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Press Release
Wednesday 19 August 2020

FOR IMMEDIATE RELEASE

Landmark Hong Kong Court of Appeal decision confirms protection for all employees

In a watershed Court of Appeal decision serving to protect the rights of all Hong Kong employees, the Court has found that the employer GF Capital (Hong Kong) Ltd wrongfully withheld pay from a former employee.

The employer delayed, and then withheld payment of a 2016 Guaranteed Bonus due in March 2017, and claiming to set-off against that debt, a disputed claim against their employee for negligent work.

The court confirmed and clarified the scope of protection provided to employees by section 32(1) of the Employment Ordinance. This states:

“No deductions shall be made by an employer from the wages of his employee or from any other sum due to the employee otherwise than in accordance with this Ordinance.”

The court confirmed that:

“The legislature must have intended that the word [“deduction”] should not have “carefully circumscribed meaning” and if that is so, that word is intended to have “an extended rather than a confined area of application”. The same reasoning should apply in interpreting the word “deductions” in section 32(1). The legislature could not have intended to remove the protection against set-off and permit the employer to deprive the employee temporarily of the right to payment of a sum due to him until the final resolution of the employer’s claim for unliquidated damages against the employee for bad or negligent work.” [Emphasis added]

and

“I agree with [the barrister for the employee] that the wording of section 32(1) clearly does not permit the defendant to exercise an equitable set-off by raising a claim for unliquidated damages against its liability to pay the Bonus. The courts below were in error in holding that there is an arguable defence of equitable set-off.” [Emphasis added]

Russell Bennett, Partner and Co-Head of Employment at Tanner De Witt said,

“We are delighted to have prevailed in this landmark case. The decision secures employee rights, including against potentially unscrupulous employers. It confirms and clarifies that employers must honour their obligations to pay wages and sums due to their employees promptly and without delay or excuse.

The decision protects employees from non-payment based on broad and/or flimsy allegations of negligence or poor work. If it had not been for this decision employees would need to dispute such allegations through the courts, before being paid their employment entitlements. That would place an almost impossible and insurmountable hurdle in the way of every employee seeking payment of wages, CNY bonuses, and/or other sums owed to them by their employer.”

Employment disputes very rarely reach the Court of Appeal; this ruling is only one of very few in recent years. The ruling outlines substantial protections, and in doing so also makes it more difficult for employers to avoid prosecution for non-payment of employment entitlements, by claiming a defence that they have a “reasonable excuse” for non-payment. This decision therefore assists and empowers the Labour Department to threaten and take criminal prosecutions to protect mistreated employees who have not been paid promptly by their employers.

The case is CACV 502 & 577/2019 (heard together and on appeal from HCA 2563/2017), Hong Kong Court of Appeal.

The plaintiff employee was represented by Tanner De Witt.

The defendant employer was represented by Simmons & Simmons.

About Tanner De Witt

Tanner De Witt is an established and recommended independent law firm in Hong Kong. Many of our lawyers have international law firm backgrounds and our firm and its lawyers receive top ratings from industry publications such as Chambers and Legal 500.

Tanner De Witt is an equal opportunities employer and strives to promote a culture of opportunity and success. Hong Kong enjoys a diversity of perspectives, history, culture and outlook; our team and client base reflect this.

The firm provides legal advice and representation in the following areas: Employment; Litigation and Dispute Resolution; Insolvency and Restructuring; Corporate and Commercial; Banking and Finance; Financial Services Regulatory; Immigration; Family and Private Client; Wills and Trusts; Hospitality including Liquor Licensing; White Collar Crime and Criminal.

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