Insurance & Personal Injury

Can an Employment be Terminated When an Employee Was Suffering from Work-related Injuries?

Introduction

If an employee sustains an injury by an accident arising out of and in the course of the employment, his/her employer is liable to pay compensation under the Employees' Compensation Ordinance (Cap. 282) (“ECO”). It is not uncommon that an employer may want to terminate the employment contract of the injured employee after a work-related accident.

Legal position under the ECO

Section 48 of the ECO provides that where the injured employee sustained work-related injuries giving rise to temporary incapacity not exceeding 3 days, the employer cannot terminate or give notice to terminate the employment contract of the injured employee before the period of temporary incapacity has expired and the compensation has been paid. Section 48 of the ECO also provides that where the injured employee sustained work-related injuries giving rise to temporary incapacity exceeding 3 days or permanent incapacity, the employer cannot terminate or give notice to terminate the employment contract of the injured employee unless either one of the following conditions is fulfilled:

1. the Commissioner of Labour (“Commissioner”) has assessed the compensation payable under the ECO and issued to the employer and the employee (who sustains temporary incapacity, whether total or partial, or sustains injury which results in loss of earning capacity) a Certificate of Compensation Assessment (Form 5) stating the amount of compensation payable; or

2. the employer has entered into an agreement with the injured employee as to the compensation payable under the ECO, but this condition is only applicable if the injured employee sustains temporary incapacity (whether total or partial) for a period exceeding 3 days but not exceeding 7 days; or

3. either the Ordinary Assessment Board or the Special Assessment Board has issued a Certificate of Assessment (Form 7) or a Certificate of Review of Assessment (Form 9) to the employee, employer and the Commissioner of Labour.
If none of the three conditions are met, the employer must obtain consent from the Commissioner to terminate or give notice to terminate the employment contract of the injured employee. If the employer fails to comply with section 48 of the ECO, the employer commits a criminal offence and is liable on conviction to a maximum fine at level 6 (i.e. HK$100,000).

From employers’ perspective

Employers should be aware that the offence under section 48 of the ECO is a strict-liability offence, as confirmed in *HKSAR v 榮利(港深)運輸有限公司* HCMA 113/2012. Since there is no statutory defence, the employer can only rely on the common law defence. The employer has to prove that he reasonably and honestly believes that he has satisfied the statutory requirements of section 48 of the ECO as outlined above.

Generally speaking, it is very difficult for employers to successfully obtain the Commissioner’s consent to terminate or give notice to terminate the employment. Section 48 of the ECO does not specify the circumstances under which the Commissioner should exercise the discretion to give consent. In a case, a bus driver was convicted of careless driving after a work-related accident and was disqualified from driving. The bus driver’s employer successfully obtained the consent from the Commissioner to terminate the employment of the bus driver, apparently because the Commissioner was satisfied that the bus driver was no longer able to perform his job duty under the employment contract.

In most cases the employer can only terminate the employment after the injured employee is medically assessed and after Form 7 or Form 5 is issued. The employer should work closely with the injured employee and the Occupational Medicine Unit (“OMU”) of the Labour Department to facilitate the medical clearance and assessment. If the employee deliberately defers the procedure without a reasonable explanation, the employer should report this to the OMU without delay and may make an attempt to seek the Commissioner’s consent.

It should be noted that even after the employment is terminated, the employer is still liable to pay periodical payments to the ex-employee who is granted further sick leave due to the work-related injuries. The employer is also liable to pay the ex-employee medical expenses or compensation for permanent total or partial incapacity as stipulated in the ECO.

From employees’ perspective

Injured employees should cooperate with the OMU to ensure timely completion of the medical clearance and assessment. In case the employment contract is terminated in breach of section 48 of the ECO, the injured employee should report to the Labour Department as soon as practicable.
The ECO does not prohibit the injured employee from tendering resignation after a work-related accident. The employer is still liable to pay periodical payments, medical expenses and compensation for permanent total or partial incapacity as stipulated in the ECO after the resignation of the injured employee.

**Conclusion**

The ECO lays down the rights and obligations of employers and employees in respect of work-related injuries. In case there is any doubt or concern, employers and employees should seek legal advice as soon as practicable.

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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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