

Tsun Sau Ching v Cheung Hung Aluminium Decoration Engineering Company Limited

DCEO 3/2018

Background

The Claimant was employed by the Respondent from 1 July 2014 to 10 July 2016 as a clerk. She alleged that Mr Chan, shareholder and director of the Respondent, pressured her to resign in June 2016 after learning in late May 2016 that she was pregnant. He allegedly said that if she didn't resign as told, he would reassign her to a hot and remote location to work, and she would have a very hard time.

The Claimant lodged a pregnancy discrimination complaint with the EOC against the Respondent. Soon afterwards, she miscarried and applied for sick leave to undergo surgery and recover from the miscarriage. Two days after she returned to work, she received a notice signed by Mr Chan saying that she had been dismissed because of her poor performance. She then lodged an additional complaint with the EOC, alleging that the Respondent discriminated against her on the ground of her disability.

Subsequently, in an email and a letter to the Claimant, the Respondent informed her that she would not be given any severance payment or proof of employment because she had lodged the aforesaid disability discrimination complaint with the EOC.

The parties failed to reach a settlement through conciliation arranged by the EOC. The Claimant then applied for and was granted legal assistance by the EOC. On behalf of the Claimant, the EOC issued legal proceedings under the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO) against the Respondent in the District Court, claiming that the Respondent had engaged in unlawful pregnancy discrimination, disability discrimination and discrimination by way of victimisation against the Claimant.

The Court's decision

While the Court acknowledged that the Claimant's miscarriage and post-surgery physical ailments came within the definition of disability under the DDO, her sick leave application only cited general gynaecological reasons. On this evidence the Court concluded that at the time of the dismissal, the Respondent was unaware of the miscarriage and instead believed that the Claimant had taken sick leave for pregnancy-related reasons. The claim for disability discrimination was therefore dismissed.

However, the Court ruled that the Respondent had indeed, on the ground of the Claimant's pregnancy, pressured her to resign, make threatening remarks and eventually dismissed her. The acts amounted to unlawful pregnancy discrimination under the SDO. Moreover, the Court made it clear that the miscarriage was irrelevant in this regard given that, as mentioned, the Respondent had no knowledge of it at the time of the dismissal.

The Court also held that the Respondent had committed discrimination against the Claimant by way of victimisation contrary to section 7(1) of the DDO, by refusing to give her severance pay and proof of employment because she had lodged a disability discrimination complaint with the EOC.

The Claimant was awarded the following damages:

Injury to feelings	HK\$ 90,000
Loss of income	HK\$ 33,000
Exemplary damages	HK\$ 10,000
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	HK\$ 133,000
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When assessing damages for injury to feelings, the Court reaffirmed that the amount should reflect the Court's determination in protecting pregnant women, adding that HK\$55,000 should be the starting point. Taking into account the intense pressure to which the Respondent subjected the Claimant with the threatening remarks, and the fact that the Claimant had to put up with the Respondent's discriminatory acts after a physically and mentally debilitating miscarriage, the Court decided that an additional HK\$35,000 in damages for injury to feelings would be reasonable.

The Court further awarded exemplary damages since the Respondent not only insisted that he had not dismissed the Claimant on account of her pregnancy, but also questioned her pregnancy and miscarriage without any reasonable ground, and conducted his defence case in an unreasonable manner, wasting much of the Court's time.

The Court also ordered the Respondent to issue a proof of employment to the Claimant for her use in seeking jobs in the future.