BRIEFINGNOTE

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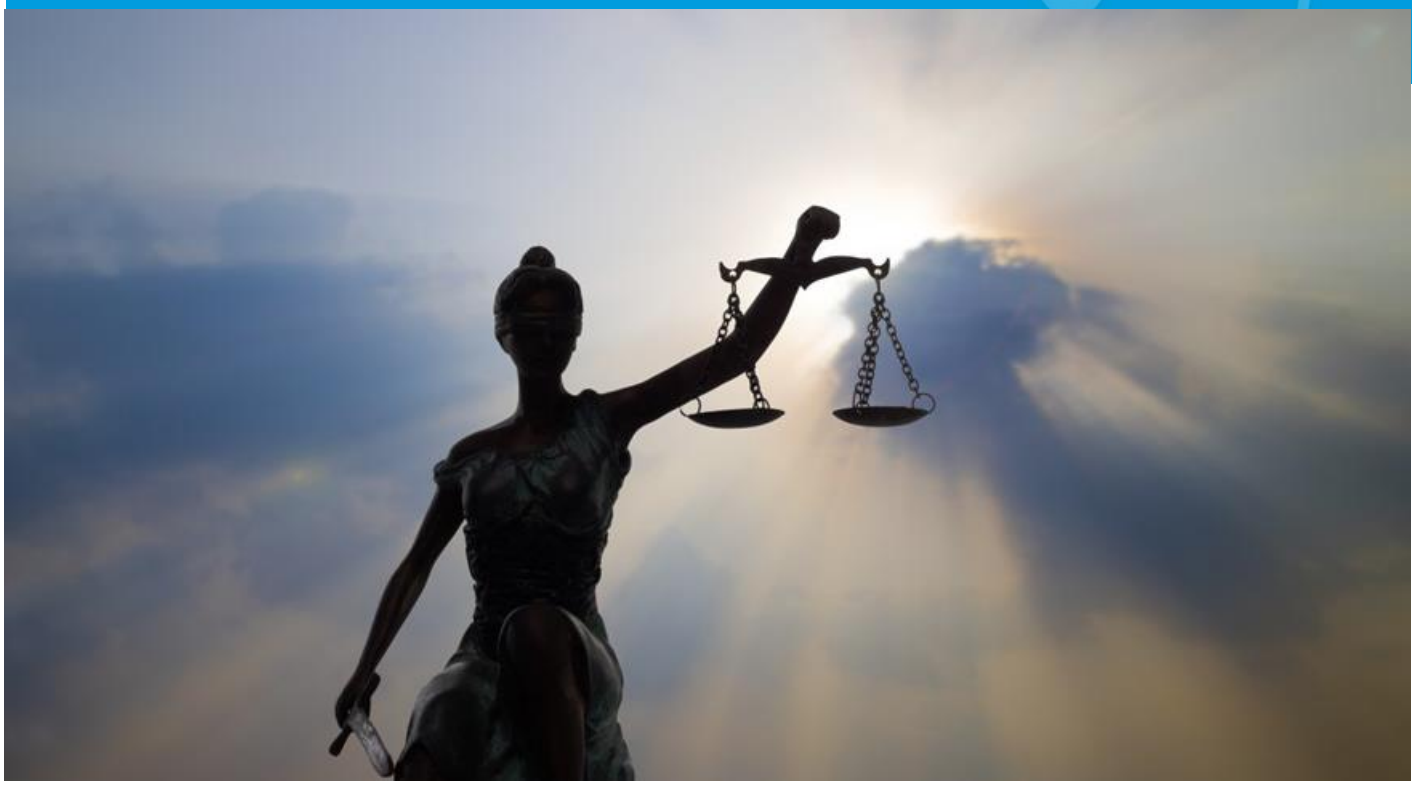
周露娜 v 中旅貨運物流中心有限公司:
Pregnancy discrimination in the workplace



Introduction

Pregnancy, while a joyful journey for many women and families, can present challenges in the workplace. It is not uncommon to hear stories that pregnant employees who were being denied of pay rise, bonus and/or promotion opportunities or that they got terminated during the pregnancy or right after they have returned from maternity leave on performance grounds.

