

Insights

EMPLOYERS' POWER TO SUSPEND EMPLOYEES UNDER HK LAW

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In *Lengler Werner v. Hong Kong Express Airways Limited* [2021] HKCFI 1333, the Court of First Instance (the “**Court**”) examined the power of “suspension” of an employee, including under section 11 of the Employment Ordinance (Cap 57) (“**EO**”).

In a nutshell, the facts of this case are as follows. A pilot was involved in an oral dispute with other captains of the airline, and was suspended from flying duties for nearly seven weeks. Upon learning that warning letters would be sent to him, the pilot tendered his resignation, claiming that the airline had constructively dismissed him. The pilot subsequently commenced proceedings before the Labour Tribunal against the airline. The Labour Tribunal ruled in favour of the pilot, and found that (a) the pilot was entitled to rely on section 11(2) to terminate the employment contract without notice or payment in lieu, and (b) in any event, the airline had constructively dismissed the pilot.

The airline appealed to the Court of First Instance against the Labour Tribunal’s decision.

Had the pilot’s employment been “suspended”?

Under section 11(1) of the EO, an employer is entitled, without notice or payment in lieu, to suspend an employee from employment for not more than 14 days¹.

Under section 11(2) of the EO, an employee who has been suspended may terminate his employment contract during the suspension period, without notice or payment in lieu.

Considering the literal wording of section 11, and a series of case law, the Court held that “suspension” under section 11 means a complete “suspension from employment”, rather than “suspension from partial performance of duties”. A suspension of employment involves the suspension of the rights and obligations of the contract of employment. In such case, the employee is not required to do any work, and the employer is not required to pay the employee.

In the present case, it was not in dispute that only part of the pilot’s duties (i.e. his flying duties) were suspended, but not the entirety of his employment. Crucially, the pilot was paid his salary and

other allowance (HK\$126,500 per month in total) during the period of suspension of his flying duties, although he was not paid his overtime or productivity bonus (HK\$20,000 per month in total).

As such, the Court held that the pilot had not been “suspended” under section 11(1) of the EO, and that the pilot was not entitled to terminate his employment contract under section 11(2) of the EO.

Was the pilot constructively dismissed?

If an employer does a repudiatory act, causing an employee reasonably to believe that it is impossible to continue to work for the employer, the employer’s act may constitute “constructive dismissal”. In these circumstances, the employee may choose to accept the repudiation of the contract, treat themselves as dismissed and the employment contract as terminated, and claim compensation from the employer².

The Labour Tribunal had found that the suspension of the pilot’s flying duties (which caused a decrease in the pilot’s income) and the airline’s failure to contact the pilot during the suspension period constituted a repudiatory breach on the part of the airline. The Labour Tribunal held that such conduct breached the implied terms of the employment contract that an employer has to maintain the relationship of trust between employer and employee, and not to exercise an employer’s right and discretion arbitrarily, capriciously or inequitably.

The Court criticised the Labour Tribunal for having failed to consider or place weight on the wording in the Employee Handbook, which provided expressly for the airline’s right to suspend the pilot from “*part of his duties*” “[p]ending disciplinary action”. The Court held that the Labour Tribunal was erroneous in finding that the airline was not entitled to suspend part of the pilot’s duties, and that the Labour Tribunal’s decision that the airline committed a repudiatory breach could not be supported.

Takeaway points for employers

1. The law makes a distinction between a “suspension from employment” and “suspension from partial performance of duties”.
2. An employer’s right to suspend an employee “from employment” is implied into every employment contract by virtue of section 11 of the EO.
3. Given that employers do not have a statutory right to suspend an employee “from partial performance of duties” under the EO, they should consider whether this right should be set out expressly in their employment contracts.
4. The advantage of retaining the right of suspension from partial performance of an employee’s duties include the following:
 - (a) Unlike a suspension from employment under section 11(1) of the EO, an employee suspended from partial performance of their duties cannot terminate the employment during the suspension

period without notice or payment in lieu.

(b) Under section 11(1) of the EO, a suspension from employment only can be made under certain prescribed grounds (see Footnote 1), and for a period of up to 14 days. On the other hand, an employer may retain in its employment contracts the right to suspend an employee from partial performance of their duties under more extensive grounds, and for a longer period of time.

5. However, an employer who suspends an employee from part of their duties should continue to pay the employee's salary, given that their employment is not being suspended.
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1 The grounds on which an employer is entitled to use the statutory suspension power are: (a) as a disciplinary measure for any reason for which the employer could have terminated the contract of employment under section 9, (b) pending a decision by the employer as to whether or not he will exercise his right to terminate the contract of employment under section 9, or (c) pending the outcome of any criminal proceedings against the employee arising out of or connected with his employment, provided that where such criminal proceedings are not concluded within the period of 14 days such suspension may be extended till the conclusion of the criminal proceedings.

2 This legal position was set out in the Court of Appeal decision in *Chen Xiang v China Daye Non-Ferrous Metals Mining Ltd* [2018] HKCA 212 (at §23), and cited with approval by the Court in the present case.

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