* v *Willesee* (1986) 4 NSWLR 457.
[142] See, Jon D Bible & Darien A McWhirter, *Privacy at the Workplace* (1990), at 171-172.

be used for private purposes, whether the employer informed the employee of the possibility of monitoring or random checks being carried out,[143] whether the intrusion is in respect of a private message or business message and whether, if it is private message, the employer had reasonable grounds for suspecting[144] that the message contained or revealed information which was against the interests of the employer.

If an employee writes with a pen given by the employer, few would suggest that that *per se* should give the employer the right to read a personal or private letter written by the employee using that pen, even if the letter is written during office hours. Of course if the employee is spending too much time writing such personal or private letters at office so that his work suffers, the employer may be able to terminate his contract of employment, either by giving notice or (if the breach is serious and drastic enough) summarily, but that should not give the employer the right to read the personal or private letter of the employee unless he has reasonable grounds for suspecting that the letter contains some material which may be detrimental to his interests. Subject to matters stated above, it is suggested that similar principles should apply to telephone and e-mail usage.

In relation to checking the sites visited by the employee on the internet, it is suggested that again similar principles should apply. If the employer impliedly[145] or expressly allows employees to visit non-work related sites (and the employees are not informed that random checks may be made and there are no reasonable grounds for believing that the interests of the employer are being compromised),[146] it is suggested, even though the computer may belong the employer, the employee may be able to maintain that the implied term of trust and confidence has been breached.

[143] However, this factor may not be conclusive; see below.

[144] This requirement flows from *Bliss* v *South East Thames Regional Health Authority* [1985] IRLR 308 and *Robinson* v *Crompton* [1978] IRLR 61, discussed below.

[145] The absence of an express policy on the matter it is suggested could amount to implied permission just as in the case of the office telephone. It must have been envisaged by both parties that there could be times when the employee is free and during such time he should be free to do what he wants so long as it is not detrimental to the interests of the employer.

[146] An example of such a case could be where there are reasonable grounds for suspecting that an employee whose job is to deal with young children is a paedophile. If he has access to the internet via the office computer it might be permissible for his employer to check the sites he has visited. However, as to whether the cost factor *per se* would justify monitoring, it is suggested it may not. This is so because, in big companies, entire lines may be leased and so cost may not vary with usage. Further, even where lines are not leased, usually payment is based on local telephone call rates which may not be substantial. Further, in some instances now and in more instances in the future, usage may be totally free.

In relation to on-premises cameras, perhaps a distinction ought to be made between visible and hidden cameras. In relation to visible cameras, clearly, the employees are aware that they may be watched, and provided that the cameras are not installed in places such as locker rooms or lavatories,[147] it might be difficult for the employee to suggest that the implied term of trust and confidence is broken. The issue of hidden cameras is more difficult. If a hidden camera is placed in an open area like a factory floor or a shop space, the employee cannot discount the possibility of others watching him and thus there would not be much of an expectation of privacy. On the other hand, if the employee is given his own space or room, there might be an expectation of privacy,[148] and if the employer intrudes this privacy by means of a hidden camera when there are no reasonable grounds for suspecting that the employer's interests are being compromised, the employee may be able to maintain that the implied term of trust and confidence is broken.

(c) *Medical examination*

As a pre-condition to offering employment, the employer may require an employee to undergo a medical examination. This comes prior to the commencement of the employment contract. As there is no general right of privacy,[149] this is unlikely to pose any problem. However, the question arises whether, once the employment contract is in place and the implied term of trust and confidence comes into play, the employer may request the employee to go for a medical or psychiatric examination or force the employee to go for a blood or other test to detect alcohol or drug abuse or to detect for instance the presence of the AIDS or HIV virus.

The issue arose in *Bliss* v *South East Thames Regional Health Authority*.[150] The plaintiff was an orthopedic surgeon and he worked with another consultant, Hay. Soon relations between the two became sour and the plaintiff began to write abusive letters to Hay. Hay, in light of these letters, raised doubts about the plaintiff's state of mind with the regional medical officer. The regional medical officer, referred the matter to a three-man committee. The

[147] This could possibly result in the commission of an offence in certain circumstances, see *supra*, note 135.