In the recent case of *周露娜 v 中旅貨運物流中心有限公司*, the Hong Kong District Court ruled against a logistics company (the "**Respondent**") for not renewing the employment contract of a pregnant employee (the "**Claimant**") and for refusing to pay her the year-end bonus for 2017 after she informed the Respondent of her pregnancy. The Claimant was awarded substantial damages in the total sum of HK$935,180, together with costs of the action (which is rare in discrimination matters). This is one of the highest discrimination awards made in Hong Kong.

The judgment sends another very strong reminder to all employers that pregnancy discrimination is serious and unacceptable, and that company policy or measures should be put in place to ensure that pregnant employees are not treated in a less favourable/discriminatory manner.

Factual background of the case

The Claimant was employed by two companies within the Respondent's group between September 2007 and March 2011, during which she was promoted twice. Since April 2011, the Claimant was employed by the Respondent as its Senior Manager of the Storage Logistics Department under successive yearly contracts.

The evidence showed that the Claimant received excellent employee awards between 2011 and 2017 and was rated highly in the annual performance appraisals from 2012 to 2015 (scored 93-96 out of 100 for her work performance). She had also been receiving annual year-end bonuses every year from 2011 until 2016.

In early March 2017, the Respondent merged four business units into one and the Claimant headed the new integrated unit. Shortly after the integration, the Claimant became pregnant, and she informed the Respondent of her pregnancy on 21 March 2017. In April 2017, the Respondent employed a new member in the Sales department with overlapping responsibilities as the Claimant. In around July 2017, the Claimant informed the Respondent that she would start taking maternity leave from 1 November 2017 (the date was subsequently changed to 11 November 2017).

On 9 November 2017, the Claimant was unwell and admitted to hospital for obstetric condition when she was informed by the Respondent via WeChat that her employment contract would not be renewed with effect from 1 January 2018 due to restructuring (架構重組) and business downsizing (業務縮減) of the Respondent (the "**Dismissal**"). A dismissal notice was sent to the Claimant on the same day by email. The Claimant was also not paid her year-end bonus for the year 2017 (the "**Denial of Bonus**"). She thereafter suffered from depression until June 2019.

The Claimant lodged a complaint to the Equal Opportunities Commission ("**EOC**") in January 2018. As the complaint could not be resolved by the EOC, the Claimant commenced legal proceedings against the Respondent in November 2019 in the District Court for pregnancy discrimination.

The Claimant claimed that the Respondent had breached sections 8(a) and 11(2) of the Sex Discrimination Ordinance ("**SDO**") and sought, amongst others, compensation for injury to feelings, loss of income, loss of bonus, a letter of apology and a reference letter from the Respondent.

The Respondent's defence

The Respondent argued that neither the Dismissal nor the Denial of Bonus was due to any discrimination.

The Respondent claimed that the Claimant was dismissed because of "organizational restructuring" and "business downsizing" and that the Claimant was not paid her year-end bonus for 2017 because of her unsatisfactory performance. The performance issues complained of included:

(1) Failure to attract quality and new clients, leading to a drop of the Respondent's logistics business;

(2) Failure to build a sales team;

(3) Unsatisfactory attendance;

(4) Failure to adhere to leave procedures; and

(5) Making unpaid private international calls.

The Respondent also alleged that the year-end bonus was discretionary in nature so it has discretion to decide whether to award such bonus to the Claimant and at what amount.

The District Court's ruling

The Court referred to a number of case authorities and reaffirmed the following legal principles concerning sex discrimination:

(1) As a starting point, the burden of proof lies with the claimant to prove discrimination on the balance of probabilities.

(2) Direct evidence of discrimination is often rare. Therefore, the outcome of a case typically relies on inferences drawn from primary facts.

(3) In cases of differential treatment, the Court expects the employer to provide an explanation. If no or any inadequate/unsatisfactory explanation is provided, the Court may reasonably infer that the discrimination was based on discriminatory grounds.

(4) The inference may be rebutted if the employer can show to the Court with evidence of a genuine reason (which is not discriminatory) for the differential treatment.

Issue 1: Whether the Claimant was discriminated against in the Dismissal?

The Court was unconvinced by the Respondent's argument that the Dismissal was due to its "organizational restructuring" and "business downsizing". The Respondent failed to provide any documentation or record to show any discussion or plan concerning such restructuring/downsizing, and that it was only mentioned for the first time in the Dismissal Notice provided by the Respondent to the Claimant.

