

April 2017

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Case Review

EOC successfully appeals decision to pay gratuity to former employee who lobbied against expansion of anti-discrimination laws

Chok Kin Ming v Equal Opportunities Commission HCLA 42/2015

In brief

The Equal Opportunities Commission has successfully appealed the Labour Tribunal's decision requiring it to pay a former employee a HKD 867,021.25 gratuity following the expiry of the employee's contract. The EOC successfully claimed that the gratuity, which was payable on "satisfactory" completion of the employment agreement, was not automatically payable at the end of the term and the EOC was entitled to consider the employee's behaviour when deciding whether to award the gratuity. The matter has been remitted to the Tribunal.

Background and Decision

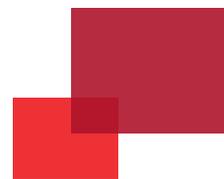
Mr C was employed as Chief Equal Opportunities Officer from 1 November 2011 to 31 October 2014. His employment contract provided for a gratuity upon "satisfactory completion" of his employment contract. The EOC's Code of Conduct applied to his employment contract and required him to avoid any circumstances where a conflict of interests may arise.

Mr C was involved in the EOC's Discrimination Law Review, a comprehensive review of all anti-discrimination legislation which involved public consultation. Mr C was responsible for explaining the objectives and proposals of the DLR to the public in consultation forums. One of these forums took place on the 16 August 2014 at a local church, which Mr C attended. Mr C gave a talk at the forum where he urged church goers to object to the DLR's proposals to expand same-sex relationship protections and support the proposals to expand exceptions to discrimination for religious purposes. Mr C also criticised the EOC and the way it had conducted the DLR.

When Mr C's employment contract lapsed, the EOC did not renew his contract and did not pay him a gratuity.

Mr C brought a claim in the Labour Tribunal for his contract end gratuity of HKD 867,021.25. In the first instance, the Labour Tribunal decided Mr C was owed the gratuity, finding that he had satisfactorily completed his employment per the contract and the conditions of service. The Labour Tribunal understood "satisfactory completion" to mean the contract had actually been completed in the specified time frame, and did not apply to Mr C's work performance.

The Court of First Instance disagreed and found the Labour Tribunal had taken too narrow a view of the meaning of "satisfactory completion". The phrase included scope for judgment by the employer. The fact that the EOC was able to recover the gratuity from the employee if it mistakenly believed



the contract had been satisfactorily completed suggests that the employer was entitled to consider the nature of the employee's service and not just the length. The Court held that the EOC had not been irrational or perverse in deciding not to award Mr C the gratuity, and that the Labour Tribunal had not applied this objective test (as set out in case law such as *Clark v Nomura [2000]*) and had instead substituted its own opinion as to whether the EOC should have awarded the gratuity.

Pursuant to this, the Court allowed the EOC's appeal and the matter was remitted to the Labour Tribunal.

Takeaway points

1. **Clarity in your bonus clauses:** if you want to include a contractual bonus in employment contracts, ensure that any requirements the employee must fulfil and the employer's discretion as to whether the requirements have been met are set out clearly.
2. **Watch out for conflicts of interests:** the case demonstrates the damaging effect an employee can have on an employer's reputation if the employee has a conflict of interests. Ensure that you have a robust code of conduct addressing conflicts of interest or that such obligations are expressly included in the employment contract.

Court of First Instance allows appeal from Labour Tribunal for Presiding Officer's failure to investigate relevant documentary material

Vermeerbergen Peter Alfred v Swisstribes Ltd [2016] HKCU 2902

In Brief

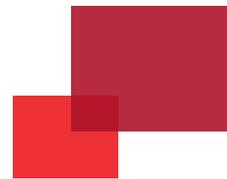
The Court of First Instance recently allowed an employee, Mr V, to appeal against a Labour Tribunal decision in favour of the employer, Swisstribes, on the basis that the Labour Tribunal Presiding Officer failed to exercise his statutory duty to investigate relevant matters and order discovery of relevant documents.

Background and Decision

Swisstribes designs and produces display fixtures for jewellery and watch brands. Mr V was employed as a Custom Relations Manager from 1 February 2013 to 1 April 2014. Following termination of his employment, Mr V filed a claim at the Labour Tribunal for, amongst other things, unpaid commission.

Mr V was entitled to 3% commission on any sales resulting from accounts that were "managed", "co-managed" or "approached" by him and any future sales from these accounts for a period of 24 months after termination of employment. Mr V's claim related to three accounts. The holder of these accounts (Account Holders) preferred to use their agents as middlemen (the Agents) to acquire the products from Swisstribes rather than buying them directly.

Mr V claimed he "approached" the Account Holders directly resulting in Swisstribes making a sale to the Account Holder's Agents, which entitled him to commission. The sale invoices were in the name of the Agents rather than the Account Holders but the products sold were ultimately acquired on behalf of the Account Holders.



The Labour Tribunal Presiding Officer ("PO") dismissed the claimant's claim on the basis that Mr V "failed to support his claim with solid evidence" and that a "substantial part of the claim is based purely on speculation".

Mr V filed a notice of appeal claiming:

- (a) the PO failed to investigate claims made by Mr V that certain invoices crucial to his claim were missing from the documents disclosed by Swisstribes;
- (b) the PO adopted the wrong criteria in deciding what commission Mr V was entitled to, as the PO disregarded any sales that came from customers who were not direct customers of Mr V, whereas Mr V's employment contract specified he was entitled to commission from any sales resulting from his "approach" even if the sales were not made directly with Mr V (as was the case with the Account Holders); and
- (c) pursuant to the above, the PO failed to make any proper inquiry or finding as to whether the accounts listed in Mr V's claim were accounts "managed" or "co-managed" or "approached" by Mr V.

