

Employment Newsletter

May 2016

Gall was instructed to act for Sunny Tadjudin against the Bank of America in this landmark employment law case. The “Sunny Case” is considered the leading authority in respect of bonus claims in Hong Kong. In the Bank’s latest appeal, the Court considered the issue of whether an anti-avoidance provision can be implied into an employment contract.

This judgment has repercussions for all employers in Hong Kong who pay bonuses, especially those in the financial sector. In line with many other jurisdictions, the Court of Appeal confirmed that it is unlawful for Hong Kong employers to terminate an employee’s employment in order to avoid the employee being eligible for assessment of discretionary bonus and payment.

Gall’s employment team, led by Nick Gall (Partner), Andrea Randall (Partner) and Stephen Chan (Senior Associate) report on their recent Court of Appeal victory.

HONG KONG COURT OF APPEAL CONFIRMS IMPLIED TERM OF ANTI-AVOIDANCE IN EMPLOYMENT CONTRACTS

Introduction

Many employees, particularly those in Hong Kong’s financial sector, receive incentive payments (e.g. annual bonuses) as part of their remuneration package. Bonuses often form a significant part of an employee’s overall package.

Employers often insert clauses into employment agreements to the effect that if an employee is no longer employed as at the date of the bonus payment, then the employee would not be eligible to receive that bonus.

As such, it is not difficult to imagine a scenario where an employee, who is due for a large bonus due to his/her performance during the year, to be terminated prior to the bonus payment date, thereby eliminating the need to pay the employee.

This is what happened in *Sunny Tadjudin v Bank of America, National Association* [2014] (CACV 12/2015) decision delivered on 20 May 2016, which we discuss in the full article.

Court of First Instance

In a decision on 24 December 2014, the Judge at first instance found in favour of the Plaintiff, Ms. Sunny Tadjudin. Amongst other findings, the Judge found that:

1. The implied term of anti-avoidance existed in Hong Kong. This prevented employers from terminating their employees for the purpose of avoiding payment of the employee’s bonus.
2. The Bank of America, through John Liptak, the manager of Ms. Tadjudin, dismissed her on the pretext of performance issues, but in reality was acting out of personal malice and vendetta against the Plaintiff.
3. Accordingly, Mr. Liptak, as an agent of the Bank, intended all of the negative foreseeable consequences which might follow termination, including the deprivation of the Plaintiff of her otherwise due bonus.

Court of Appeal

The Bank sought to appeal against the Judge's findings at first instance. The Bank argued that:

1. There was no scope in Hong Kong for the anti-avoidance term to be implied.
2. The anti-avoidance term was inconsistent with the employer's right to terminate by giving notice or payment in lieu of notice.
3. The anti-avoidance term lacked mutuality or reciprocity.
4. The anti-avoidance term could not be found without a pleading of the implied term of mutual trust and confidence.

The Court of Appeal rejected all of these arguments and found:

- A. Hong Kong legislation did not "occupy the field" in relation to bonus payments. The Employment Ordinance only dealt with "rights, benefits or protection conferred" by the ordinance itself, which do not relate to payments of bonuses.
- B. There was no inconsistency with the employer's right to terminate. The right to terminate just had to be exercised in good faith.
- C. It was not necessary to make a finding that the anti-avoidance term should be implied in all employment contracts generally. In the present case, there need not be any reciprocity as the pleaded obligation was only on the Bank, not the Plaintiff.
- D. The anti-avoidance term could be (and was) implied without having to rely upon the implied obligation of mutual trust and confidence.

Conclusion

This case now confirms that while employers still have broad powers to dismiss employees under the Employment Ordinance (Cap. 57), employees have an opportunity of redress against the employer if such dismissals are occasioned by the employer attempting to avoid assessment and payment of bonuses.

About The Employment Team

Led by Senior Partner Nick Gall, the employment practice at Gall is consistently ranked top tier in all legal guides. Over the last 12 months, the practice received further recognition when the firm won "Best in Labour and Employment" in the Asialaw Asia-Pacific Dispute Resolution Awards 2015 and was also chosen as "Best in Employment and Industrial Relations" in the 2015 China Business Law Awards in October 2015.

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