Public Consultation on Review of the Employment Act

Feedback from the Corporate Practice and Civil Practice Committees of the Law Society of Singapore

21 February 2018

Consolidated Comments of the Law Society of Singapore's
Corporate Practice Committee and Members of the Civil Practice Committees
for the Employment Act (Cap 91) Review

	Current Legislation	Proposal for reform
1	Employees who are employed in a managerial or executive position ("**PME**s") and earning basic monthly pay above S$4,500 are not covered by the Employment Act ("**EA**"), and PMEs earning less than S$4,500 but more than S$2,500 are also excluded from Part IV of the EA. Part IV of the EA prescribes mandatory requirements for employment terms like hours of work, rest days and annual leave. One significant provision in Part IV is **section 45** which provides for prospective entitlement to retrenchment benefits (depending on contractual rights) for covered employees serving at least 2 years. A significant provision in the EA (outside Part IV) is **section 14** which provides for an avenue of redress available to covered employees for wrongful dismissal by their employers. A covered employee may make an appeal to the Minister for Manpower who may make an inquiry into the matter, and may order the employer in question to reinstate the unfairly dismissed employee or pay compensation in lieu of reinstatement.	Much public attention has been focussed on whether all PMEs should be covered by the EA or whether the salary cap for covered PMEs should be raised to keep in line with wage inflation. In our opinion, it is better for the policy debate to focus on whether all or some PMEs should be covered by section 14 (remedy for unfair dismissal) and section 45 (retrenchment benefit). First of all, it should be remembered in the past 15 years and particularly in the last few years, many pieces of social legislation have been enacted in Singapore to better protect the interests of employees. The Children Development and Co-Savings Act (Cap 38A) prescribes for maternity leave, childcare leave, unpaid infant care leave, shared parental leave, paternity leave and so on, to all employees including PMEs regardless of the salary they draw. The Retirement and Re-employment Act (Cap 274A) requires an employer to re-employ or make an "employment assistance payment" to eligible employees regardless whether they are PMEs and of their salary on reaching the statutory retirement age. Finally, in 2017 the Employment Claims Act (Act 21 of 2016) established the Employment Claims Tribunal which allows all PMEs to bring monetary claims of up to S$20,000 (or S$30,000 for employees who go through the Tripartite Mediation Framework or union-assisted mediation) against their employers or ex-employers in a low-cost and self-help avenue, much like the Small Claims Tribunal. Most of the protective provisions in the EA like mandatory provisions for public holiday, sick leave/annual leave entitlements, timely payment of salary and allowable deductions, are uncontroversial and not issues of concern to ordinary PMEs. Thus, it is submitted that the policy discussion on whether PMEs' rights should be enhanced should just focus on whether all or some PMEs should be covered by sections 14 and/or 45 (in particular if section 45 is amended to make retrenchment benefits mandatory).

		Another view expressed is that the proposals to extend the EA protections for unfair dismissal and retrenchment to PMEs earning more than $4,500 per month should not be adopted for the following reasons: 1. Unlike other legislation like the Children Development and Co-Savings Act (Cap 38A) dealing with childcare benefits, the EA does not include any citizenship criteria. This means that if you extend the EA benefits to PMEs earning more than S$4,500, it applies to expatriates and other foreign workers as a well as Singapore citizens. 2. When exploring setting up options with international clients, many post their PMEs here because the employment regulatory regime is employer friendly (at least when it concerns PMEs earning more than S$4,500, as expatriates will usually exceed this threshold). We will lose this competitive advantage if the EA is extended to all PMEs regardless of salary level (potentially then including even C-Suite level employees on high five-figure salaries). In the alternative, if the intention is to extend the EA to cover more PMEs regardless of citizenship status, then the threshold could possibly be raised (as has been the case previously) rather than eliminated entirely.
2	Section 14 This is an unusual provision in Singapore legislation as it bestows wide judicial-like powers on the Minister for Manpower, a member of the executive branch of the Government. Subsection (5) is a judicial ouster clause as the Minister's decision shall be "final and conclusive" and "shall not be challenged in any court". Subsection (6) further provides that a direction by the Minister shall operate as a bar to any court action for damages by the employee in any court in respect of wrongful dismissal. Another unsatisfactory aspect of Section 14 is the requirement for an aggrieved employee to appeal within one month from his last day of work, or the right to appeal to the Minister will be lost. It is not inconceivable that employees with poorer access to justice may often find themselves out of time when they eventually learn of their rights	When Section 14 was first historically introduced in the EA, perhaps due to the then fragile tripartite relationship, it was decided that the glare of publicity in an "open court" justice system may not be an ideal way to resolve disputes for wrongful dismissal. The same public policy consideration does not apply today. Singaporeans expect the administration of justice to be undertaken in a transparent manner. Thus, it is proposed that rather than the Minister retaining his/her role of adjudicating on unfair dismissal claims and the power to order reinstatement, this jurisdiction and power should be given to the Employment Claims Tribunals under the Employment Claims Act (as we understand is presently being contemplated). After all in any dispute, making findings of fact and assessing credibility of witnesses are matters better suited for a person trained as a judge. We believe that currently, district judges are appointed as referees of the Employment Claims Tribunals. Further, Employment Claims Tribunals decisions may be appealed

