

Termination of a Sick and Pregnant Employee was not Unlawful Discrimination

In March 2016, the Hong Kong District Court in *Law Miu Kuen Sally v. Sunbase International (Holdings) Limited* (DCEO 7/2012) dismissed an employee's claim of disability, sex and family status discrimination against her employer. The plaintiff (P) was a long serving employee who had her employment terminated by the defendant company (D) shortly after returning from maternity and sick leave.

Facts

P frequently took sick leave to undergo medical treatment following a traffic accident in November 2007.

In August 2009, D issued a set of guidelines (Leave Guidelines) which required all employees to submit sick leave certificates and that paid sick leave would only be granted for sick leave periods of not less than four days. Before the Leave Guidelines were issued, sick leave was granted without any qualifying period.

D had made the decision to terminate P shortly after September 2009. However, the termination was put on hold because P notified D she was pregnant in October 2009.

In April 2010, immediately prior to P going on maternity leave, D met with P and gave her the option to resign, but the offer was rejected.

P was scheduled to return from maternity and annual leave on 9 August 2010, but she took sick leave between 12 and 20 August 2010. On 23 August 2010, on the day P returned to work after her sick leave, D terminated P's employment.

P claimed that the issuance and implementation of the Leave Guidelines and the termination of her employment were unlawful discrimination because they were done on the grounds of her disability, sex and family status, in contravention of the *Disability Discrimination Ordinance*, *Sex Discrimination*

Ordinance and *Family Status Discrimination Ordinance*, respectively.

Court Findings

The parties agreed that the burden was on P to prove unlawful discrimination on the balance of probabilities based on the two-part test stated in *M v. Secretary for Justice* [2009] 2 HKLRD 298. This test involved determining (i) whether less favourable treatment to the plaintiff had occurred, and (ii) whether it had been caused by one of the protected grounds.

The Court dismissed P's claim for the following reasons:

1. The introduction of the Leave Guidelines did not amount to unlawful discrimination. The Court held that the Leave Guidelines were aimed at malingering, not disability, and was applicable to all employees (not just P). It introduced a scheme in compliance with the provisions of the *Employment Ordinance* and the Court held it cannot reasonably be argued that an employer would commit an act of discrimination by following the law. The procedural requirements under the Leave Guidelines (i.e., how to report sick leave and the need to provide a sick leave certificate) were held to be reasonable and fair.
2. P had claimed she suffered less favourable treatment when D offered another female employee the option to use her annual leave to set-off her sick leave but did not make the same offer to P. The Court found that D did not offer the other female employee the option to set-off, but rather the female employee had requested for a set-off and D gave permission in response to the request. The Court found that P had never made such a request to D to set-off. Therefore, no claim for less favourable

treatment could be maintained if P had never asked for a set-off.

3. P had alleged that representatives of D had requested that P resign during the meeting in April 2010 owing to her unsatisfactory physical condition and her prospective status as a mother. D's witness evidence was that they did not request P to resign during the April 2010 meeting but only gave P the option to resign. Their evidence was that the cause of the meeting was P telling them she was not happy at work and P having at the time poor performance and behavioural issues. They did not want P's unhappiness at work affecting staff morale. The Court accepted D's evidence on this point.
4. D's case was that P's employment was terminated due to poor work performance (including delay in preparing financial statements, poor attitude towards co-workers and poor handling of petty cash) and abuse of her work computer by using it for personal matters. The Court found on the evidence that P's work performance had been consistently unsatisfactory over a substantial period of time. The Court held that D had a legitimate concern that the complaints against P might not be isolated incidents and that the continued employment of P would not be conducive to staff morale. P had voluminous non-work related and personal data on her work computer. This was in breach of D's computer guidelines. The quantity of data on P's work computer also suggested she had spent a substantial amount of office time dealing with non-work and personal matters. The Court held that D did have strong legitimate grounds to dismiss P.

Lessons For Employers

Terminating the employment of a sick and/or pregnant employee is fraught with legal risks given the prohibitions on termination and the anti-discrimination ordinances. However, this case shows that the risks associated with unlawful termination can be managed where an employer can demonstrate valid grounds for termination. Some of the lessons from this case include:

- Have (legitimate) reasons for taking action: If an employer cannot prove a legitimate reason for terminating an employee, then they run the risk of the employee claiming the termination was done for an unlawful reason. Having a consistent paper trail over a period of time adds weight and credibility to an employer's version of events. This is particularly important in defending unlawful discrimination claims because the anti-discrimination legislation provides that if an act is done for a number of reasons, and one of those is the unlawful reason, then the act will be deemed to have been done for the unlawful reason. So, the employer should be able to demonstrate that the sole reason for doing or not doing something, is a legitimate reason.
- Be patient: Although D wanted to terminate the employee sooner, it did not do so once it was notified that P was pregnant. This was due to the prohibition in the *Employment Ordinance* on terminating a pregnant employee and certainly D would be facing a (further) different type of claim if it had proceeded with terminating P's employment during her pregnancy. But, even absent this prohibition, it can be seen from the facts that D had tolerated its issues with P for a period of time and did not move quickly to terminate P's employment. This allowed time to build up a paper trail.

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