

## Hong Kong employment law update: suspensions of staff.



Unclear drafting of the suspension provisions in section 11 of the Employment Ordinance ("EO") have meant employers and Human Resources managers have needed to tread very carefully indeed when suspending a member of staff.

Sections 11(1)(a) to (c) of the EO provide employers may suspend an employee for a period of up to 14 days:

- (a) As a disciplinary act for serious misconduct instead of summarily dismissing the employee;
- (b) While deciding whether or not to summarily dismiss them; or
- (c) Pending the outcome of criminal proceedings connected to the employment<sup>1</sup>.

Among the uncertainties which exist is the fact that the EO does not clarify whether the 14 day period only applies to suspensions without pay or is equally applicable to a suspension on full pay. It is also unclear what section 11(1)(c) of the EO applies to. For example, is someone's arrest a criminal proceeding and is an internal investigation included?<sup>2</sup>

Recently in *Lengler Werner v Hong Kong Express Airways Ltd.* ("HKE") [2021] HKCFI 1333, the Court of First Instance overturned a 2018 decision of the Labour Tribunal concerning a pilot's suspension. With all of the uncertainties that exist a judgment about employee suspensions helps to provide some useful guidance.

### Facts

Following a minor oral dispute between Mr Werner and two other captains of HKE on 3 November 2017 an internal inquiry was commenced. Mr Werner was then suspended from flying from 10 November but not from his other duties.

It then transpired that the last contact he had from HKE was on 15 December 2017.

On 28 December 2017, Mr Werner asked about the status of the investigation and was informed that it was incomplete but that he would be getting 2 warning letters. In response he tendered his resignation claiming HKE's actions amounted to a constructive dismissal.

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<sup>1</sup> If such criminal proceedings aren't concluded within the 14 day period referred to in section 11(1) EO then the period of suspension can be extended until their end.

<sup>2</sup> Cases suggest not. Civil investigations/internal investigations probably won't come within section 11(1)(c) EO.

The Labour Tribunal awarded Mr Werner arrears of wages, wages in lieu of notice and overtime pay on finding that he'd exercised his statutory right as a suspended employee to terminate his employment pursuant to section 11(2) of the EO which states:

*'An employee who is suspended from employment under subsection (1) may at any time during the period of his suspension, notwithstanding sections 6 and 7, terminate his contract of employment without notice or payment in lieu.'*

### **Appeal To The Court Of First Instance**

The Court of First Instance considered whether: (i) section 11 EO applied at all; and (ii) HKE's acts amounted to a constructive dismissal.

### **Application Of Section 11 EO?**

The Court held that section 11 only permits an employer under some very limited circumstances related to a potential summary dismissal or criminal prosecution to "*suspend from employment any employee*". Cited and approved were various cases<sup>3</sup> that drew a distinction between suspension from all employment and the mere suspension from the partial performance of duties.

The Court also found that the same distinctions were apparent from the contractual documents between HKE and Mr Werner, for example HKE's Employee Handbook stated:

*"Pending disciplinary action, the employee may be suspended from part of his duties, and may or may not be required to perform other duties."*

In this case, only Mr Werner's his flying duties not his employment in total had been suspended. He meanwhile continued to be paid per month his: (i) basic salary of HK\$75,000; (ii) Market Based Allowance (General) of HK\$24,000; and (iii) Guaranteed Market Based Allowance (Productivity) of HK\$27,500.

However, his suspension from flying meant Mr Werner lost overtime and a productivity bonus which were estimated to be worth about HK\$20,000 per month to him.

The Court held that section 11 of the EO was not engaged. Mr Werner's suspension was only partial and was not for any of the limited reasons permitted. Therefore he was not entitled to invoke or rely upon section 11(2) EO.

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<sup>3</sup> **Wu Man Kwong v Asia Culture Broadcast Co. Ltd**, unrep, HCLA 1/1998, 29 January 1999; **Yeung Chung Ming v Commissioner of Police**, unrep, CACV 13/2006, 13 February 2007.

## Constructive Dismissal?

It is well known that constructive dismissal can exist if an employer does a repudiatory act that causes a reasonable belief to exist that it is impossible to continue to work for them, allowing the employee to accept the repudiation, treat themselves as dismissed and to claim compensation.

The Labour Tribunal observed that HKE's Human Resources Department had last approached Mr Werner on 15 December 2017 and thereafter left him in the dark as to the developments. Such silence and inaction was labeled as unfair, unreasonable and unacceptable and in breach of HKE's implied terms of the employment contract: (i) to maintain a relationship of trust with Mr Werner; and (ii) not to exercise its rights and discretions arbitrarily, capriciously or inequitably. The Court disagreed. In particular, with respect to point (ii), the Court noted that HKE's contractual documents permitted it to act exactly as it had done so.

## Mr Werner's Drop In Income

Cutting an employee's pay is often a fundamental breach of an employment contract and Mr Werner's drop in income was as expected an important issue in the dispute. The Labour Tribunal felt cumulatively and separately this was also a repudiation justifying him asserting he'd been constructively dismissed. The Court disagreed stating that a drop in income cannot be viewed in isolation and must be considered in conjunction with whether HKE was entitled to suspend part of Mr Werner's duties and if it was able to do that then it could not possibly constitute a repudiatory breach.

## Discussion Points

There is no doubt about it, HKE's contractual documentation saved the day in this matter for example there is no common law right to reduce an employee's pay and in the absence of a contractual right to do so (or agreement) it appears Mr Werner's claim of constructive dismissal would have succeeded.

Employers therefore need to be careful to ensure that Handbooks or employment contracts are drafted accordingly, including giving them rights to suspend an employee from some of their duties.

Employers also need to bear in mind that suspending an employee within section 11(1) of the EO means that the employee can during that period lawfully terminate their employment without notice or a payment in lieu entitling them to receive various statutory entitlements.<sup>4</sup>

Finally, when suspending employees employers need to act expediently to avoid employees alleging they've been constructively dismissed because: (i) they've been deprived of their right to work; and/or (ii) the implied term of trust and confidence has been breached.

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<sup>4</sup> Severance or long service pay need the employee to be dismissed to become payable.

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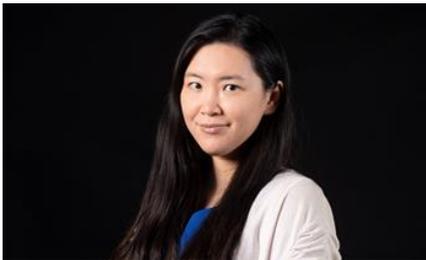


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