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TENURE IN EMPLOYMENT

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Educational institutions exist to serve the public good as centres for the transmission of knowledge and as places where new knowledge can be created or discovered. In order to achieve these goals, academic freedom, that is the freedom to teach what one believes to be the truth and the freedom to conduct research wherever it may lead to, is absolutely crucial. Tenure guarantees such freedom. In addition, tenure gives staff the opportunity to embark on long-term research that may not produce immediate results. In light of these reasons, universities, polytechnics as well as certain other organisations involved in higher education, often grant tenure to their staff upon the fulfillment of certain criteria. The aim of this note is to examine what is meant by the term tenure in the Singapore context. This is because, while tenure is quite commonly granted in the context of some educational institutions in Singapore, the exact legal meaning of it tends to be fuzzy. The note also makes some comparisons to the position in America in this regard.

I. INTRODUCTION

Educational institutions exist to serve the public good as centres for the transmission of knowledge and as places where new knowledge can be created or discovered. In order to achieve these goals, academic freedom, that is, the freedom to teach what one believes to be the truth and the freedom to conduct research wherever it may lead to, is absolutely crucial. Tenure guarantees such freedom. In addition, tenure gives staff the opportunity to embark on long term research that may not produce immediate results. In light of these reasons, universities, polytechnics as well as certain other organisations involved in higher education, often grant tenure to their staff upon the fulfillment of certain criteria.

However, there is also a school of thought that subscribes to the view that tenure leads to unproductivity. They argue that security of employment leaves the employee with little incentive to perform. They also argue that the tenure system results in inflexibility. Rapid changes in the outside world may make courses, programmes, departments or even faculties redundant and irrelevant, Nonetheless, the institutions may be forced to retain staff because they are on tenure.

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Though there are pros and cons, the aim of this note is not to examine the merits or demerits of the tenure system. Rather the aim of this note is to examine what is meant by the term tenure in the Singapore context. This is because, while tenure is quite commonly granted in the context of some local educational institutions in Singapore, the exact meaning of it tends to be fuzzy. This note will also make reference to the practice in certain American universities with regard to tenure.

II. PERMANENT EMPLOYMENT

In order to ascertain the meaning of tenure, one has first to look at the contract granting the tenure. The contract may define exactly what is meant by tenure in which case there will be little uncertainty. Many American universities for instance, have clear definitions as to what is meant by tenure.[1] However, if the contract does not define the term tenure, aside from stating that the employee has been granted tenure, then that could result in considerable uncertainty.

Tenure is often viewed as offering permanent employment. For instance, the Oxford Dictionary of Current English[2] defines tenure to mean "guaranteed permanent employment". Likewise, the Cambridge International Dictionary of English states in respect of tenure; "If you have tenure in your job, your job is permanent".[3]

However, that leads to the question of what is meant by permanent employment. One case in which the issue arose for consideration was *McClelland* v *Northern Ireland General Health Services Board*.[4] In this case, the defendant board in an advertisement for the post of a senior clerk stated, "[s]ubject to a probationary period appointment will be permanent and pensionable". The plaintiff applied for the job and was selected. Having served her probation she was confirmed in her job. 4 years later her employment was terminated by notice. As to the issue of what was meant by the term permanent, Lord Goddard stated, "[t]hat an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment".[5] This was followed in two local cases. In the first, *Chiam Heng Hsien* v *Jurong Town Corporation*,[6] the relevant clause read "[a]ll existing staff, shall upon satisfactory completion

1 See for instance, Rice University's definition at http://www1.umn.edu/usenate/faculty_senate/guidelines.html and University of Tennessee's definition at http://web.utk.edu/ ~senate/UT_Tenure6-98.html.

2 Oxford University Press, 1998 revised edition at p 941.

3 Cambridge University Press, 1995 edition, at 1501.

4 [1957] 2 ALL ER 129.

5 *ibid* at p 134.

6 [1986] 1 MLJ 121.

of their probationary period, be examined by the Medical Officer in charge of Staff before confirmation in their appointments, and if passed fit, shall be placed on the permanent establishment". In the second, *Low Pu Tong* v *Housing and Development Board*,[7] the plaintiff employee received a letter stating that he was placed on "permanent employment". In both cases, the court cited *McClelland's* case in approval and stated that permanent employment did not mean employment for life.

