

Insights

HK COURT CONFIRMS LABOUR TRIBUNAL HAS NO JURISDICTION OVER MIXED CLAIMS FOUNDED IN BOTH CONTRACT AND TORT

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The Labour Tribunal in Hong Kong has jurisdiction over a claim of money arising from the breach of a term of an employment contract. However, mixed claims founded in both contract and tort are excluded from the jurisdiction of the Labour Tribunal. This recently was confirmed in the Court of First Instance (**Court**) case of *Lee Yiu Hong v Well-In Hotel Supplies Company Limited* [2020] HKCFI 2760.

Background

In this case, the Employee commenced proceedings in the Labour Tribunal (**Tribunal**) to claim against the Employer for unpaid commission.

The Tribunal gave judgment in favour of the Employee. The Employer sought leave to appeal against the Tribunal's decision, on the ground that the Tribunal erred in law by failing to discharge its statutory duty to investigate and subsequently to take into account relevant issues or claims raised by the Employer, being the Employee's breach of his duties of fidelity and good faith owed to the Employer. In particular, the Employer argued that the Tribunal erred in attaching little or no weight to the following allegations:

- a. The Employee's unauthorised disposal of important company documents that belonged to the Employer shortly before his termination of employment.
- b. The Employee's refusal or failure to return company computer containing confidential information.
- c. The Employee's appointment as director of a competing company carrying on similar business as the Employer's shortly after his resignation.
- d. The fact that the Employee held the senior position of sales director at the Employer and was privy to important sales information.

The Employer's complaint was that, if the Tribunal did discharge its duty properly to investigate the Employee's conduct, substantial damages in respect of the Employee's breaches could have been set-off against the Employee's claim for unpaid commission.

Court's Decision

The Court began by discussing whether there was any arguable case that the Tribunal had jurisdiction to deal with the Employer's claim for unliquidated damages for alleged breaches of duty. The Employer argued that such claim for damages for breaches of duty was within the exclusive jurisdiction of the Tribunal, so the Tribunal should have inquired into the matters above.

Section 7(1) of the Labour Tribunal Ordinance (Cap 25) (LTO) provides that "*[the] tribunal shall have jurisdiction to enquire into, hear and determine the claims specified in the Schedule*".

The Schedule to the LTO provides inter alia as follows:

*"1. A claim for a sum of money, whether liquidated or unliquidated, which arises from –
(a) the breach of a term, whether express or implied, of a contract of employment*

.....

3. Notwithstanding paragraphs 1 and 2, the tribunal shall not have jurisdiction to hear and determine a claim for a sum of money (whether liquidated or unliquidated), or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of duty imposed by a rule of common law or by any enactment."

The Court pointed out that paragraphs 1 and 3 of the Schedule to the LTO show there can be overlap between (a) a contractual claim falling within paragraph 1, and (b) a tort claim falling within paragraph 3. By reason of the jurisdiction-exclusion provision in paragraph 3, a claim for breach of confidence being one that can be founded both in contract and in tort was outside the Tribunal's jurisdiction.

Dealing with the Employer's allegations in turn, the Court concluded that:

- a. As regards the Employee's alleged failure to return company computer and to dispose of important company documents without authorisation, the cause of action would have been a tortious claim in conversion.
- b. As regards the Employee's alleged misuse or threat of misuse of confidential information, the cause of action would have been a claim for breach of confidence grounded in both tort and contract.
- c. As regards the Employee's alleged failure to provide the complete set of documents for client orders and having erased company information in the computers that were returned, the cause of action would have been the tort of causing loss by unlawful means.
- d. As regards the allegation that the Employee enticed one of his colleagues (who was employed by the Employer) to join his new company, the claim would have been grounded on economic tort of inducing or procuring breach of contract.

Given that the causes of action above were in tort and/or in both contract and tort, the Employer's claims would have fallen outside the jurisdiction of the Tribunal pursuant to paragraph 3 of the

Schedule of LTO. Therefore, the Court was of the opinion that the Tribunal was not at fault in not investigating further into these facts or matters.

Takeaway points for employers

1. Where Labour Tribunal proceedings are brought by or against an employee, the employer should not assume that the Labour Tribunal has the jurisdiction to resolve all matters surrounding the employee's employment. As was made clear in the case above, the Labour Tribunal has no jurisdiction in relation to mixed claims founded in both contract and tort.
2. Where Labour Tribunal proceedings are brought against an employer and the employer wishes to raise counterclaims against the employee which fall outside the Tribunal's jurisdiction, the employer should consider applying to the Labour Tribunal to transfer the employee's claim to the Court of First Instance or the District Court pursuant to section 10 of the LTO, so that both the employee's claims and the employer's counterclaims can be dealt with by the same tribunal at the same time.
3. Even though no legal representation is allowed in Labour Tribunal proceedings, if an employer intends to bring claims or counterclaims against an employee, the employer should seek legal advice as to the causes of action which would be involved, in order to ensure that the claims or counterclaims are brought in the appropriate forum.

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