

## Employment, Privacy & Discrimination

### Will exemplary damages be awarded to employer as a result of employee's fraudulent behaviour?

#### Introduction

In *Promo International Ltd v Chae Man Tock And Another* [2018] HKCU 688, the Court of First Instance (“**Court**”) explored various issues in relation to employment law, including the principles for establishing whether or not there is an employer-employee relationship, what duty of good faith entails for an employee, and in what circumstances can exemplary damages be awarded to an employer.

#### Background

Promo International Limited (“**Plaintiff**”), the employer, is a company incorporated under the laws of the United Kingdom. Its business mainly involves supplying products such as baseball caps, waiter trays, plastic pitchers and bottle openers to customers in the United Kingdom and the European Union for business promotional purposes.

In 2003, a “buying office” was set up by the Plaintiff in Shenzhen to source products for the Plaintiff. Under an oral agreement, Mr Chae Man Tock (“**D1**”) was initially employed by the Plaintiff as a merchandiser in the Shenzhen office. After the Shenzhen office ceased its operations in March 2007, under a further oral agreement, D1 worked as an office manager in the Plaintiff’s Hong Kong office starting in May 2007. The Plaintiff made payments to D1 by reason of his employment in GBP (British pound sterling), and did not make contribution towards D1’s Mandatory Provident Fund (“**MPF**”) in Hong Kong. The Plaintiff also employed D1’s wife, Ms Chow Ting Hei (“**D2**”), by oral agreement to work in the Hong Kong office in around August 2007. D1 and D2’s duties include sourcing products from suppliers in Mainland China for the Plaintiff’s benefit.

D1 and D2 were subsequently found to be involved in a scheme where they fraudulently inflated suppliers’ prices on the invoices and demanded commissions from suppliers. Such scheme was committed without the Plaintiff’s knowledge or consent. D1 and D2 were criminally convicted of fraud in 2012 and sentenced to 3.5 years of imprisonment.

#### Judgment

The Plaintiff claimed against D1 and D2 for breach of their employment agreements and sought recovery of the price differences paid by the Plaintiff and the amounts quoted by the suppliers to D1 and D2. D1 argued that he was an independent contractor in the Hong Kong office and had employed D2 himself.

The Court considered the following issues:

(1) Whether or not D1 and D2 were the Plaintiff's employees at the material times

In deciding whether or not a person is an employee, the Court considered the Court of Final Appeal's decision in Poon Chau Nam v Yim Siu Cheung [2007] HKCFA 19, (2007) 10 HKCFAR 156, where it was established that the modern approach to the question of whether or not a person is an employee is to examine all the features of the relationship to determine, as a matter of overall impression, whether the relationship is one of employment. This involves a nuanced and not a mechanical approach.

With this principle in mind, the Court found on the facts that D1 and D2 were employees of the Plaintiff. The Court took into account the following facts:

1. payments to D1 were made in GBP did not matter as the payments still counted as salary payments to an employee;
2. D1 had written to the managing director of the Plaintiff when taking leave and requesting for bonuses;
3. the Plaintiff did not contribute to D1's MPF was not in itself a determining factor that the Plaintiff was not D1's employer; and
4. D2 reported to D1 did not necessarily mean that D1 was her employer.

(2) Whether or not D1 and D2 breached their duties of good faith owed towards the Plaintiff

It is well established that an employee, during the course of employment, owes a duty of good faith to his employer. Such duty includes a duty to not make any secret profit. As the Court found D1 and D2 were employees of the Plaintiff, there existed an implied term in D1 and D2's employment that they owed a duty a good faith towards the Plaintiff. D1 and D2 should have sourced goods of acceptable quality at the lowest price possible to maximise the Plaintiff's profits. The fraudulent actions of D1 and D2 harmed the Plaintiff. Therefore, D1 and D2 had breached their duties of good faith in inflating the prices of suppliers and pocketing the differences.

(3) Extent of damages suffered by the Plaintiff arising from the D1 and D2's breach of duties

On this issue, the Court considered whether or not there were grounds for awarding exemplary damages (i.e. damages awarded to punish, rather than to compensate) to the Plaintiff. It was held that the Plaintiff was not entitled to exemplary damages as D1 and D2's actions were not "*the worst of its kind*" (*per* The Honourable Madam Justice B. Chu at para. 231), and that the Plaintiff, as a company, could not suffer direct physical and mental injury.

Therefore, compensatory damages were adequate to punish and deter D1 and D2 for their conduct.

## Takeaways

To avoid disputes, employers should document their employment agreements in writing to set out clearly the terms of employment. Furthermore, employers should establish adequate internal control to monitor and detect breaches by employees of their duties. The case also demonstrates that the Hong Kong courts take a practical approach in assessing damages, where exemplary damages will only be awarded in extreme cases.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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