

If an employer finds out that an employee who resigned had committed a wrong against the company during his employment, can the company withhold the outstanding salary of that errant employee?

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I. INTRODUCTION

1. Fred owns a modest renovation company. One of Fred's long-time employee, Eric, had recently resigned after serving his mandatory one-month resignation notice period. A few days later, Fred discovers to his dismay that Eric had started a competing business immediately after leaving. To add insult to injury, several of Fred's big clients had moved their business over to Eric's. Given the speed at which Eric started his new company, Fred suspects Eric had used his last three months while still working as Fred's employee to set up his new company and poached Fred's clients. Furious, the first thought that flashed through Fred's mind was: "If only I had found out earlier, I could have fired him immediately and saved both money and anguish...". When Fred eventually cooled down, an idea popped up: "I know! Since I haven't paid his salary for his final month, I'll hold on to that while I figure what to do next. Afterall, it's only fair that I withhold it before I determine how much compensation I should deduct from his outstanding salary".

2. Is it legal for Fred to withhold Eric's outstanding salary payment after the latter's resignation? From Fred's perspective, it seems intuitively fair and prudent to withhold the outstanding salary payment: fair because any business losses due to Eric ought to be compensated; prudent as it would be far easier to withhold payment than to claw back compensation from a crafty ex-employee. However, as this article will show, Singapore's employment law mandates that salary must be promptly paid to resigning employees even if the employee had wronged the employer; this is a strict position with only a few rare exceptions allowed. Further, the courts have clarified that any wrong caused by a resigning employee is a separate matter. As a separate matter, the proper recourse by the employer to right any such wrong would be to take legal action against the employee under the terms of the employment contract.

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II. DISCUSSION

What does Singapore's Employment Act¹ ("EA") say about withholding a resigning employee's salary?

3. The EA is Singapore's main labour law that covers employees (less seafarers and domestic workers) working under a contract of service for an employer. The EA lays down the *minimum* employment terms and conditions in Singapore to safeguard basic employment standards.² The EA also regulates employment relations by establishing the basic duties of employers and workers. In relation to the question posed, the EA imposes a legal duty on the employer to pay the salaries of its employees on time.

4. The EA mandates that the outstanding salary due to a resigning employee must, *by default*, be paid on that employee's final day of work when the employment contract formally ends.³ Further, this default payment deadline is strict as the EA only provides a seven-day extension to this deadline under two specific situations. First, where the employee fails to provide the requisite notice period to the employer when resigning.⁴ Second, where the employee fails to complete working for the employer until the end of the requisite notice period. Under these two circumstances, the employer would also be entitled to deduct the employee's salary for the shortfall in notice days or working days until the formal end of the employment contract. These two exceptions make practical sense for companies as the notice period allows the company to source for a replacement and provide for a hand-over of work duties from the resigning employee to his/her replacement.⁵

5. Should an employer fail to pay the outstanding salary of a resigning employee on time, he/she will be liable to a fine of between \$3k and \$15k or to imprisonment of up to 6 months

¹ Employment Act (Cap. 91, Rev Ed 2009) ("EA").

² *Singapore Parliamentary Debates, Official Report* (18 November 2008) Vol 85 at cols 947 ff (Mr Gan Kim Yong, Acting Minister for Manpower).

³ EA, *supra* n 1, s 23(1).

⁴ *Id.*, s 10.

⁵ Ministry of Manpower website <<https://www.mom.gov.sg/faq/termination/can-an-employer-withhold-an-employees-final-salary-payment-if-the-employee-leaves-without-a-proper-handover>> (accessed 9 October 2021).

or both upon conviction.⁶ For repeat offenders, the fine doubles to between \$6k and \$30k or to a prison term of 12 months or both.⁷

Are there exceptions to the statutory limitations imposed by the EA?