[148] In America, it would appear that in certain states, such as Connecticut, Delaware and Michigan, hidden cameras are prohibited in places where the employee can reasonably expect privacy such as in his own office room; see Jon D Bible & Darien A McWhirter, *Privacy at the Workplace* (1990), at 179.

[149] See above.

[150] [1985] IRLR 308.

three-man committee, after examining the letters, did not find anything wrong with the state of mind of the plaintiff. However, a little later, the regional medical officer, requested the plaintiff to undergo a medical examination with a nominated consultant. The plaintiff refused and his employment was suspended. The plaintiff then brought an action against the health authority in question. The court held that in the absence of an express term in the contract which allowed the employer to request the employee to go for a medical examination, the employer could nonetheless request the employee to go for a medical examination on the basis of an implied term. However, the court stated that before this could be done the defendants must have "reasonable grounds for believing that he might be suffering from physical or mental disability which might cause harm to patients or adversely affect their treatment".[151] On the facts of the case, there was no reasonable ground for believing this to be the case. Hence the court held that there was a breach of the implied term of trust and confidence and that the breach was repudiatory in nature.

This case would suggest that factors such as whether the contract expressly allowed such examinations or tests to be carried out,[152] whether the employer had reasonable grounds for believing that the employee was suffering from any such medical, psychological or physical impairment, and whether such medical, psychological or physical impairment was likely to affect the performance of the employee's job, would be relevant in determining the issue.

The position appears to be quite similar in America as well, though as stated earlier caution must be exercised when referring to American cases.[153] In *Transportation Workers Local 234* v *SEPTA*,[154] for instance, the court held that a plan to randomly check transportation workers for drug abuse was valid as there were many prior instances of such abuse and public safety was at stake. Similarly, in *Copeland* v *Philadelphia Police Department*,[155] the court upheld the police department's decision to test a police officer for drug abuse, not simply on the basis of an accusation coming from a former girlfriend, but on the basis that the matter was corroborated by evidence from other sources as well. Further, on the facts there was also an element of public interest at stake.

[151] *Ibid*, at 314.
[152] However not withstanding *Bliss's* case, this factor may not be conclusive; see below.
[153] See above.
[154] 4 IER Cases 1 (3rd Cir 1986).
[155] 840 F 2d 1139.

(d) *Searches*

The employer may also wish to search the employee's room, locker, drawer or bag to see if the employee has been misappropriating any property belonging to the employer, including confidential information. The question that naturally arises is whether this could also amount to a breach of the implied term of trust and confidence.

The English decision of *Robinson* v *Crompton*,[156] though not directly on point is of relevance here. In this case, the employer's act of improperly accusing the employee of theft and calling the police was held to have breached the implied term of trust and confidence. The English Employment Appeal Tribunal, stated that before the employer can take such action, there must be "reasonable grounds to believe that a dishonest matter had occurred".[157] It would follow that if there are reasonable grounds for suspecting that the interests of the employer are being sacrificed, it would not be in breach of the implied term of trust and confidence to carry out such a search.

Reference may also be made to American cases in this regard, but with the usual caution.[158] In *O'Connor* v *Ortega*,[159] a psychiatrist who was in charge of a residency program was suspected of having coerced participants into making certain monetary contributions, harassing a female employee and improperly disciplining another. The hospital administrator placed the psychiatrist on paid leave and searched his room and seized various items which eventually let to the psychiatrist's discharge. The psychiatrist then brought an action on the grounds of invasion of privacy. The US Supreme Court held that the employee's expectation of privacy had to be balanced with the employer's desire for supervision, control and efficient operation of the workplace and that the searches would have been valid if there were reasonable grounds for the suspicion. The matter was then remanded to the trial court to determine whether this was the case.

