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Employment Law Alert - July 2010

Welcome to our July 2010 edition of Employment Law Alert, in which we consider several recent cases particular to Hong Kong.

Recent Decisions

Zielona Transport Ltd v Au Sou Lin HCLA 46/2008

Employer successfully counter claims "unjust enrichment" of employee who voluntarily opted to be hired as a contractor instead of an employee but who subsequently claimed statutory employment benefits

Facts

The employer ran a dockyard transportation business and originally hired all its drivers as employees. In 1996, the employer introduced a contractor system where employee drivers were given a choice to work as contractors instead. The claimant was one of the drivers who opted to become a contractor driver. Under the new contract, it was expressly stated that the claimant would earn 15% more than employee drivers, but in turn the claimant would no longer be entitled to the benefits and protection conferred to employees under the Employment Ordinance (Cap. 57) ("**EO**") as the claimant was no longer an employee.

While both parties voluntarily entered into a contractor relationship instead of an employment relationship the Court found that the relationship was an employer-employee relationship. The employee therefore claimed all the benefits under the EO that the parties had originally intended the 15% extra "wages" would cover.

The employee argued that the clause by which the employee "gave up" his benefits under the EO was void by virtue of section 70 of the EO (which prohibits contracting out of benefits proscribed by the EO). The employer counter claimed, arguing that the employee has "double benefited" and wished attempted to recover the extra 15% remuneration on the ground that the employee was "unjustly enriched" in effect cancelling out the employee's claim.

Law

In seeking a remedy of unjust enrichment, the employer had to prove 4 elements:

(1) that the employee had received a benefit, interest or enrichment;

(2) that the employer had given the benefit, interest or enrichment;

(3) that it would be unjust to allow the employee to retain the benefit, interest or enrichment; and

(4) that the employee has neither a reason nor defence to stop the employer from seeking recovery of the enrichment.

Therefore, as long as the employee had obtained some enrichment as a result of the employer having given the employee a benefit, the employer could and only could recover the amount the employee was enriched by, regardless of the original amount the employer has given to the defendant. There is no additional requirement that the benefit enjoyed must be of the same or more monetary value then what the (double) payment made by the employer was intended to cover.

Decision

The Court held that the employee was unjustly enriched. Contrary to the decision of the Labour Tribunal, the Court on appeal held that it was irrelevant that the employer had failed to precisely attribute the extra 15% remuneration to the statutory holidays' pay, annual leave pay, severance payment or long service payment claimed by the employee. Put simply the employee could not have their cake and eat it too.

The second issue was by how much was the employee unjustly enriched. The Court held it should be calculated as the difference between the salary of a contractor driver and that of an employee driver. Although the particular term forgoing the employee's benefits was void, the rest of the contract concerning remuneration was not; the illegality of that particular term was no defence to the action.

Practical Implications

This case shows that the law provides adequate protection for employers who have mistaken their relationship with employees as being one of principle and contractor. The doctrine of unjust enrichment is useful in preventing employees mistakenly categorised as contractors from claiming additional monies or a "double payment" when they have otherwise been already remunerated.

Employers are reminded that according to section 70 of the EO, they cannot contract out of the benefits conferred upon employees by the EO. Neither should employers attempt to evade such benefits by disguising an employment relationship by "employing" employees as contractors; the veil will inevitably be lifted by the Courts. However, where parties genuinely intend to create a relationship of principle and contractor, it is advisable to provide for such an arrangement in a carefully drafted contract for service.

Tadjudin Sunny v Bank of America CACV 173/2009

An claim based on an alleged implied 'anti-avoidance' term survives a strike out application on appeal

The defendant employer tried to apply for a striking-out of the plaintiff employee's claim and was at first successful. The defendant asserted that the implied terms

contended for could not co-exist with the statutory regimes in Hong Kong as provided by the EO; the plaintiff's case was therefore legally unsustainable and should be struck out before trial. The plaintiff appealed the lower Court's decision.

Facts

The plaintiff was employed by the defendant as a vice-president for over seven years. The employment contract was terminated according to terms of the contract in August 2007. The plaintiff's claim was in relation to the performance bonus for the year 2007, which was payable in February 2008, by which time the plaintiff's employment with the defendant had already been terminated.

The plaintiff argued that there was an implied term preventing the termination of her employment which was allegedly designed to avoid the plaintiff being eligible for the company's performance incentive programme. This is the so called "anti-avoidance" term which allegedly prevented the employer from "avoiding" the payment of bonuses as set out in the plaintiff's employment contract by terminating her employment prior to a particular date.

The Law

The Court in this case took the view that the law relating to a possible implied "anti-avoidance" term was an area of law which was still in the process of development and as such the striking out of such a claim at a preliminary stage prior to trial was held to be inappropriate. The Court then observed that although there cannot be an implied anti-avoidance term protective of the employee's interest in remaining employed, a term protecting employees against tactics *calculated* to avoid the payment of the performance bonus *may possibly* be implied.

The Court stated that the EO only serves as an "irreducible minimum" in terms of employee protection. Where the existing statutory provisions are found to be inadequate or insufficient to meet the requirement of justice, the common law can be resorted to by the Courts to develop the law, such as by implying the necessary anti-avoidance terms, because justice and fair play so requires.