6. The considerable penalties attached to the withholding of a resigning employee's salary highlight the emphasis placed by the EA on the need to pay the outstanding salary due to a resigning employee promptly on his/her last day of work. However, is this fair to the employer if the resigning employee had wronged and injured the company? In the case of *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* ("Mattheus"),⁸ a company withheld the salary payment of a resigning executive who had set up a rival company and diverted some of the company's business to the newly established rival. Although the errant executive was found to have injured the company's business by his actions before he resigned, the Court of Appeal ruled that the company's withholding of his outstanding salary was unlawful. The Court of Appeal further clarified that the correct approach for the employer to recover from the errant employee would be to pursue the appropriate legal remedies under contract law instead. This is because the employment relationship is ultimately one of contract between the two willing parties of the employer and the employee.

7. Under contract law, the appropriate action that the employer should take is to sue the employee directly for damages, rather than withhold the resigning employee's salary as a self-help measure. Doing so requires the company to prove that the employee's actions caused the company to suffer a loss,⁹ that the damages suffered were not too remote (i.e., both employer and employee would have reasonably contemplated the damages from the employee's breach at the time of contracting),¹⁰ and that the company had taken reasonable actions to limit its losses upon knowledge of the employee's breaches.¹¹ Applied to Fred's situation, he would need to first show that his renovation company suffered losses in the form of lost revenue from clients that had gone over to Eric's new company. Fred would then need to prove that it was reasonably foreseeable that the setting up a rival company by an employee to poach the

⁶ EA, *supra* n 1, s 34(2)(a).

⁷ *Id.*, s 34(2)(b).

⁸ *Schonk Antonius Martinus Mattheus and another v Enholco Pte Ltd and another appeal* [2016] 2 SLR 881 ("Mattheus") at [12].

⁹ *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782.

¹⁰ *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145.

¹¹ *Johnson v Agnew* [1980] AC 367.

company's business would have caused business losses to the company. Fred would also need to show he had updated clients that Eric no longer works for nor represents the company upon learning of Eric's disloyalty.

8. Alternatively, the company may *exceptionally* withhold salary payment if the company can prove a "total failure of consideration" on the part of the employee.¹² In the context of an employment contract, an employee's "total failure of consideration" refers to the situation where the employee had failed or refused to perform *any* part of his/her contractual obligation thereby defeating the purpose of the employment contract.¹³ However, it would be near impossible to establish a "total failure of consideration" in an employment relationship for the simple reason that so long as the errant employee had performed some tasks that are related to his/her job scope, the employee would have provided *some* consideration and thus obliging the employer to pay salary for work done. In short, unless the employer can show that there was absolutely *no work done at all* throughout the duration of employment, or that *all the work done were irrelevant* under all the terms of the employment contract, the employee would be entitled to his/her salary payment. Applied to Fred's situation, it would be near impossible to show that his former employee Eric had not fulfilled or contributed to any work assignments during his long employment stint with Fred.

III. CONCLUSION

9. What should employers who unfortunately find themselves in Fred's shoes do in the future? As the EA lays down a clear legal duty on the part of the employer, an employer like Fred should not withhold any outstanding salary due to a resigning employee as it would be breaking the law. While this may appear unfair from the employer's perspective, such is the state of employment law in Singapore until Parliament decides to amend the legislation.¹⁴

10. Moreover, business owners should note that the enactment of the Employment Claims Act together with the establishment of the Employment Claims Tribunal ("ECT") has greatly lowered the barrier for employees to bring legal action against employers.¹⁵ Given the low cost of personally filling a claim at the ECT (\$30 for claims below \$10k and \$60 for claims

¹² *Mattheus, supra* n 8 at [12].

¹³ *Ooi Chong Ling v Just Gems Inc* [2003] 1 SLR(R) 14 at [43].

¹⁴ Ravi Chandran, *Employment Law in Singapore* (Lexis Nexis, 6th Ed, 2019) at para 1.1.

¹⁵ Employment Claims Act 2016 (No. 21 of 2016).

between \$10k and \$20k), aggrieved employees would likely feel empowered to take legal action themselves to claim any unpaid salary.

11. While it can be challenging to prove a breach of the employment contract and claim damages as described in para 7, company owners should quickly make an initial assessment of whether it can do so. Should the employer feel it has strong grounds to do so, it should quickly seek legal advice and, where appropriate, commence legal action to establish the breach and claim damages. Withholding an errant employee's salary should be the last thing on Fred's mind.