Though one of the relevant factors in determining whether such a search can be carried out would be whether there are reasonable grounds for the suspecting that the interests of the employer are being sacrificed,[160] it is

[156] [1978] IRLR 61. See also, *Fyfe & McGrouther Ltd* v *Byrne* [1977] IRLR 29.
[157] *Ibid*, at 62.
[158] See above.
[159] 107 S Ct 1492 (1987).
[160] All along it has been assumed that the only reason the employer may wish to carry out a search is to detect misappropriation. However, there may be other reasons. Thus the employer or fellow employee may wish to open the drawer of another employee who is absent in order to retrieve a document or article which is needed for the business. It would seem in this regard that if the need is reasonable in the circumstances, it is unlikely any breach would have occurred: *K-Mart Corp Store No 7441* v *Trotti*, 677 SW 2d 632 at 637.

suggested that it may not be always necessary for the suspicion to be directed at any individual employee. Thus, in the case of a department store where goods go missing and where there is an adequate security system in place to ensure that customers do not leave without paying, the employer may have reasonable grounds for suspecting employees generally. In such circumstances it is suggested that it should be possible for the employer to search some employees randomly or to search all the employees involved.[161] Of course the answer could be clearer if there was an express clause in the contract which allowed such searches.[162] In addition, the issue of the amount of control an employee has over the place searched could also be of relevance. An employee can be expected to have more control over his personal bag or briefcase or locker for which he is allowed to use his own lock[163] as compared to an unlockable drawer in a room that is shared by others. The more control there is, the greater will be the expectation that the employer would respect it.

(e) *Defences*

Where the implied term of trust and confidence is breached, is there any defence available to the employer? The answer is in the affirmative.

In *General Billposting Company* v *Atkinson*,[164] the court held that if the employer was in repudiatory breach of the employment contract in wrongfully dismissing the employee, he could not later seek to enforce a restraint of trade clause in the contract of employment. Similarly, it would follow that if the employee has committed a repudiatory breach of the contract of employment, he cannot then seek to bring an action against the employer for the breach of the implied term of trust and confidence. Thus, if the employee has committed a repuditory breach of contract by leaking con-

[161] In such circumstances, the question might also arise whether it would be reasonable to carry out a search by touching or feeling the body of the employee to determine if he is bringing out any unauthorised goods from the store. Since it is a "fundamental principle, plain and uncontestable, that every person's body is inviolate"; *per* Robert Goff LJ in *Collins* v *Wilcock* [1984] 3 ALL ER 374 at 378; it might be more difficult to justify such intrusion by the employer and this may amount to the tort of trespass. Further, whatever the circumstances, a strip search by the employer would probably not be justified; see for instance the American case of *Bodewig* v *K-Mart, Inc*, 635 P.2d 657.

[162] However, this factor alone may not be conclusive; see below.

[163] *K-Mart Corp Store No 7441* v *Trotti* 677 SW 2d 632.

[164] [1909] AC 118; See also, *Measures Brothers Ltd* v *Measures* [1910] 2 Ch 248.

fidential information[165] or misappropriating the employer's property,[166] and this information comes to the knowledge of the employer as result of some form of surveillance, search or monitoring which is in breach of the implied term of trust and confidence, the employee is unlikely to succeed in a claim against the employer.

Since the duty arises by virtue of an implied term, the question may also arise as to whether it would be possible to exclude the application of the implied term by an express clause stating that any implication of trust and confidence on the part of the employer is to be excluded from the contract. In *Johnstone* v *Bloomsbury Health Authority*,[167] the contract of employment of a junior doctor provided that he was required to work 40 hours a week and "be available for overtime of a further 48 hours per week on the average". The plaintiff doctor who alleged that in some weeks he had to work for more than 100 hours brought an action against the authority alleging a breach of the authority's duty as his employer to take reasonable care of his safety and well-being. The English Court of Appeal upheld the claim. Stuart-Smith LJ stated that there were terms implied by law and terms implied by facts. In relation to terms implied by law,[168] these cannot be overridden by express terms to the contrary. The duty to take reasonable care of the employee was a term implied by law and hence, the express term in the contract giving the employer the power to call him for overtime time work was subject to this implied duty. Sir Nicholas Browne-Wilkinson VC also found in favour of the doctor but on different grounds. He stated that if the contract imposed an absolute obligation to work an extra 48 hours, that would preclude any argument that the employer was (by so requiring the employee to work) in breach of an implied duty of care. However, on the facts, the contract merely conferred an option or discretion on the employer to call the employee and this was subject to an implied duty not to injure the health of the employee. Thus, either on the basis that a term implied by law cannot be excluded by an express term or on the basis of a restrictive interpretation,[169] or even on the basis of public