Thus, usually just because a person is placed on "permanent employment", it does not necessarily mean that he is employed for life. However, it is not the case that there can never be employment for life. In *Salt* v *Power Plant Co*,[8] the plaintiff was engaged by the defendant company upon the terms of a letter dated 24 December 1925. The letter provided that the plaintiff's engagement was for a minimum period of three years, subject to the defendant company's right to cancel the agreement in case of wilful default by the plaintiff. The letter also provided that "The company shall have the right to terminate the agreement after the expiration of the above mentioned period by giving 6 months' notice in writing prior to the ensuing 31 December, and in the absence of such notice the engagement to remain in force as a permanent one". Thus essentially, the company had to give him notice by 31 December 1928, failing which the employment would be a permanent one. The court held the engagement was to last the lifetime of the plaintiff because of the very clear language used. This case was distinguished in *McClelland's* case. The court in *McClelland's* case in respect of *Salt* v *Power Plant Co*, stated "the language used and the contrast between the two periods of service were there so strong as to render inevitable the conclusion that a lifetime service was intended".[9]

Thus it would appear that it is possible to have a contract for life if indeed that is the intention of the parties. In the case of educational institutions, clearly the intention of the parties in granting tenure could not have been to make the employment terminable by notice on the part of the employer as that would make the tenure meaningless. Thus it is suggested, an employee on tenure, subject to the matters discussed below, would indeed have permanent employment in the true sense of the word.

However, must permanent employment be for life; can it not be until the official retirement age?[10] The Retirement Age Act[11] provides that subject to

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7 [1991] 1 MLJ 396. See also, *Clark* v *Independent Broadcasting Co Ltd*, [1974] 2 NZLR 587.

8 [1936] ALL ER 322.

9 [1957] 2 ALL ER 129 at 139.

10 See also AG Guest, *Chitty on Specific Contract* (Sweet & Maxwell, London, 1999) at 872, where a similar query is raised.

11 Cap 274A, 1994 Ed.

certain exceptions,[12] the minimum retirement age is 62. It does not provide for a maximum retirement age. Though it does not provide that the maximum age for working is 62, the question arises whether it would nonetheless be possible to maintain that it is an implied term in the contract of employment that the tenure granted would only be up to the official retirement age.[13]

The two well-established tests in contract law under which terms are implied are the officious bystander test[14] and the business efficacy test.[15] Using the officious bystander test, the question would turn on whether it is so obvious that it goes without saying that a person who has passed the official retirement age should not be working for an educational institution. Using the business efficacy test, the question would turn on whether business efficacy dictates the contract of employment of a person employed in an educational institution should terminate at the age of 62 as a matter of necessity. Given that an employee in an educational institution would be exercising intellectual as opposed to physical skills and given that there are many senior faculty who have passed the official retirement age and who are still serving useful functions in educational institutions through out the world, it is likely that these questions would be answered in the negative. Hence, it is suggested that if an employee is on tenure, he would have a permanent job for life, subject to the matters discussed a little later.

Of course one obvious qualification to having a permanent job for life, is a provision to the contrary in the contract of employment. The contract for instance, can state that the tenure is till the age of 55 or 60. If the contract provides that tenure is till the age of 55 or 60, then the job cannot be for life. However, the question might arise as to whether such a provision wound run foul of the Retirement Age Act. Section 2(2) of the Retirement Age Act provides that an employee would be considered dismissed under the Retirement Age Act if the contract of employment is terminated by the employer before the official retirement age, with or without notice, or if the employer retires or requires or causes the employee to retire on the grounds of age. Breach of the Retirement Age Act results in an offence under section 4(3). Further, section 6 provides that a contract term which provides for retirement age for less than 62 years of age is invalid.

However, as stated, there are certain exceptions to the Retirement Age Act and these are contained in the Retirement Age (Exemption) Notification. Section 2(c) of the Retirement Age (Exemption) Notification provides that members of the teaching staff of the local polytechnics or the National University of Singapore or the Nanyang Technological

[12] See, Retirement Age (Exemption) Notification.

[13] See also, *Duke* v *Reliance Systems* [1982] ICR 449.

[14] *Shirlaw* v *Southern Founderies (1926) Ltd* [1939] 2 KB 206.

[15] *The Moorcock*, (1889) 14 PD 64. See also, the local case of *Chuan Hong Auto (Pte) Ltd* v *Shell Eastern Petroleum (Pte) Ltd*, [1996] 1 SLR 415.

University[16] employed "under a contract for a fixed term" are exempted from the provisions of the Retirement Age Act.

