

Know Your Rights Emotional statements can be costly

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When someone is fired for conduct perceived to be grossly improper and highly detrimental to the employer's interests, it can be difficult to separate personal feelings from the facts of the case. Emotions run high and comments are made in the heat of the moment which, later on, may only complicate the root cause of the problem and delay resolution.

Sometimes, for instance, the employer may feel compelled to make an internal announcement to state or explain the reason for the dismissal. The intention may be nothing more than to avoid the same thing happening again. However, doing this can potentially give rise to liability for defamation, with the former employee perhaps pursuing legal action on these grounds and seeking substantial monetary compensation.

This can be well illustrated by the recent case of John Simpson Warham and Others v Cathay Pacific Airways.

The crux of the case was that pilots had complained about the airline's rostering practices which, they said, required them to assume extra duties by flying longer hours with shorter breaks to recuperate. Their position was that this resulted in problems of stress and fatigue. The union representing the

pilots negotiated with Cathay Pacific for a change of rostering practices and better compensation packages, but was unsuccessful.

When the union subsequently called for a "contract compliance" campaign, advocating rigid adherence to employment terms and limited industrial action, the majority of pilots voted in favour. The airline considered this action had seriously disrupted operations and decided to sack 49 pilots who instigated and played an active role in the campaign.

Following their dismissal, members of the senior management team made certain statements which were seen as critical of the pilots.

In short, various comments reported in the press accused the pilots of being "unprofessional" and taking "selfish" action which affected the airline's employees and customers, and was "holding Hong Kong to ransom". At the same time, the airline insisted that the sackings were unconnected to the industrial action but were because of bad employment records.

Dissatisfied by what they saw as an attack on their professionalism and character, the pilots took legal action claiming, among other things, defamation. On considering the original press statement, the court ruled that the accusations, if false, would be

defamatory. This was because the accusations would result in the pilots being held in lower esteem by right-thinking members of the public and have serious repercussions for their careers.

The airline argued that, even if the press statements were defamatory, they were justified in making them. But to rely on the defence of justification, they were required to prove on a balance of probabilities that the words used were true in substance and fact.

The court also ruled that the mere fact that the pilots had voted for contract compliance and limited industrial action at union meetings did not justify labelling them unprofessional, bad employees, or "not having Hong Kong's best interests at heart". There was no evidence that the pilots had an intention to disrupt. Furthermore, the expressed desire to abide by the strict terms of their employment contract could not be treated by any stretch of the imagination as equivalent to an anticorporate attitude.

The outcome was that the airline was held liable for defamation and was required to pay general damages of HK\$3 million to each pilot. The court also took account of the fact that the company refused to apologise despite a lack of evidence to back its defamatory statements.

This led to the award of additional

aggravated damages of HK\$300,000 for each pilot. In light of cases such as this, employers should take very particular care when dealing with staff suspected of engaging in illegal or improper conduct.

Specifically, the company should avoid making post-termination announcements containing accusations or imputations unless it is possible to support them with objective evidence. There can be substantial yet unseen risks in trying to win understanding within the company and, especially, in trying to court public opinion.

Whatever the provocation or supposed justification, the company should also avoid any exaggeration, however minor, about the employee's previous record, presumed misconduct or underperformance. For example, it is one thing to fire someone for persistently failing to meet sales targets, but quite another to then openly describe that person as being "highly incompetent".

The basic rule for employers is never to make any statements they know to be untrue, unverifiable or mere rumour. This applies equally to internal communications, staff briefings, public statements and written references for former staff.

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