[165] See, for instance, *Laughton* v *Bapp Industrial Supplies* [1986] ICR 634.

[166] See, for instance, *Sinclair* v *Neighbour* [1966] 3 ALL ER 988; *Motilal* v *Gutherie Agency (M) Ltd* [1968] 1 MLJ 211.

[167] [1991] 2 All ER 293.

[168] Terms implied by law refer to terms which generally apply to all contracts of a particular type as opposed to terms implied by facts which are unique to the particular facts of the case; see *Liverpool City Council* v *Irwin* [1977] AC 239 at 257. Thus, it would follow that the implied term of trust and confidence too would be a term implied by law.

[169] See also, *United Bank* v *Akhtar* [1989] IRLR 507; *Imperial Group Pension Trust Ltd* v *Imperial Tobacco Ltd* [1991] ICR 524; *Clark* v *Bet plc* [1997] IRLR 348 and *Wandsworth London Borough Council* v *D'Silva* [1998] IRLR 193 at 197.

policy,[170] it might be difficult for the employer to ignore this implied duty of trust and confidence.[171] Similarly express terms in the contract which allow the employer to carry out searches, monitoring or surveillance may not be conclusive as they may be restrictively interpreted.[172]

(f) *Remedies*

The usual remedies of damages and injunctions should be available for an action relating to the breach of the implied term of trust and confidence. However there is no authority in which an injunction was actually granted to restraint a breach of the implied term of trust and confidence. Nonetheless, since such injunctions have been granted restraining employees from breaching their duty of fidelity,[173] in principle such injunctions should also be available against employers.

Percuniary or financial loss that flow from a breach of the implied term of trust and confidence can clearly be claimed[174] on the usual principles based on remoteness. However, in the context of the implied term of trust and confidence, the damage suffered is more often than not non-percuniary in nature. Employees may wish to claim for matters such as anxiety, depression, embarrassment or mental distress. Can these be claimed if they are not too remote? The leading authority is *Addis* v *Gramophone Co Ltd*[175] where it was held that damages for injured feelings cannot be claimed when the employment contract was wrongfully terminated. *Addis* v *Gramophone Co Ltd* also represents the current position in Singapore.[176]

[170] See, Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 ILJ 79.

[171] See also the New Zealand case of *Walden* v *Barrance* [1996] 2 ERNZ 598 where the Chief Judge suggested that the implied term of trust and confidence might be incapable of being negatived if to do so would be incompatible with the contract remaining an employment contract. Further, in so far as such a clause can be construed as an exclusion clause, section 3 of the Unfair Contracts Act (Cap 396, 1994 Ed), could also be relevant: see the writer's note, "Express Terms in Employment Contracts" [1999] 6 CLP 215 at 217.

[172] See, *supra,* note 169.

[173] *Printer & Finishers Ltd* v *Holloway* [1965] 1 WLR 1; *Tang Siew Choy* v *Certact Pte Ltd* [1993] 3 SLR 44.

[174] *Malik* v *BCCI SA* [1997] 3 All ER 1.

[175] [1909] AC 488.

[176] *SR Fox* v *Ek Liong Hin Ltd* [1957] MLJ 1; *Haron bin Mundir* v *Singapore Amateur Athletic Association* [1992] 1 SLR 18. See also the Malaysian decision of *Penang Port Commission* v *Kanawangi s/o Seperumaniam* [1996] 3 MLJ 427.