The phrase "fixed term" in the context of an employment contract was considered in *British Broadcasting Corporation* v *Ioannou*.[17] Lord Denning in this case stated:

> In my opinion a 'fixed term' is one which cannot be unfixed by notice. To be a 'fixed term', the parties must be bound for the term stated in the agreement, and unable to determine it by notice on either side. If it were only determinable for misconduct, it would, I think, be a 'fixed term' - because that is imported by the common law anyway. But determination by notice is destructive of any 'fixed term'.[18]

Geoffrey Lane LJ in the same case stated that "the word 'fixed' must have been intended to add something to the word 'term' and the only meaning, it seems to me, which can be applied to it is that the two year term should not be capable of abbreviation except by one of the reasons implied by the common law in every contract of employment, such as a wilful and serious misconduct".[19]

Thus, this case suggests that a fixed term contract is one in which neither party to the contract can determine it before the fixed period is up. If this definition were applied to the case of an employee on tenure, that may lead to problems. This is because while the intention of the parties in relation to tenure must have been not to give the employer the right to remove the employee prior to the expiry of tenure by giving notice, it could not have been the intention of the parties to bind the employee to the job for the period of tenure. Indeed, it is a very common practice for employees to leave the service of the educational institution by giving notice whilst still having tenure.

However, the correctness of *British Broadcasting Corporation* v *Ioannou* was doubted in the subsequent case of *Dixon* v *British Broadcasting Corporation*.[20] Lord Denning stated that that part of the decision of *British Broadcasting Corporation* v *Ioannou* on the definition of a fixed term contract was "erroneous"[21] and that the court in this case should "depart from it".[22] Lord Shaw and Brandon concurred, both stating that the *British Broadcasting Corporation* v *Ioannou* had been decided *per*

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[16] The Singapore Management University is not included in the list and it would appear that tenure in that university is granted till the age of 62.

[17] [1975] 2 ALL ER 999.

[18] [1975] 2 ALL ER 999 at 1003.

[19] [1975] 2 ALL ER 999 at 1008.

[20] [1979] IRLR 114.

[21] *Ibid* at page 116.

[22] *Supra* note 20 at 116.

incuriam.[23] The court in this case stated that a fixed term contract was merely a contract that was for a specific stated period though it was terminable by notice within that period. This was followed in the subsequent case of *Ryan* v *Shipboard Maintenance Ltd*.[24] Thus, the present state of the law would appear to be that so long as the contract is for a specific stated period it can be a fixed term contract even if it allows for earlier termination by notice.

In relation to tenure, if the contract states that tenure is until the age of 55 or 60, the contract would be for a specific stated period of time. Thus, it is likely that an employee with tenure would be considered to be employed under a fixed term contract even if he has the right to terminate the contract prematurely by notice. Hence, it is suggested that the exception to the Retirement Age Act is likely to be met. Thus, if the contract provides that the tenure is until a particular age and that age is earlier than the official retirement age, this is unlikely to run foul of the Retirement Age Act.

III. EMPLOYER IN BREACH

If it is accepted that tenure is for life or until the age provided for in the contract offering the tenure, what would be the effect if the employer nonetheless sought to terminate the contract prematurely by notice. If the employer tries to terminate the contract prematurely by notice, that would clearly amount to a repudiatory breach on the part of the employer subject to the matters discussed below. The employee in such a situation may seek damages or reinstatement.

(a) *Damages*

In relation to damages, the measure of damages as in all contract actions would prima facie be the amount that the plaintiff employee would have earned if the contract had been properly performed. In *Zaglanikis* v *Dana West Hotels Ltd and Courtyard Inns Ltd*[25] for instance, the plaintiff employee was guaranteed one year of work from 9 March 1981 to 9 March 1982. On 1 September 1981, the employers in breach of the contract unlawfully terminated the contract. The court held that the employee was entitled to what he would have received from 1 September 1981 to 9 March 1982, after deducting the amount that was already paid to him on termination. Similarly, in *Reigate* v *Union Manufacturing Company (Rams-Bottom), Limited and Elton Cop Dyeing Company, Limited*,[26] where the agent who was to be hired for seven years was prematurely removed from

[23] *Supra* note 20 at 116 and 117 respectively.
[24] [1980] IRLR 16.
[25] (1982) 20 Sask R 59.
[26] [1918] 1 KB 592.

his services, the court held that he was entitled to damages based on what he could have earned for the balance of the seven years. However, the court did not actually decide the amount and that matter was redirected to another court.

If similar principles were applied to wrongful dismissal cases involving tenured employees, that could lead to a lot of speculation. This is so because the employee, after the trial, could have died or become incapacitated, in which case he would not have received an income from the employer in any case. In addition, the employee would be receiving a lump sum in advance and so this amount has to be discounted so as not to over compensate the plaintiff.