	through free legal aid; there is often a waiting period for an improvident person to seek help from a free legal clinic.	to the High Court, with leave from the District Court. If the above proposal is taken on board, this will not result in the Ministry of Manpower being completely removed from the process of resolving unfair dismissal disputes. Under the Employment Claims Act, it is mandatory for an ex-employee who wishes to make any claim to submit a request to the Commissioner of Labour for a mediation session with his ex-employer, which is often then done through the Tripartite Alliance for Dispute Management. It is also submitted that extending Section 14 to **all** PMEs may impose an onerous burden on the resources of the Ministry of Manpower if the Ministry would have to investigate and adjudicate on all unfair dismissal claims brought by PMEs. A claim brought by a senior PME for unfair dismissal is very likely to be a complicated and lengthy dispute (potentially involving issues of bonus and performance incentive payments, stock and share options, etc.) and a curial forum should be more appropriate to allow the disputants to ventilate their issues properly and fully. In the interests of transparency and recognition of Singapore's strength in its judicial infrastructure, all adjudication of employment disputes should therefore be carried out by the Employment Claims Tribunals or Courts. The role of the Commissioner for Labour should be kept to mediation. If the mediation is unsuccessful, the dispute should be adjudicated at the Employment Claims Tribunals or a Court. In summary, we advocate amending and migrating Section 14 of the EA to the Employment Claims Act with the objective that all employees (including PMEs) should be able to bring an action for compensation or reinstatement to the Employment Claims Tribunals. This will also involve allowing the Employment Claims Tribunals to hear unfair dismissal claims, which it in effect often already does when summarily dismissed employees bring claims for unpaid notice. As the tribunals' jurisdiction is limited to claims not exceeding $20,000 (or S$30,000 for employees who go through the Tripartite Mediation Framework or union-assisted mediation), a senior PME who wishes to claim for unfair dismissal is more likely to resort to a civil suit than the Employment Claims Tribunal.

		That said, while it is encouraging that both dismissal and salary-related claims could be streamlined for employees and employers under one forum, there are concerns that this may further limit access to the Courts for dispute resolution. The Employment Claims Tribunals currently handles lower value claims of S$20,000 (or S$30,000 in tripartite/union mediated cases). If the coverage of the EA and/or the Employment Claims Tribunals is to be extended, this will likely result in more complex claims coming before it. The standing and effectiveness of Employment Claims Tribunals should be enhanced by allowing legal representation: 1. For disputes coming before the Employment Claims Tribunals, there is at present an inequality of arms between the employee, who would be unrepresented, and the employer, who could be represented by in-house, legally-trained counsel; 2. The Employment Claims Tribunals may not be well-equipped to resolve high level dismissal-related cases that can be rather complex, such as in the case of *Phosagro Asia Pte Ltd v Piattchanine Iouri* [2016] 5 SLR 1052, which went before the Court of Appeal; If the concern is over cost of legal representation in the Employment Claims Tribunals, then scale fees can be introduced for lower value claims for lawyers who wish to appear before the ECT. Aspects of the Primary Justice Project (PJP) can be modified and applied in this context. It is submitted that true access to justice is difficult to achieve without the right of legal representation. There is another issue with Section 14. Prior to 1 April 2014, Section 14 was titled "*Misconduct of Employee*". This section allowed an employer, after due inquiry, to dismiss an employee without notice (or down-grade or suspend him from work without pay up to one week) on grounds of misconduct. The employee could lodge a complaint with the Minister, who could then direct the employer to reinstate the employee or pay compensation if the Commissioner feels that the employee had been dismissed without just cause or excuse.