The underlying policy reasons for this approach include the difficulty in assessing such damages,[177] and the possibility of excessive claims.[178] However, these reasons are open to some debate. In relation to the difficulty in assessing such claims for instance, the courts have not been prevented from assessing such damages in tort actions.[179] Moreover, in relation to the fear of excessive claims, it is unlikely that Commonwealth courts are likely to be swayed[180] by the practice in America of awarding huge amounts of damages.

Perhaps in light of the fact that the underlying considerations are somewhat questionable,[181] *Addis* v *Gramaphone Co Ltd,* was not followed in *Cox* v *Philips Industries Ltd*.[182] Lawson J in this case stated, "I can see no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach".[183] On the facts, the unjustified relegation of the plaintiff employee to a position of lesser responsibility was held to be have been in breach of contract and the court awarded damages for the resulting mental distress. However, any hope that *Cox* v *Philips Industries Ltd* heralded a new direction in recognizing such damages was dashed in *Bliss* v *South East Thames Regional Health Authority*.[184] The case involved a breach of the implied term of trust and confidence, but the court refused to follow *Cox* v *Philips Industries Ltd*, finding itself bound by *Addis* v *Gramaphone Co Ltd*. Hence, the claim for mental distress was disallowed albeit without much argument. However, the matter again came up for consideration recently in *Malik* v *BCCI SA*[185] where *Addis* v *Gramaphone Co Ltd* received a restrictive interpretation by House of Lords. Though the case only concerned financial losses, it may be that *Addis* v *Gramaphone Co Ltd* is finally on the wane.

[177] *Per* Brennan J in the Australian case of *Baltic Shipping Company* v *Dillion* (1992-1993) 176 CLR 344 at 369.

[178] *Per* Straughton LJ in *Hayes* v *Dodds* [1990] 2 All ER 815 at 823; *per* Mason J in *Baltic Shipping Company* v *Dillion* (1992-1993) 176 344 at 362.

[179] *Per* Cooke P in *Mouat* v *Clark Boyce* [1992] NZLR 559 at 569.

[180] As Lord Denning stated in *Perry* v *Sidney Phillips & Son* [1982] 3 All ER 705 at 709, matters such as anxiety, worry and distress, will not be subject to excessive compensation but only "modest compensation".

[181] See also, Burrows, "Mental Distress Damages in Contract – a Decade of Change" [1984] LMCLQ 119.

[182] [1976] 3 All ER 161.

[183] *Ibid*, at 166.

[184] [1985] IRLR 308. See also *Shove* v *Downs Surgical plc* [1984] 1 All ER 7.

[185] [1997] 3 WLR 95.

In addition there has been much academic support for the view that such damages should be awarded. For instance, *McGregor on Damages*[186] states,

> The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however, the contract is not primarily a commercial one, in the sense that it affects, not the plaintiff's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in contemplation.

Moreover, such an approach has also been adopted at least in some of the cases in Canada[187] and New Zealand.[188] It may also be pointed out that in the Canadian case of *Vorvis* v *Insurance Corporation of British Columbia*,[189] Wilson J who dissented, stated,[190]

> Professor Fridman[191] notes that the most important type of contract in which damages for mental distress have been awarded is the employment contract[192]...He suggests that this is because of the nature of relationship it creates which is one of trust and confidence...I would add that it may also be because of the vulnerability of the employee to the superior authority of the employer.

Thus, *Addis* v *Gramaphone Co Ltd* may not be the final word on the matter and there is a possibility that such claims may be allowed. Of course, the fact that such damages may be awarded does not mean that they will

[186] (1997 – 16th Ed) at 99. See also, Phang, "Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords" [1996] JBL 362 at 373-380; Enonchong, "Breach of Contract and Damages for Mental Distress" (1996) 16 OJLS 617.

[187] *Newell* v *Canadian Pacific Airlines Ltd* (1976) 74 DLR (3d) 574; *Brown* v *Waterloo Regional Board of Commissioners of Police* (1982) 136 DLR (3d) 729.