However, such problems are not unique to wrongful dismissal cases. In personal injury cases as well similar problems abound. In relation to personal injury cases, *McGregor on Damages* states:

> The courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the plaintiff's present annual earnings less the amount if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow the fact that a lump sum is being given now instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to the multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decease in the annual earnings, the so-called contingencies of life, and the incidence of inflation and taxation. [27]

However, wrongful dismissal cases while similar to personal injury cases, are not identical. This is because in the case of personal injury cases, the plaintiff's argument would usually be that it would not be physically possible to get the same type of job or salary because of the disability or injury. In the case of wrongful dismissal, there would be a further complication that it may not be physically impossible to get the same type of job or salary and thus this factor too has to be taken into consideration.[28]

Indeed, the case of *Edwards* v *Society of Graphical and Allied Trades*[29] supports the view that a somewhat similar though not an identical approach be used for breach of contract actions when assessing future losses. In this

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[27] 16th ed (London: Sweet & Maxwell, 1997) at 1564.

[28] See *Edwards* v *Society of Graphical and Allied Trades,* [1970] 3 WLR 713 at 723 and 724.

[29] [1970] 3 WLR 713.

case, the plaintiff employee was a temporary member of the defendant union. The contract between the plaintiff and the union provided that if certain dues were not paid the union membership would be terminated. The dues were to be deducted from his salary and paid by his employers. However, owing to an error that was not due to his fault, the dues were not paid. The union revoked the plaintiff employee's membership, which made it difficult for him to find a suitable job. This was so because vacancies in the field were normally offered to union members. The court awarded him damages based on the actual financial loss to the date of the trial and a sum for future loss of earning capacity assessed. In relation to the latter, Sach LJ stated:

> This is not a case for embarking on detailed calculations or on precise forecasts as to how long it will be before a suitable job with prospects of promotion to Grade 1 becomes vacant and he is selected for it: nor as to how long he may remain in lower grades. An overall assessment on a broad basis is needed.[30]

Lord Denning concurred and stated "I feel that damages in such a case as this are so difficult to assess that I would be inclined to view them somewhat broadly".[31] Megaw LJ too concurred stating:

> Where there are so many incalculables, it would not be right to seek to give an aura of scientific respectability to the assessment of future damages by purporting to apply arithmetical or actuarial formulae to the assessment, or to any individual factor on which the assessment partly depends. One must try to assess. One cannot calculate.[32]

Thus, while the court recognised that future loss of earnings for an unlimited period of time can be claimed for a breach of contract action, it did not lay down any precise formula. This is unlike personal injury cases where generally as stated, courts use the multiplier-mutiplicand method.

Another related matter in relation to damages which has already been alluded to is mitigation. As stated by Lord Haldane in *British Westinghouse Electric and Manufacturing Co* v *Underground Electric Railways Co of London*,[33]

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to

[30] *Ibid* at 729.
[31] *Supra* note 29 at 723.
[32] *Supra* note 29 at 731.
[33] [1912] AC 673.

> mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his negligence to take such steps.[34]

The onus of proving the failure to mitigate is on the defendant[35]. However, the plaintiff does not have to accept the first job that comes along the way. Thus in *Yetton* v *Eastwoods Froy Ltd*,[36] the court held that the plaintiff who has been removed from his managing director post did not have to accept the assistant managing director post offered by the defendants. Similarly, in *Edwards* v *Society of Graphical and Allied Trades*,[37] the court held that the plaintiff who was a skilled craftsman did not have to immediately accept lower grade jobs. However, after a reasonable time, the plaintiff may have to settle for some other albeit lower level of a job or a job offering lower salary.[38]

To illustrate the principles discussed above, take the case of an employee who is receiving $10,000 per month and who is on tenure and whose contract does not allow the employer to terminate it earlier by giving notice. If that employee were unlawfully dismissed, does not manage to find another job for a year and decides to bring an acrion, one issue that the court would have to consider is mitigation. In this regard, if the court decides that it was reasonable for the employee to have searched for an alternative job for a year, for that period, the damages would have centered around $10,000 per month. If the court also finds that thereafter, the employee should have settled for a job offering $6000 per month, assessing the damages for that subsequent period would involve speculation as the employee might eventually earn as much as he could have had he not benn unlawfully dismissed, but as stated in *Edwards v Society of Graphical and Allied Trades*,[39] the court would have to approach the problem broadly and assess the damages for the subsequent period on that basis.

In relation to damages, it may also be pointed out that while only salary was considered, other payments which were obligatory but which were foregone as a result of the termination such as payments in respect of furnished accommodation[40] or central provident fund contributions[41] can also be claimed.

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[34] *Ibid* at 689.

[35] *Roper v Johnson*, (1873) LR 8 CP 167; *Garnac Grain Co. v Faure & Fairclough*, [1968] AC 1130.