The Court allowed the appeal based on the fact that the PO did not take an active inquisitorial role and failed to exercise his statutory power to investigate crucially relevant matters. The Court stated that the PO had misunderstood his powers of discovery and failed to order discovery of important documents, such as the invoices detailed above. The PO is able to order production of documents under section 20 of the Labour Tribunal Ordinance (similar to the principles applicable in High Court proceedings).

Take-away points

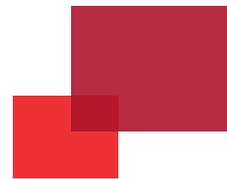
1. **No positive obligation to disclose:** as there are no rules imposing an obligation of discovery on parties to a Labour Tribunal dispute, if you believe the other side holds relevant documents you must ensure the PO exercises his duty to order discovery of documents.
2. **Failure to order discovery can lead to appeal:** a failure by the Labour Tribunal to discharge its positive statutory duty to investigate relevant matters and order discovery of relevant documents may constitute valid grounds for appeal. As the Labour Tribunal does not allow legal representation, and as there are no rules imposing an obligation of discovery on parties to a Labour Tribunal dispute, the PO's duty to investigate and order discovery of documents where applicable may be more open to scrutiny.

Employer who wrongfully dismissed an employee without notice required to pay only one month's damages, despite 12 month notice period

Chung Tin Shun Caesar v The Hong Kong Football Academy Ltd HCLA 26/2016

In Brief

The Court of First Instance recently dismissed an appeal made by an employee against a Labour Tribunal decision ordering payment of one month's wages in lieu of a 12 month notice period.



The employee, Chung, was employed by the Hong Kong Football Academy under a written employment contract which provided for either party to give 12 months' notice on termination. There was no provision for a payment in lieu of notice. The Football Academy later dismissed Chung with immediate effect without making any payment in lieu.

The Labour Tribunal held that Chung was not entitled to 12 months' wages as compensation but that he should be given damages to put him back into the position he would have been in had the agreement not been breached. **Chung was required to mitigate his loss.** The Labour Tribunal held that Chung would have been able to secure a new job one month after termination by the Football Academy and would be able to earn a monthly income of around HKD 15,000 (based on his earnings at a previous job Chung had at a health management company). The Labour Tribunal assessed damages as HKD 15,000, being the difference between the 12 month salary under his employment contract and the 11 month salary he would have earned at the hypothetical new job.

The employee was unhappy with the award and sought leave to appeal to the Court of First Instance. The Court agreed with the Labour Tribunal, stating that in the absence of any specified remedy in the employment contract for a breach of contract, damages will apply to place the employee in the same position as if the contract had been performed.

Commentary

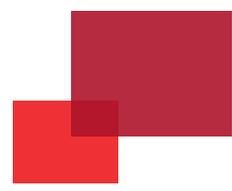
1. **Payment in lieu notice not implied:** the Labour Tribunal and CFI may not imply any payment in lieu of notice obligations if they are not included in the contract – this appears to wholly ignore section 7 of the Employment Ordinance, which allows either party to make a payment in lieu of an agreed notice period, even if the clause is not included in the employment contract;
2. **Damages may apply in absence of express provisions:** in the absence of any express provisions in the employment contract governing remedy for breach of contract, the normal rules regarding damages will apply; and
3. **Duty to mitigate loss:** an employee has a duty to mitigate his/her loss if an employer breaches the employment contract and the employee claims for damages at common law. There is no such obligation to mitigate if damages for wrongful termination are claimed under section 8A of the Employment Ordinance. It is unclear from the judgment whether a claim was made at common law or under section 8A, but it must be assumed it was the former otherwise the duty to mitigate would not have applied.

Legislative Developments

Chief Executive announces plans to enhance retirement protection system

CY Leung has proposed to progressively abolish the Mandatory Provident Fund set-off mechanism, which allows employers to use the money they put into workers' retirement funds to off-set severance and long service payments.

To assist employers with the financial burden of the proposals, the government has stated:



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- the abolition will have no retrospective effect, so that MPF contributions made by employers before the implementation date will be exempted;
- employers may be subsidised for a portion of the costs in the first ten years following the implementation date; and
- the amount of severance payments and long service payments that employers are required to pay may be reduced from two-thirds to half of the employee's monthly wages. Currently, severance and long-service payments are calculated by taking two-thirds of an employee's last monthly salary and multiplying it by his or her years of service.

Statutory Minimum Wage to rise to HKD 34.50 per hour

The Minimum Wage Commission has by consensus recommended that the current Statutory Minimum Wage rate of HKD 32.50 per hour be raised to HKD 34.50 per hour, an increase of 6.2 per cent.

To correspond with the increase, employers will be exempted from the requirement under the Employment Ordinance to record the total number of hours worked by an employee in a wage period if wages payable are not less than HKD 14,100 per month (the exemption amount is currently set at HKD 13,300 per month). The increase will come into effect from 1 May 2017.

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Standard Working Hours Committee submits report to government

The Standard Working Hours Committee ("SWHC") submitted its report on standard working hours to government on the 27 January 2017. The SWHC recommended that legislation be introduced for low-income employees only, with any legislation ensuring that low-income employees are paid overtime compensation at a rate no less than their agreed wage. Low-income employees are not defined. The SWHC also recommended the government form sector specific guidelines for working hours standards and review the effectiveness of any measures taken after two years.

Increased compensation for employees injured at work

The levels of compensation for employees injured at work or suffering from prescribed occupational diseases under the Employees' Compensation Ordinance have increased with effect from 1 April 2017.

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