Are there really no consequences for job applicants who accept an offer and then change their minds?

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It is not uncommon in Hong Kong for job applicants to accept a job offer and then later change their minds, either to stay in their current employment or accept another offer. In such cases, the job applicants' change of mind is likely to be considered a termination of the employment contract they just signed. The parties' rights and liabilities are then determined by scrutinising the terms of the employment contract, taking into account the relevant factual matrix.

In the recent case of *Law Ting Pong Secondary School v. Chen Wai Wah*[1], a teacher who accepted a school's employment offer in July but soon after terminated his contract in August, before the school term had started, was ordered by the Hong Kong Court of Appeal to make a payment to the school in lieu of three months' notice pursuant to the terms of his contract.

The dispute between the teacher and the school revolved around the following documents (Documents):

- a letter of offer of appointment (Letter of Offer) issued by the school;
- conditions of service (Conditions of Service), which was signed by both the teacher and the school; and
- a letter of acceptance (Letter of Acceptance), a copy of which had been signed by the teacher and returned to the school.

The Conditions of Service stated that the "period [of employment]" was from 1 September 2017 to 31 August 2018. The teacher's employment may be terminated during the contract period by either party by giving three months' notice or payment in lieu (Termination Provision).

In the Letter of Acceptance, the teacher acknowledged that the conditions of the contract would come into effect immediately.

Was the Letter of Acceptance part of the employment contract?

As the Letter of Offer referred only to the Conditions of Service, the teacher contended the terms of the Letter of Acceptance, which stated that the contract came into effect immediately, were not part of the employment contract. As the teacher's employment did not commence until 1 September 2017 (when the school term started), the Termination Provision was not operative when the teacher backed out on 22 August 2017. This argument was rejected by the Court of Appeal. It was held that, because the teacher was given all three Documents, the terms of such Documents were accepted as a "package deal".

The Court of Appeal also made a distinction between commencement of the employment contract and the time of

performance. In this case, although the teacher's performance of teaching duties would only commence on 1 September 2017, a valid contract had already been formed and was enforceable as from 17 July 2017 when the Documents were signed. Accordingly, the Court of Appeal held that the Termination Provision was to take effect immediately upon creation of the employment contract on 17 July 2017, and the teacher was bound by the terms of the contract to give three months' notice or make payment in lieu to the school.

Was the Termination Provision a penalty clause which was unenforceable?

The teacher also sought to argue that the provision on payment in lieu of notice was unenforceable as a penalty clause. His argument was that the amount involved was wholly disproportionate to the monetary loss that the school may suffer and its legitimate interests.

It is well established that a clause would be invalid as a penalty if it is unconscionable and calculated more to discourage a breach than to facilitate compensation[2]. In determining whether the Termination Provision was a penalty clause, the Court of Appeal adopted the modern approach as discussed by the Supreme Court of the United Kingdom in *Cavendish Square Holdings v. Makdessi*[3].The test is whether the clause imposes a detriment on the contract-breaker out of proportion to any legitimate interest of the innocent party in the enforcement of the contract.

The Court of Appeal reiterated that a clause could only be a penalty if it was a secondary obligation triggered by a breach of a primary obligation. In this case, the Termination Provision was not regarded as a provision operating on the breach of a primary obligation under the employment contract but, rather, it was a clause providing for a means to terminate the contract without any breach by the party who wished to end the employment earlier. Therefore, the Court of Appeal held that the Termination Provision was not a penalty clause.

Even if the law of penalty was engaged, the Court of Appeal still considered that the teacher could not succeed because the three-month notice period and payment-in-lieu provision could not be said to be out of all proportion to the school's legitimate interests in ensuring a sufficient number of teaching staff to support the operation of the school, given that the teacher terminated a few days before the school term started.

Key takeaways

- Depending on the terms of an employment contract (which may consist of multiple documents), employees and employers may be legally bound to perform their obligations, including duties to give notice of termination and/or payment in lieu of notice, even before the commencement of performance of duties.
- A termination clause stipulating notice period and payment in lieu of notice (provided it is not extravagant) is unlikely to be considered an invalid penalty clause for two reasons: (1) it requires performance of a primary obligation pursuant to an agreed method of lawful termination, rather than a secondary obligation arising from breach of a contract; and (2) employers have a legitimate interest in maintaining an adequate and steady workforce.

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1. [2021] HKCA 873
2. Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co [1915] AC 79
3. [2016] AC 1172

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