[36] [1967] 1 WLR 105.

[37] *Supra* note 29.

[38] *Yetton v Eastwoods Froy Ltd,* [1967] 1 WLR 105.

[39] *Supra* note 29.

[40] *British Guiana Credit Corp v Clement Hugh Da Silva* [1965] 1 WLR 248.

[41] *D'Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154; *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109.

(b) Reinstatement

Aside from damages, the question may also arise whether the employee can seek reinstatement. Generally, specific performance is not granted in contracts of emp loyment and thus this possibility is unlikely.[42] However, the employee may explore other avenues that may be open to him.

The first avenue is through the provisions of the Employment Act.[43] The Employment Act applies to employees as defined in the Employment Act. Section 2 of the Employment Act defines an employee to mean

> a person who has entered into or works under a contract of service with an employer and includes a workman and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any Part of section thereof, but does not include any seaman, domestic worker or any person employed in a managerial, executive or confidential position or any person belonging to any other class of person whom the Minister may from time to time by notification in the Gazette, declare not to be employees for the purposes of this Act.

For our purposes, it may be noted that the President has not made any declaration as to the category or class of government employees covered and hence government employees are not covered under the Employment Act. Further, the Minister has made a notification that employees of statutory boards are not covered.[44] The term statutory board is not defined in any statute. However, it is perceived to include organsations set up pursuant to an Act of Parliament and which perform some public purpose.[45] Thus, it is likely that employees of the National University of Singapore, Nanyang Technological University and the local polytechnics, all of which are created under Acts of Parliament and which serve to achieve some public purpose are statutory boards.[46] However, the Singapore Management University is not a statutory board as it was intended to be a private organisation.[47] Thus while the employees of the National University of Singapore, Nanyang Technological University and the local polytechnics are unlikely to be covered, the employees of the Singapore Management University may be. Even if they are, the question might arise whether such

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[42] *Lim Tow Peng v Singapore Bus Services*, [1976] 1 MLJ 256 at 258 and *Low Pu Tong v Housing and Development Board*, [1991] 1 MLJ 396 at 398.

[43] Cap 91, 1996 Ed.

[44] See, Cap 91, N1, 1990 Edition.

[45] See, *Halsbury's Laws of Singapore*, Vol. 1, at 7.

[46] See also, Singapore Parliamentary Debates, Official Report, Vol 71, at 871.

[47] *Ibid*.

employees would be employed in a "managerial, executive or confidential position". In this regard, in the recent case of *Stanfield Business International Pte Ltd* v *Minister of Manpower,*[48] the court held that the lecturer in a private institution was not employed in a managerial, executive or confidential position as no evidence was raised in this connection. Thus, in so far as the employees in question are not involved in any such functions, they may fall under the purview of the Employment Act.

Under section 14(2) of the Employment Act it is provided that "where an employee considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment".

Section 14 is headed as "misconduct of employee" and in addition section 14(1) relates to dismissal without notice on grounds of misconduct. Thus the question arises whether section 14(2) only applies to such cases or also applies to cases in which the employee's services have been terminated with notice but the employee believes that his dismissal or termination has been without just cause. It has been argued that section 14(2) applies to both categories of cases.[49] However, in the very recent case of *Noor Mohamed bin Mumtaz Shah* v *Apollo Enterprises Ltd (t/a Apollo Hotel Singapore),*[50] it was held that section 14(2) does not apply to cases where there has been a termination by notice. This is likely to be correct and hence it would be very difficult even for tenured employees covered under the Employment Act to seek reinstatement using this provision if their services have been terminated by their employer giving notice.

The second avenue that may be open to them is through the process of judicial review. Decisions of the employer can be challenged on public law grounds if the employee can be considered to be holding a "public office".[51] If successfully challenged, the termination may be deemed null and void and the employee may be deemed to never have left the employment of the employer.[52] Though it is not entirely settled what is meant by the phrase "public office", it is likely to be restrictively interpreted in light of the very recent case of *Public Service Commission* v *Lai Swee Lin Linda*.[53] In this case the employee in question was a senior officer with the Land Office, Ministry of Law. She was placed on probation and eventually her contract was terminated. She applied to court for judicial review. The court held that the terms of the contract were spelt out in the instruction manual that was part of her contract with the Government. It was also held that the

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48 [1999] 3 SLR 742 at 753.

49 CCH, *Employer's Legal Guide*, at D-3, 903.

50 [2000] 1 SLR 159.

51 *Ridge* v *Baldwin*, [1964] AC 40.

52 *Phang Moh Shin* v *Commissioner of Police*, [1967] 1 MLJ 186.

