

Court finds in favour of employer who terminated employee during long-term sick leave, rejecting a claim for disability discrimination

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In the recent decision of *Lee Chi Bun v. Novartis Pharmaceuticals (HK) Ltd*,¹ the District Court was asked to determine whether an employee, who had been on sick leave for almost a year when he was terminated, had been the subject of disability discrimination by his employer in that he was terminated by reason of his illness.

Lee had been employed by Novartis since August 2004 and his employment was terminated on 23 December 2016 by reason of redundancy. He became ill in mid-December 2015 and was hospitalised. After a short period of rest, he resumed work on 8 January 2016, when he was approached by Novartis's HR manager who informed him that he had scored unsatisfactorily in his 2015 performance review and he was given the option to resign. He said he would think about it, but then took sick leave for most of 2016 due to his illness.

In mid-August 2016 while Lee was on sick leave, a decision had been made and then approved by Novartis to eliminate his role as well as the role of his immediate supervisor (who resigned voluntarily), as a result of Novartis HK's ophthalmology business unit being integrated with that of another company. Novartis asserted that, due to Lee's illness (and in order for him to continue to receive medical insurance coverage), he was not terminated until 23 December 2016, although he was still on sick leave at that time.

Following his termination, Lee made a disability discrimination claim against Novartis, alleging that he was terminated due to his illness. There was no dispute that Lee was suffering from serious illness from 13 December 2015 to 23 December 2016 and that he was terminated when he was still on sick leave.

Citing the Court of Final Appeal in *Leung Kwok Hung (Long Hair) v. Commissioner of Correctional Services*,² which dealt with sex discrimination but which is substantially similar to the equivalent section in the Disability Discrimination Ordinance (Cap. 487), the court reiterated the four-step approach in determining whether discrimination had occurred:

1. There must be a difference in treatment between one person with a particular disability (i.e. the complainant) and another person, real or hypothetical, without that disability (i.e. the compared person);
2. The relevant circumstances between the complainant and the compared person are the same or at least not materially different;
3. It must then be shown that the treatment given to the complainant is less favourable than that given to the compared person; and
4. The difference in treatment is on the basis of the presence or absence of the disability.

The burden is on the claimant to prove discrimination on the balance of probabilities. Once the court is satisfied that the claimant is able to show from the primary facts that inferences could be drawn from the circumstances that disclosed a possibility of discrimination, the court would look to the respondent for an explanation. If there is no reasonable or satisfactory explanation put forward, then the court would be entitled to infer discrimination as a matter of common sense.

In finding in favour of Novartis, the court took into consideration the following factors:

1. Lee's unsatisfactory performance rating in 2015 (his performance review process was conducted between mid-October to the end of November 2015) had been given well before Novartis knew³ he was ill, so his illness was not and could not have been a factor in the assessment of his performance;
2. Lee's second line supervisor had given credible evidence as to Lee's unsatisfactory performance in 2015 with specific examples (although the reason for his termination was redundancy, and not poor performance);
3. The two witnesses of Novartis were found to be credible and reliable, whereas the court found Lee to not be an honest and reliable witness;
4. There was no evidence that Novartis could have offered Lee a position with terms similar to those of his original position but had refused to do so due to Lee's disability; and
5. There was also no evidence showing that Novartis had used the business integration as an excuse to eliminate Lee's role as alleged.

The court also found that Novartis had tried to make various accommodations to Lee, including providing him with a post-termination sponsored drug plan with 100% discount and a sponsored medical insurance plan (both of which were rejected by Lee), and a payment of six months' base salary which was accepted by Lee, and no set-off was effected by Novartis of his long service payment against its MPF contributions.

This is a welcome decision for employers in Hong Kong. Whilst caution should always be exercised (and legal advice taken) when making a decision as to whether to continue to employ an employee who is on long-term sick leave, employers are not expected to do so if there is a good reason for terminating the employee. One way of mitigating the risk of litigation is to negotiate and settle with an employee before their departure, which may be less costly than litigation,⁴ should a claim be brought at a later date.

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1. 3 September 2021, [2021] HKDC 1101.
 2. (2020) 23 HKCFAR 456.
 3. Lee submitted a sick leave certificate on 14 January 2016 stating his medical diagnoses. Lee had deliberately chosen not to disclose his medical condition prior to this date.
 4. The usual position is that each party must bear their own costs in a claim for discrimination, which is what the court ordered in this instance. This meant that, despite the win, Novartis could not recover any of its legal fees from Lee.

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