		This approach was easy to understand. If the employer wanted to dismiss an employee without notice (or downgrade him or suspend him without pay), the employer must first have a good reason to do so, and must do so only after due inquiry. If not, the dismissal may be without just cause or excuse. In unclear cases, employers should always terminate the employment in accordance with agreed provisions under the employment contract e.g. by giving notice or pay in lieu of notice. On 1 April 2014, Section 14 was amended and its title changed to "*Dismissal".* The definition of "relevant employee" was amended to include PMEs. More importantly, a PME who has served 12 months of employment (and a non-PME, regardless of his length of employment) could now seek redress for wrongful dismissal, even though he was dismissed with notice (or had received salary in lieu of notice) in accordance with his contractual terms of termination. In Parliament, NMP Assoc Prof Eugene Tan asked how that could be considered "wrongful dismissal". While the Minister did not answer that question directly, the Minister stated that for cases of termination with notice (or pay in lieu of notice), *"the onus will be on the employee to substantiate their unfair dismissal claim, for instance, by showing that the dismissal arose from the employer's intent to deprive him or her of employment benefits he or she would otherwise have been entitled to."* This may throw the door wide open to all kinds of claims. The shifting of burden of proof is also not stated in the Act. Ultimately, Section 14(2A) can be seen to be problematic as Section 14 is intended to deal with dismissals without notice in the first place, so why should employees who were dismissed with notice or paid salary in lieu in accordance with their employment contracts be entitled to lodge a complaint and ask for reinstatement under Section 14(2)? This issue takes on even greater significance if the EA amendments result in Section 14(2) applying to all employees in Singapore – this will then allow any employee to bring a claim for unfair dismissal even where he has been terminated with notice (or payment in lieu of notice) in accordance with his contract. Taken to its logical conclusion, this could result in Singapore ceasing to be an at-will employment jurisdiction, a very drastic change indeed.

3	Section 45 is another unusual provision in the EA. It is worth setting out this provision in full: "45. No employee who has been in continuous service with an employer for less than 2 years shall be entitled to any retrenchment benefit on his dismissal on the ground of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work." Although not entirely free from doubt, this provision could imply that an employee (covered in Part IV of EA) who has served for at least two years is entitled to retrenchment benefit, although the quantum of payment is not stated in the EA or any subsidiary legislation.	Section 45 should be reworded to make it clear that being in continuous service for at least 2 years for a covered employee is a *necessary* condition to be entitled to retrenchment benefit. The next issue is largely a public policy matter – should all employees (including PMEs) be covered by Section 45 or only some, and in the case of the latter, should the salary cap be increased to allow more employees to be entitled under Section 45. The reality of the modern economy is many businesses, including large enterprises, face disruptive forces and will do well to retain the ability to restructure their operations and workforce without having to bear huge restructuring costs. It is also a key plank in our country's economic strategies to build an eco-system that fosters start-ups which necessarily means there will be more enterprises that will fail and lay off employees. Overall, it will make Singapore less competitive as a place to do business if restructuring costs have to include a significant component of retrenchment benefit to be paid to all employees. Hence, it is submitted that Section 45 should be retained in Part IV of the EA without all employees being covered by Section 45.
4	Part IV of EA covers workmen earning no more than S$4,500 in basic monthly salary and other employees earning no more than S$2,500 in basic monthly salary.	There seems to be no prevailing public policy that justifies having a differential salary cap between workmen and other employees. The number of Singaporeans who are workmen performing manual labour should be decreasing whereas those considered to be other employees (e.g. clerical staff and retail assistants) should be increasing. One approach would be to extend coverage under Part IV to all employees earning no more than S$4,500 and cease making a distinction between workmen and other employees. This would be consistent with an overall increase of the EA threshold limit for PMEs from S$4,500 upwards as well.