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In the case of John Simpson Warham and Others v. Cathay Pacific Airways Ltd. and another (11/11/2009, HCMP 4400/2001), 18 former Cathay Pacific pilots were successful in their claims against Cathay for unfair dismissal, wrongful dismissal and defamation. A substantial amount of damages (over HKD3 million) was awarded to each pilot (with the exception of one), for defamatory statements made by Cathay.

Background

Cathay terminated the employment of 49 employees in July 2001 during an industrial dispute concerning rostering practices and contractual entitlements, including compensation. Only 18 of the 49 pilots pursued the case to the Court of First Instance. Crucially, all the pilots in this case were members of a trade union.

In July 2000, the union had voted to reinstate a "contract compliance" campaign which advocated a "rigid adherence" by union members to the letter of the pilots' employment contracts. Examples of practices encouraged by the union were to urge union members not to make themselves contactable by Cathay's Crew Control staff on a Guaranteed Day-Off and to take the full time allocated for preparation before leaving home if called to duty. In June 2001, the union voted in favour of undertaking limited industrial action which was subsequently decided to take the form of a "work-to-rule" Maximum Safety Strategy ("MSS"). This included, for example, adhering to the letter of flight action manuals which would cause anticipated flight delays of 15-60 minutes or more. Negotiations between Cathay and the union were attempted but broke down. Cathay management, as a response, undertook a review of each aircraft office employed by Cathay to identify pilots with attendance records, warning letters or those considered to be "unhelpful or uncooperative". After the review process had taken place, the employment of the plaintiff pilots was terminated by Cathay by providing three months' payment in lieu of notice.

The main points of the case are:

Unfair Dismissal

Trade union membership

Under section 21B(1) of the Employment Ordinance ("EO"), every employee has the right to become a member of a trade union registered under the Trade Unions Ordinance

and to take part in the activities of the trade union. Section 21B(2)(b) prohibits an employer from terminating an employee's contract of employment because an employee exercises his/her rights under section 21B(1).

No valid reason

A court or Labour Tribunal may make an award of compensation payable by an employer to an employee if the employer dismisses the employee without a valid reason (as set out in the EO) and in unlawful circumstances. This would include termination in breach of the provisions prohibiting dismissal of an employee who is pregnant or receiving sickness allowance, for example. It also includes dismissal in contravention of section 21B(2)(b).

The court in this case rejected Cathay's argument that the valid reason for dismissals was the employees' conduct. Relying on the case of *Thomas Vincent v. South China Morning Post Publishers Ltd.* [2005] 4 HKLRD 258, the court pointed out that it was necessary to ascertain the predominant motive for Cathay's act of dismissal. It noted that the pilots singled out in the review process were "probably the most active supporters of the union cause" and found that in, dismissing the employees, Cathay's intention was to show union members that management was prepared to take tough action against pilots participating in the MSS. The predominant reason for the employees' termination of employment was for supporting the union and they were chosen for dismissal as likely participants in the contract compliance campaign and intended limited industrial action. The court found that the employees had been dismissed without a valid reason contrary to section 32K of the Employment Ordinance. Because the dismissals were also in breach of the protections for trade union activities, they were awarded HKD150,000 each under section 32P of the EO.

Wrongful Termination

Cathay had in place contractual Disciplinary and Grievance Procedures ("DPG") which it was obliged to follow before dismissing any pilots on disciplinary grounds. The court found that the conduct alleged by Cathay against the pilots amounted to gross misconduct under the DPG and, as a result, it was obliged to give the pilots a fair chance to be heard before dismissing them for gross misconduct. Cathay did not do so and was consequently in breach of contract. The judge awarded the pilots damages equivalent to one month's wages for breach of the DPG.

Defamation

Statements made by Cathay management in relation to the dismissals (which were accessible to the public) were held by the court to be defamatory. It viewed the statements as making serious allegations about the professionalism, character and employment of the pilots and pointed out that "aspersions on a pilot's professionalism and employment record are bound to have a serious effect" on a pilot's career. The court observed that Cathay should have at least tried to ascertain the pilots' views on the matters alleged but made no attempt to do so. The pilots were each awarded

general damages of HKD3 million.

It is useful to reflect on the court's summary of the three purposes of general damages for defamation: 1. to console for the distress suffered as a result of publication; 2. to compensate for the loss to reputation consequent upon the publication; and 3. to vindicate one's reputation. In assessing damages, the court also took into consideration that the one of the statements remained published on Cathay's website until September 2009. The pilots were additionally awarded aggravated damages of HKD300,000 due to Cathay's refusal to apologise.

Take Away Points for Employers

1. This case illustrates the difficulties employers face when dealing with employees who are active trade union members. Employers must tread carefully if contemplating dismissals, and ensure that they can show that trade union membership (or activities associated with the trade union membership) is not the predominant reason for the termination of employment.
2. Employers should avoid having contractual disciplinary procedures. The employers are likely to be contractually obliged to complete the procedures before terminating the employment relationship if the reason for dismissal is the employee's conduct. The effect is to diminish other contractual rights, such as the right to terminate employment by giving contractually-agreed notice or payment in lieu.
3. Employers must carefully consider any statements made surrounding the termination of employment of its employees. As can be seen from this case, the potential damages for a successful defamation action in the context of employment are large. On this point, an area of the judgment that is worth specifically highlighting is the court's observation that "news spreads around quickly in a small industry and one may encounter enormous difficulty finding employment due to the loss of reputation arising from defamatory statements". This comment will have equal application to other industries in Hong Kong and is highly relevant when looking at defamation in the employment sphere.
4. When assessing the statements made by Cathay management and the effect of strict contract compliance, the court stated that "a desire to abide by the terms of one's contract can by no stretch of the imagination be treated as equivalent to an anti-company attitude". Employers should take note of this comment when assessing individual performance as, in today's modern working world, the expected demands of the job often go further than the black and white letter of the contract.