[188] *Mouat* v *Clark Boyce* [1992] 2 NZLR 559; *Watson* v *Dolmark Industries Ltd* [1992] 3 NZLR 311.

[189] (1989) 58 DLR (4th) 193.

[190] *Ibid*, at 214.

[191] This was with reference to Fridman, *The Law of Contract in Canada* (1986), at 675.

[192] See, for instance, *Pilon* v *Peugeot Canada Ltd* (1980) 114 DLR (3d) 378; *Tippett* v *Int'l Typographical Union Local* 226 (1976) 71 DLR (3d) 146; *Pilato* v *Hamilton Place Convention Centre Inc* (1984) 7 DLR (4th) 342; *Bohemier* v *Storwal Int'l Inc* (1982) 142 DLR (3d) 8 and *Speck* v *Greater Niagara General Hospital* (1983) 2 DLR (4th) 84.

be awarded in every case in which the implied term of trust and confidence has been breached. It would only be awarded in cases where such damages could have been said to be within the contemplation of the parties. The unreported American decision involving a McDonald's employee discussed earlier[193] would perhaps be such a case.

Finally, in relation to the question of whether the employee can terminate the contract of employment if the employer has breached the implied term of trust and confidence, that would depend on whether the employer's actions clearly demonstrate that he wishes no longer to be bound by the contract.[194] In relation to the employer if the searches or monitoring reveal that the employee has committed a repudiatory breach of contract for instance by misusing confidential information or misappropriating office property, summary dismissal may be justified.[195] If the searches or monitoring merely reveal that the employee has been using the internet or e-mail for private purposes, whether that *per se* can justify summary dismissal, would depend on factors such as whether the contract prohibited such usage,[196] whether the contract spelt out the effect of such usage, the extent of such usage and whether the usage reveals anything that is highly detrimental to the interests of employer.[197] However, a safer course for the employer to adopt would be to terminate the contract by giving notice.[198]

IV. Conclusion

Though there is no right of privacy as such in Singapore, privacy can be indirectly enforced in the employment context through a breach of confidence action or through an action based on the breach of the implied term of trust and confidence. In order to avoid such actions, the best possible course of action for the employer would be to have an express term in the contract allowing him to carry out the relevant searches, surveillance or monitoring. This may not be conclusive but it certainly will be highly relevant. From the viewpoint of the employee, the greatest hurdle is the fact that where

[193] See above.

[194] *Western Exacavating (ECC) Ltd* v *Sharp* [1978] IRLR 27 at 29; *Bracebridge Engineering Ltd* v *Darby* [1990] IRLR 3.

[195] See, for instance, *Laughton* v *Bapp Industrial Supplies* [1986] ICR 634.

[196] However, this may not be conclusive, see *supra*, note 59.

[197] See, for instance, *supra*, note 146.

[198] Even if the contract of employment does not expressly provide for termination by notice, generally it is still possible for the employer to terminate the contract by giving reasonable notice; see *Richardson* v *Koeford* [1969] 3 All ER 1264; *D'Cruz* v *Seafield Amalgamated Rubber Co Ltd* (1963) 29 MLJ 154.

the damage suffered is non-percuniary in nature. One cannot say with absolute surety that such damages can be claimed. Further, given that it is a relatively untraversed area, the employee may be unwillingly to embark on such action. In addition, since (other than for the recent economic crisis) the job market in Singapore has been relatively buoyant, the employee who is displeased with the employer's conduct may just resign and seek employment elsewhere. Thus, it is unlikely that many actions concerning privacy will arise in Singapore. Nonetheless, this should lead the employer into thinking that it is fine to implement such measures. This is so because there is a school of thought[199] that suggests that all such measures are ultimately counter productive and would lead to unhappiness, stress and bitterness at the workplace.

RAVI CHANDRAN*

[199] See, for instance, Bible, *Privacy in the Workplace*, (1990), Chapter 14.

* LLB (NUS); LLM (Cantab); Advocate and Solicitor (Singapore). Assistant Professor, Faculty of Business Administration, National University of Singapore.