Decision

The implying of an "anti-avoidance" term may not necessarily be incompatible with the statutory regime of the EO. Whether or not the implied terms contended by the plaintiff will in fact be implied greatly depends on the factual matrix of the case relating to the proper construction of the relevant clauses in the employment agreement. In this case there was no 'plain and obvious' case for striking out and dismissing the plaintiff's claim outright. Therefore the strike-out action failed.

It is yet to be seen if the Courts hold that such an implied "anti avoidance" clause exists.

Practical implications

As stated above, we will have to wait to see what the Court's position is in relation to whether an "anti-avoidance" term can, if at all, be implied into an employment agreement. However it is clear that Courts will not go so far as to interfere with a parties' intentions and imply an anti-avoidance term where it is inconsistent with any express terms of an employment agreement. Therefore, employers should be especially careful when drafting employment agreements and bonus provisions to ensure that no possible term be implied where it need not of been.

Sit Ka Yin Priscilla v Equal Opportunities Commission & Ors [2010] HKCU 370

Employee's claims of disability and sex discrimination failed due to lack of supporting evidence and comparing treatment with inappropriate "comparators"

Facts

The plaintiff Madam Sit was employed as the first Director of the Gender Division of the Equal Opportunities Commission ("**EOC**"), the defendants, in September 1996. The plaintiff alleged that she had been directly discriminated against by the EOC on the ground of disability and sex which resulted in the termination of her employment. Other claims disability harassment and victimisation by reason of her gender were held groundless.

The case was heavily fact based and highly dependent on the judge's perception of witnesses (which is immaterial for the purpose of this article).

The objective differential treatment complained of by Madame Sit mainly consisted of:

(1) negative comments made in relation to Madame Sit and her being eventually terminated without warning by the EOC, allegedly because of her disabilities including neck injury, muscle pain and regular fevers;

(2) Madam Sit never being allowed to "act up" in the post of the Chief Executive, whereas two other colleagues of her same ranking, Mr. Tong and Madam Papadopoulos, had been appointed as Acting Chief Executive whilst the Chief Executive was on leave; and

(3) Mr. Tong, her male colleague of the same ranking, being selected to attend a training course at Tsing Hua University and an overseas conference relating to disability issues on paid leave.

The EOC maintained that the differential treatment was due to the poor work performance of Madam Sit rather than any prohibited reason.

Law

According to the Sex Discrimination Ordinance (Cap. 480) ("**SDO**") and the Disability Discrimination Ordinance (Cap. 487) ("**DDO**"), it is unlawful for an employer to directly or indirectly discriminate against employees.

According to section 6 of DDO and section 5 of SDO, a person directly discriminates against another person if, respectively, on the ground of disability and the ground of sex he or she treats an individual less favourably than he or she would treat an individual without a disability or of a different sex. Section 3 of DDO and section 4 of SDO, the prohibited ground can be only one of the many grounds why there was differential treatment for a claim to be grounded.

Section 8 of DDO and section 10 of SDO allow for a comparator to be used for the purpose of determining whether the treatment received by the complainant was less favourable. An appropriate comparator can be hypothetical but must be holding the same job and responsibilities and of the same working abilities to make the comparison meaningful. In certain cases, it will not be useful or possible to identify an appropriate comparator and the only essential question that matters is "did the claimant, on the proscribed ground, receive less favourable treatment than others?"

In determining whether the claimant was discriminated on the unlawful prohibited ground, the "but for" test should be applied. Discrimination will therefore only be unlawful where differential treatment would not have occurred but for the difference in gender or disability. It is unusual to find direct evidence of discrimination and it usually depends upon what inference it is proper to draw from the primary facts, for example where there lacks adequate explanation for differential treatment.

Decision

Mr. Tong and Madam Papadopoulos were held to be "inappropriate comparators" as their jobs and responsibilities *were different from those of Madam Sit* and their working abilities were held not to be the same. For example, Mr. Tong was given the opportunity of attending a conference because that particular conference was more related to his scope of work than that of Madam Sit. There was therefore no differential treatment.

In relation to the differential treatment in appointing an Acting Chief Executive, the negative feedback at work and the eventual termination of Madame Sit's employment, there was strong corroborating evidence from EOC's witnesses that Madam Sit's work performance was actually below standard and that this in fact was the true reason behind the eventual termination of her employment with the EOC. Moreover, even where favouritism was alleged by Madam Sit, the law did not actually require an employer to provide equal opportunities to every employee so long as the decision for choosing the appropriate candidate was not itself in any way influenced or caused by the unlawful prohibited grounds stated in the various anti-discrimination ordinances.

Practical Implications

The law does not prevent favouritism at work - only that favouritism which involves a prohibited ground. Furthermore, this case illustrates that unlawful discrimination cannot be casually alleged and Courts will not necessarily seek out a comparator where it is not useful to do so.

To avoid this sort of dispute, employers should always keep a complete and corroborative record of managerial decisions. Such records will be useful evidence in proving legitimate grounds for differential treatment when an employee alleges unlawful discrimination.

If you require any further information on any of the above articles please let us know.

We trust that you have found our latest edition of Employment Law Alert informative relevant to your business. Please do let us know if you have any questions. In additional to our Alert, we will be holding a free lunchtime seminar on other recent Hong Kong employment law cases at **12:45 p.m. - 2:00 p.m.** on **29th July 2010** at our offices. Lunch will be provided. Please confirm your attendance with Lincoln Kinley by email at lkinley@rsrbhk.com

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RICHARDS BUTLER
in associated with Reed Smith LLP

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