

Suspension of employment: Employers' rights clarified

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In the recent decision of *Lengler Werner v. Hong Kong Express Airways Ltd*¹ the High Court examined and clarified issues surrounding an employer's legal right to suspend an employee's duties.

Mr Werner was employed by the airline as a pilot. He had a verbal dispute with two other captains and the airline carried out an internal investigation following the incident. His flying duties were temporarily suspended for around six weeks pending the investigation. After six weeks and before the internal investigation was completed, Mr Werner inquired about the progress and was told he had been sent two warning letters, at which point he resigned and asserted that the airline had constructively dismissed him.

Mr Werner then brought a claim against the airline at the Labour Tribunal, claiming arrears of wages, wages in lieu of notice and overtime pay. The Labour Tribunal initially found in his favour, but the airline appealed the decision on a point of law and the High Court found in favour of the airline. In doing so, the High Court clarified the position surrounding an employer's right to suspend an employee.

Section 11 of the Employment Ordinance (Cap. 57) provides that an employer may suspend from employment any employee for a period not exceeding 14 days and that an employee who is suspended pursuant to this section may, at any time during the suspension, terminate his employment without notice or payment in lieu. Mr Werner was suspended from his flying duties but not his other duties, and he continued to be paid during the suspension. The High Court considered the relevant case law and held that section 11 applied only in circumstances of **complete suspension** of employment and not to any suspension from **partial performance** of duties. Accordingly, Mr Werner was not in fact entitled to terminate his employment contract pursuant to section 11, since his suspension was not a section 11 suspension. For there to be a section 11 suspension, the obligations of both the employer and the employee must be completely suspended for the specified period not exceeding 14 days.

The High Court also held that the Labour Tribunal had erred in holding that there had been a constructive dismissal. The airline's employee handbook specifically provided for its contractual power to suspend an employee from work during any investigation or during disciplinary or grievance proceedings, so the airline could not possibly be said to have repudiated the employment contract so as to constitute constructive dismissal. Mr Werner was ordered to pay the costs of the airline for the appeal.

This decision has clarified the application of section 11: employers who have properly provided for a contractual right to suspend partial performance of an employee's duties will not face the risk of the employee terminating the employment without notice of payment in lieu; the employee must still resign in accordance with the law and his/her contract. It also goes without saying that having the proper contractual provisions for suspension in place would protect employers from claims for constructive dismissal by disgruntled employees.

1. [2021] HKEC 2078.

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