

Insights

IMPLIED DUTY OF MUTUAL TRUST AND CONFIDENCE AND EMPLOYERS' RIGHT TO TERMINATE

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In Hong Kong, an implied duty of mutual trust and confidence ("**Duty**") exists between an employer and an employee. This duty requires that an employer shall not "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" (Malik v BCCI [1998] AC 20).

DOES THIS DUTY AFFECT THE EMPLOYER'S RIGHT TO TERMINATE?

This issue was explored in the Court of First Instance ("**Court**") decision (on appeal from the Labour Tribunal) of *Lam Siu Wai v Equal Opportunities Commission* (HCLA 21/2020) (Date of Judgment: 15 October 2021), in which the Court overturned the Labour Tribunal's decision to award damages to the Claimant employee.

FACTS OF THE CASE

The Claimant ("**Lam**") was employed by the Defendant ("**EOC**") as a Chief Equal Opportunities Officer, when she was terminated on 15 May 2018 with immediate effect. Under Lam's employment contract, EOC had the right to terminate Lam without cause by giving three months' notice or payment in lieu of notice.

Despite not being obliged legally to provide reasons for Lam's termination, EOC's termination letter to Lam stated that "*your recent attitude and behaviour do not closely match with the requirements of this senior position*" ("**Dismissal Reason**").

In accordance with her employment contract, Lam was paid three months' wages in lieu of notice and all benefits due to her.

DECISION OF THE LABOUR TRIBUNAL

In the Labour Tribunal, Lam argued that EOC's termination of her employment was wrongful because it was done in bad faith and amounted to a serious breach of the Duty. Lam argued that this breach entitled her to claim loss and damages.

Deciding in favour of Lam, the Labour Tribunal ruled that:

1. Termination under section 7 of the Employment Ordinance (Cap 57) (i.e. by payment in lieu of notice) was a “mode of termination” but did not override the Duty.
2. EOC had the onus to prove that the reason for dismissing Lam was “good and valid”, and to “prove” the Dismissal Reason.
3. The Dismissal Reason was not true and the “possible reason” for dismissing Lam was that the Chairperson of the EOC was unhappy with Lam lodging a complaint against him.
4. The EOC had breached the Duty because Lam’s dismissal was an act of retaliation against Lam.

As a result, the Court awarded Lam damages in the amount of HK\$1,294,783.06 in total, consisting of loss of income and gratuity.

EOC appealed against the Labour Tribunal’s decision.

DECISION OF THE COURT

In allowing the EOC’s appeal, the Court ruled that:

1. The Duty cannot be applied to water down an employer’s right to terminate an employee without cause, whether under the contract or statute.
2. The Duty involves maintaining the relationship between employer and employee. The Labour Tribunal erred in applying the Duty in the present termination context.
3. A contractual right to terminate an employment (on the part of either employer or employee) can be exercised unreasonably or capriciously so long as the right is exercised in accordance with the contract. The court will not be concerned about the rightness or wrongness of such a dismissal.
4. To imply a duty of good faith in the termination of employment without cause would have far reaching effect on the law of employment. Such significant changes in the law should be dealt with by the legislature.
5. Given that the EOC was entitled to terminate Lam’s employment without cause under the Contract, and given that it mattered not whether the exercise of such right was unreasonable or capricious, the Dismissal Reason had no bearing on the termination. The EOC could not be in a different position than having given no reason for the termination.

TAKEAWAY POINTS

- This case reinforces the employers’ right to terminate an employee without cause pursuant to the employment contract.

- To avoid arguments with the employee or inviting the courts to scrutinise the merits of the decision to terminate (as the Labour Tribunal did in this case), employers must make careful thoughts before deciding to give reasons for termination, or whether it is preferable to stay silent on the reasons for termination.
- This case also confirms that an implied duty of mutual trust and confidence exists between employers and employees during the employment relationship. However, this implied duty cannot be used as a basis to allow an employee to recover damages for loss arising from the manner of their dismissal.

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