53 [2000] 1 SLR 644.

instruction manual that had terms relating to the probation were not enacted under any statute or statutory legislation. Thus they did not have statutory force. The court held that the relationship between the employee in question and the government was that of an ordinary employer and employee. It was purely governed by contract and if breaches occurred the remedy lay in private law and not under public law. The court cited in approval the leading case of *R* v *East Berkshire Health Authority, ex p Walsh*, where Sir John Donaldson MR[54] stated:

> Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer. This only makes it more likely that there will be special statutory restrictions upon dismissal or other underpinning of his employment: see Lord Reid in *Malloch v Aberdeen Corporation*, at p 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interests of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.

Since in the case of educational institutions in Singapore, the granting of tenure would be a matter of contract and not pursuant to any statutory provision, the breach of the provisions of the tenure would be a matter of private law. As such it would be most unlikely for an employee whose tenure has been prematurely terminated by notice to be able to successfully challenge it by means of judicial review.

IV. EMPLOYEE IN BREACH

(a) Summary Dismissal

Though it would not be possible for the employer to terminate the contract of a tenured employee by notice without breaching the contract himself, if the employee commits a repudiatory breach, the employer may summarily dismiss him. As observed in *British Broadcasting Corporation* v *Ioannou*,[55] a contract of employment including a fixed term contract can always be terminated for serious or wilful misconduct. This is in fact similar to all other contracts that can be terminated for a repudiatory breach even if they cannot be terminated by notice.

While if there is a repudiatory breach, the employer can terminate the contract and summarily dismiss the employee, the problem would be to

[54] [1985] QB 152 at 164.

[55] *Supra*, note 17 .

determine what amounts to a repudiatory breach. Cases have held that among other matters incompetence[56] and negligence[57] on the part of the employee can amount to a repudiation of the contract though much would depend on the actual facts of each case. Similarly, in *Orr* v *University of Tasmania,*[58] a professor's summary dismissal for seducing a female student was upheld. Further, as stated in *Peace* v *Foster,*[59] "if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master".

In the case of tenure, the contract granting the tenure may specifically explain what may be viewed as incompetence or negligence or misconduct and the consequences of such incompetence or negligence or misconduct as in the case in many American universities.[60] In this regard, as stated in *Pringle* v *Lucas Industrial Equipment Ltd,*[61] "[i]f employers wish to dismiss automatically for certain misconduct which is short of inherently gross misconduct they must be able to show that the management has unequivocally brought to the attention of employees what that conduct is and what its consequences will be". For instance, it may be clearly provided that plagiarism, dishonest research or falsification of institutional records, may amount to misconduct resulting in dismissal. However, of course if the definition of incompetence, negligence or misconduct is worded too broadly that may defeat the very purpose of granting tenure and so employers would have to bear this in mind when drafting such clauses.

It must also be pointed out that if misconduct is established and the employer with full knowledge of the misconduct elects to continue with the services of the employee, the employer may lose his right to summarily dismiss the employee on the ground of that misconduct.[62] However, further misconduct even if it is of the same type, may give the employer a fresh right to summarily dismiss.[63]

If there is a summary dismissal for misconduct, and the employee falls under the purview of the Employment Act,[64] the employer must first

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[56] *Harmer* v *Cornelius*, (1885) 5 CBNS 236.

[57] *Baster* v *London and County Printing Works* [1899] 1 QB 901. In this case, the court also stated that a single act of negligence can also justify summary dismissal if it causes the employer considerable damage. Thus, the submission of wrong questions for an examination for instance may amount to such negligence warranting summary dismissal. See also, The *Jupiter General Insurance Co Ltd* v *Ardershir Bomanji Shroff* [1937] MLJ 143.

[58] [1957] 100 CLR 526.

[59] (1886) 17 QBD 536 at 539.

[60] See for instance, the section on termination for adequate cause of tenured employees in the case of Rice University and University of Tennessee; *supra* note 1.

[61] [1975] IRLR 266 at 269.

[62] *The Manager, Scudai Estate* v *Narayanan* (1960) 26 MLJ 162.

[63] *Ibid*.

[64] See *infra*.

conduct a due inquiry before dismissing the employee.[65] For instance, in *Lim Tow Peng* v *Singapore Bus Services Ltd*,[66] the court held that there was no due inquiry on the facts as the employee had not been told of the misconduct and had not been given a chance to be heard. Further, under the Employment Act, if the employee considers that he has been dismissed without just cause or excuse by his employer, he may within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.[67]

The question might also arise whether it would be possible to seek judicial review in respect of the dismissal. The respective Acts of Parliament, for instance in the case of the National University of Singapore, the National University of Singapore Act, provide that any statutes or regulations made pursuant to the constitution of the institutions would not have statutory force and would not been deemed to be statutory instruments.[68] Among other things, the constitutions grant the institutions the right to make regulations pertaining to the dismissal of employees.[69] Since such regulations do not have statutory force, following *Public Service Commission* v *Lai Swee Lin Linda*, discussed above, it is unlikely that the employee would be considered to be holding a public office. Thus any dispute relating to dismissal would be a private matter and not a public matter subject to judicial review.

