

Hong Kong Court confirms that employers can act “unreasonably” in dismissing employees despite obligation of mutual trust and confidence

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The law recognises that an employment contract creates a close personal relationship where there is often a disparity of power between the parties and frequently the employee is the more vulnerable party. As such, in every employment relationship, the law imposes an obligation on the employer requiring it not to, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the employer and its employee. The obligation is known as the implied obligation of mutual trust and confidence.

This obligation is said to be an “overarching” one and in appropriate cases can prevent an employer from exercising its express rights under a contract of employment. In a recent case, *Lam Siu Wai v. Equal Opportunities Commission*¹, the Hong Kong Court considered whether the implied obligation of mutual trust and confidence may operate to restrict an employer’s right to terminate employment.

The *Lam Siu Wai* case arose out of a decision of the Equal Opportunities Commission (“**EOC**”) to terminate the employment of a senior officer by way of payment in lieu of notice, in accordance with her employment contract and section 7 of the Employment Ordinance (Cap. 57)². The EOC’s decision was not due to any deficiency in work performance or misconduct on the employee’s part. However, the EOC stated in its letter of termination that the employee’s recent attitude and behaviour did not closely match with the requirements of her senior position, and this formed the basis for the termination of her employment.

Contending that the EOC’s decision was made in bad faith and had deprived her of a full gratuity upon the completion of her fixed-term employment contract, the employee filed a claim in the Labour Tribunal seeking, among other things, damages for breach of the implied obligation of mutual trust and confidence. The Labour Tribunal ruled in favour of the employee, finding that the EOC had no “true and valid” reason for dismissing her.

However, the Labour Tribunal’s decision was subsequently overturned by the High Court on appeal by the EOC. The High Court held, as the law stands, the obligation of mutual trust and confidence cannot be applied to water down an employer’s right to terminate the employment of a worker without cause by invoking the notice provisions under the contract and/or the statute. In so ruling, the court pointed out that it is well established that a contractual right to terminate 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 is not concerned with the rightness or wrongness of a dismissal.

The court also concluded that the fact that EOC gave a reason for the dismissal was of no legal relevance in this case, in light of the EOC’s clear entitlement to terminate the employee’s employment without cause.

It is generally prudent not to state any reason for dismissal in a notice of termination if the termination is one without cause, as the court remarked that such a step is not legally required and unnecessary. Indeed, the *Lam Siu Wai* case illustrates that such a step could provoke legal challenge by the employee and lead to adverse findings by the Labour

1. [2021] HKCFI 3092.
2. Section 7 of the Employment Ordinance (Cap. 57) provides, among other things, that either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay in lieu of notice.

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