The Court found that the Respondent's five accusations regarding the Claimant's work performance were "baseless" and "unfair" and that no written warning has ever been issued to the Claimant.

In addition, the Court considered that the proximity in time between the Claimant's notification of pregnancy to the Respondent (given on 21 March 2017) and the Respondent hiring the new employee in the Sales Department (in April 2017) indicated that the new employee was employed with one of the purposes, if not the dominant one, to replace the Claimant in her role and responsibilities.

Based on these findings, the Court inferred that the Claimant's pregnancy was one, if not the substantial, reason for the Dismissal so, by virtue of Section 4 of the SDO[1], the Dismissal and unfavourable treatment shall be taken as done by reason of her pregnancy and the Respondent is liable for pregnancy discrimination.

Issue 2: Whether the Claimant was discriminated against in the Denial of Bonus?

The Court clarified that the central issue was whether the Claimant received less favourable treatment because of her pregnancy. It was therefore crucial to ascertain what the usual treatment given by the Respondent to other employees of the same grade as the Claimant.

After considering the evidence, the Court concluded that the Denial of Bonus was discriminatory for the following reasons:

(1) The prevailing and usual practice of the Respondent was to provide year-end bonuses to staff members of the same or similar grade as the Claimant. As a matter of fact, all staff, except for those being dismissed, received bonuses for 2017.

(2) The reasons put forth by the Respondent (i.e. the Claimant's unsatisfactory performance) for declining the Claimant's year-end bonus were after-thoughts.

[1] Section 4 SDO states: If: (a) an act is done for 2 or more reasons; and (b) one of the reasons is - … (iii) a woman's pregnancy; or … whether or not it is the dominant or a substantial reason, then, for the purpose of this Ordinance, the act should be taken to be done for the reason specified in paragraph (b).

(3) The true and actual reason for not paying the Claimant the year-end bonus for 2017 was because of her Dismissal in November 2017, which was consistent with the Respondent's prevailing practice.

(4) Given that the Denial of Bonus was consequential upon the Dismissal, the Denial of Bonus was also discriminatory because the Dismissal was.

(5) The allegations of the Claimant's unsatisfactory performance were unsubstantiated.

Damages awarded

The Respondent was ordered to pay the following to the Claimant:

(1) Loss of income in the sum of HK$306,680 (being the Claimant's salary for 1 year) with interest;

(2) The 2017 Year-end bonus in the sum of HK$498,500 with interest;

(3) Damages for injury to feelings in the sum of HK$130,000 which was assessed provisionally on the basis that the Respondent will issue to the Claimant an apology and a reference letter in appropriate form and terms; and

(4) The Claimant's costs of the action, with a certificate for Counsel.

In respect of (3), the Court accepted the Claimant's submissions that the following factors are relevant when measuring the injury to feelings: (i) the proven outstanding long employment record of the Claimant; (ii) the timing of the discrimination was appalling (the Claimant was dismissed while being hospitalised and just before, she was about to start her maternity leave); (iii) the Claimant suffered from depression and (iv) the Respondent made up reasons to justify the Dismissal and made various baseless and unfair accusations against the Claimant and the discrimination has been continuing for a number of years.

Takeaway points

Discrimination in the workplace can be disastrous and costly – it affects employee morale, staff turnover rates and the business's ability to attract talent and customers. If the case goes to the court, not only would the employer be ordered to pay substantial damages and legal costs should they lose, the adverse publicity could also harm the business's reputation (which is unquantified and difficult to rebuild in the short run). Such a bad reputation is always hard to lose.

In order to reduce the potential risk of being held liable in discrimination claims, it is therefore important for employers to:

(1) Be familiar with the anti-discrimination legislation in Hong Kong;

(2) Have a clear and properly drafted anti-discrimination policy;

(3) Enforce the anti-discrimination policy in a reasonable and consistent manner;

(4) Provide regular training to employees to ensure that they are aware of the employer's anti-discrimination policy;

(5) Be mindful in handling termination cases, especially when the employee being terminated has one of the protected characteristics;

(6) Keep a paper trail to substantiate employees' performance issues and the employer's decision to terminate employees. If the decision is being challenged subsequently, such contemporaneous record may assist the employer to show that the termination is unrelated to discrimination; and

(7) Seek legal advice if in any doubt.

This article was written by **Karis Yip**, managing associate in Stephenson Harwood's contentious employment department.

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