The question might also arise whether aside from the provisions of the rules, Article 110(3) of the Constitution could apply. Article 110(3) provides that no public officer shall be dismissed or reduced in rank under the Article without being given a reasonable opportunity to be heard. Article 2 defines a "public officer" to mean a "holder of a public office in Singapore". The phrase "public office in Singapore" is in turn defined to mean an "office of emolument in the public service". The phrase 'public service' has been defined to mean 'services of the Government'. Since the institutions with the exception of Singapore Management University are likely to be statutory boards and not part of the government per se, it is unlikely that Article 110(3) would be applicable to them. As for the Singapore Management University, as it is a private organisation,[70] again Article 110(3) would not be applicable.

Thus, it is most unlikely that a tenured employee summarily dismissed from any of these institutions can seek to be reinstated by means of a judicial review.

[65] S 14(1) of the Employment Act.

[66] [1976] 1 MLJ 254.

[67] S 14(2) of the Employment Act.

[68] For instance, in the case of the National University of Singapore, see s 6(3).

[69] For instance, in the case of the National University of Singapore, see s 18(2)(b) of the First Schedule.

[70] See *infra*.

(b) Suspension

The question might also arise whether it would be possible for the employer to suspend a tenured employee for a certain period of time without pay[71] instead of dismissing him on the ground of misconduct. In common law, there is no implied right on the part of the employer to suspend an employee without pay for breach of duty.[72] Such a right has to be expressly included in the contract. Many American universities for instance, expressly include this right to suspend.[73] It may also be noted that in so far as the right is included in the contract, the right to suspend automatically means that the employee is not entitled to pay during the period of suspension even if this is not expressly stated in the contract.[74]

Aside from common law the right to suspend may also be implied by statute. Section 14(1) of the Employment Act provides that an employer may, instead of dismissing an employee who is guilty of misconduct, suspend him from work without pay for a period not exceeding one week. As the suspension is at most for a week, this right is not particularly significant in respect of tenured employees working in educational institutions. In addition, as stated, the Employment Act does not apply to all employees and thus section 14(1) would only be applicable in respect of employees covered by the Employment Act.[75]

(c) Pay Reduction

The question might also arise whether it would be possible for the employer to unilaterally reduce the pay of its tenured employees if they are not performing well. Payment is a fundamental term of the contract and a unilateral reduction of pay would amount to a repudiatory breach on the part of the employer. However, the employer may unilaterally reduce pay if there is an express term to this effect.[76] In certain American universities for

[71] However, it is usually possible for the employer to suspend the employee *with* pay. This is because there is generally no obligation on the part of the employer to provide the employee with work. See *Turner* v *Sawdon* [1901] 2 KB 653; *KV Pillai* v *Power Foam Rubber Products (MFG) Co Ltd*, (1963) 29 MLJ 268 at 270.

[72] *Henley* v *Pease & Partners Ltd*, [1915] 1 KB 698.

[73] See for instance, University of Tennessee's rules on suspension at http://web.utk.edu/-senate/UT_Tenure6-98.html

[74] *Wallwork* v *Fielding*, [1922] 2 KB 66.

[75] See *infra*.

[76] However, see *Wandsworth London Borough Council* v *D-Silva*, [1998] IRLR 193. The court in this case stated that if the employer is given the right to unilaterally vary the contract, clear language was required to reserve on the employer such a right. Further, the court stated that if the variation relates to a right of the employee courts would in construing the contract seek to avoid such a result.

instance, there are clear provisions as to when pay can be reduced and by how much and the procedure to be adopted before such reduction can take place.[77]

Further, it may also be noted that if the contract allows for variable components and these variable components which are based on performance are reduced, the employee may not have a cause for complaint. Further, it is also possible that if the employee commits a repudiatory breach warranting summary dismissal, instead of summarily dismissing the employee, the employer may be free to enter into a new contract with the employee at a reduced pay.[78]

V. FRUSTRATION OF THE EMPLOYMENT CONTRACT

Another way in which the contract of employment of a tenured employee may lawfully come to an end is by frustration. As stated *in Davis Contractors Ltd v Farham UDC*:

> [F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract….It was not this that I promised to do [79]

One situation in which the contract of employment would be frustrated is where the employee dies. As stated by Blackburn J in *Taylor* v *Caldwell*:

> There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, for example…promises to serve for a certain period of time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet, it was very early determined that, if the performance is personal, the executors are not liable. [80]

Another situation in which the contract of employment may be frustrated is where illness or disability sets in. In *Condor* v *Barron Knights Ltd*[81] for

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[77] See for instance, University of Minnesota's rules on pay reduction at http:/www1.umn.edu/usenate/faculty_senate/guidelines.html and Carnegie Mellon University's policies on pay reduction at http:/gollum.ma.cc.cmu.edu/uni_policy/documents/Tenure.html

[78] *Williams* v *Moss'Empires Ltd* [1915] 3 KB 242.

[79] [1956] AC 696 at 728-729.

[80] 122 ER 309 at 313.

[81] [1966] 1 WLR 87.

instance, the drummer in question entered into a contract that for five years he would play seven nights a week, frequently twice a night. Due to his over-exertion he collapsed after two years. When he recovered he was medically advised to perform only on four times a week. As his contract specifically obliged him to do what he in his weakened condition was not able or likely in the near future to do, the contract was held frustrated.

However, it is not every illness which frustrates the contract. As stated in the leading case of *Marshall* v *Harland and Wolff Ltd*,[82] the question is:

> Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment?[83]

Sir John Donaldson J in *Marshall's* case further listed some factors which would be relevant in determining the issues,[84] though these factors are not exhaustive:

(a) *The terms of the contract, including the provisions as to sick pay.*

The whole basis of a weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work or appears likely to return to work within the period during which such sick pay[85] is payable.

(b) *How long the employment was likely to last in the absence of sickness.*

The relationship is less likely to survive if the employment was inherently temporary in its nature for the duration of a particular job, than if it was expected to be long term or even lifelong.

[82] [1972] 2 ALL ER 715.

[83] *Ibid* at 718.

[84] *Ibid* at 718-719.

[85] Part IV of Employment Act has provisions relating to sick pay. S 44 of Part IV provides that generally an employee would be entitled to 14 days of paid sick leave if no hospitalisation is necessary and to 60 days of paid leave if hospitalisation is necessary in a year. However, s 35 provides that Part IV only applies to employees who are workmen or who earn less than $1600 a month. Thus even in respect of the tenured employees of the Singapore Management University who are covered under the Employment Act, Part IV would not be applicable. Thus in the case of tenured employees of all local educational institutions, the amount of sick leave an employee would be entitled to would have to be determined by looking at the contract.

(c) *The nature of the employment*.

Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) *The nature of the illness or injury and how long it has already continued and the prospects of recovery*.

The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship will be destroyed.

(e) *The period of past employment*.

A relationship which is of long standing is not so easily destroyed as one which has but a short history.

These factors would equally be applicable to employees on tenure, though factor (b) would point against frustration in the case of tenured employees.

The question might also arise whether it would be possible for the contract of employment of a tenured employee to be frustrated because of financial constraints on the part of the employer. For instance, because of a sudden drop in intake, it may not be economically viable to have so many staff teaching a particular subject. However, it is well established that economic viability generally would not frustrate the contract.[86] Further in such a situation, the staff may be assigned to teach fewer students or may be assigned to teach other courses within their capability. Perhaps, the more problematic question would be what if rapid changes in the industry, make a whole programme, department or faculty redundant? In that case, if it is not possible to assign some other suitable appointment to the tenured employee concerned, it may be argued that the contract has become radically different from what was originally envisaged and hence the contract is frustrated. Nonetheless, the position would be much clearer if there were an express term in the contract which provides for such matters as is the case with many American universities.[87]

[86] *Tsakiroglou & Co Ltd* v *Noblee and Thorl GmbH* [1962] AC 93; *Kin Nam Development Sdn Bhd* v *Khau Daw Yau* [1984] 1 MLJ 256 at 258.

[87] See for instance, Rice University's policies on such matters at http://web.edu/-senate/UT_Tenure6-98.html and Camegie Mellon University's policies on such matters at http://gollum.mac.cc.cmu.edu/univ_policy/documents/Tenure.html

VI. CONCLUSION

Increasingly in Singapore there has been a trend to follow the American system in respect of higher education. While emulating general policies, it might also be good practice to adopt the finer points. Adopting a clear definition of what is meant by tenure and expressly providing for situations in which the tenure may be terminated, as is the case with many American universities, would be one step in that direction. In fact, since adopting such a practice would go to help the employer more than the employee, employers should look seriously into this possibility.