



# HR e-Journal

## Legal Focus



**LEGAL FOCUS**

**Hong Kong Court Clarifies Employer's Rights and Duties in Employment Termination and Bonus Awards**

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## Takeaway Points for Employers

- The Court has reaffirmed in unequivocal terms that an employer's contractual right to terminate the employment of an employee by notice without cause is not restricted by any implied duty of trust and confidence.
- Where an employer has an unqualified discretion over employment decisions, such as determining whether to award a bonus (and if so how much), it must ensure these decisions are made rationally and not in an arbitrary or capricious manner. A key aspect of demonstrating rationality is to ensure the employer only takes into account relevant considerations, excluding irrelevant considerations.

## Hong Kong Court Clarifies Employer's Rights and Duties in Employment Termination and Bonus Awards

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In the recent case of *Yang Zhizhong v Nomura International (Hong Kong) Limited* [2024] HKCFI 2192, the Court of First Instance revisited the applicability of various implied terms, including the duty of mutual trust and confidence, duty to exercise discretion in good faith and anti-avoidance terms, in the context of termination of employment and bonus awards in Hong Kong.

### Background

The employee commenced employment with Nomura as a senior investment banker in 2008. Since then he has held various senior positions within Nomura (including Senior Managing Director, Head of China and Chairman of the investment banking division in Asia) until his employment ceased in 2017.

Prior to the cessation of his employment, the employee was subject to an internal investigation by Nomura in response to concerns raised by the Securities and Futures Commission ("SFC") during a routine inspection in September 2016. The SFC found that the employee had set up a "three-way meeting" with a potential IPO applicant and Nomura's research analyst, without proper compliance approval from Nomura. The SFC expressed significant concern in this regard, highlighting potential conflicts of interest between the investment

banking division (which earns fees from promoting an IPO) and the research division (which is in a position to influence the investing public through its published research) and other related issues with regulatory compliance.

As a result of Nomura's investigation, the employee was issued a warning letter and removed from his position as Head of China (whilst retaining his role as IBD-AEJ Chairman). There were then discussions between Nomura and the employee regarding separation. As the separation discussion continued, a decision was made by Nomura not to award a bonus (or to award zero bonus) for the financial year 2016/2017 (the "Bonus Decision") and a separation package was offered to the employee for him to cease employment for redundancy. The employee eventually did not accept the severance package, and Nomura proceeded to terminate his employment for redundancy in May 2017 by giving the contractually agreed 3 months' notice.

The employee subsequently claimed Nomura for breach of various implied terms of the employment contract, in issuing the warning letter, failing to grant him the discretionary bonus for the financial year 2016/17 and the termination of employment.

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### The Judgment

The court examined, *inter alia*, the nature and applicability of an employer's implied duties to:

1. not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee (the “**duty of mutual trust and confidence**”),
2. exercise discretion in good faith and not arbitrarily or capriciously (the “**Braganza duty**”), and
3. not exercise its right to terminate an employee's employment to avoid the employee becoming eligible for or receiving a bonus award (the “**anti-avoidance term**”).

#### *The duty of mutual trust and confidence*

The court found that, while the duty of mutual trust and confidence applies to the decision on issuing the warning letter and the Bonus Decision, such duty cannot apply to the termination of employment relationship. It was held that the duty is concerned with the preservation of the continued relationship between an employer and employee, and hence cannot be used to “water down” the employer's right to terminate without cause.

The court's decision has also identified the key questions to be considered in determining whether there has been a breach of the duty of mutual trust and confidence:-

- whether the employer's conduct was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. This is to be assessed objectively, by reference to all the circumstances,
- whether there was reasonable and proper cause for the conduct, and
- whether the conduct was calculated to destroy or seriously damage the relationship.

Applying the above, the court considered that Nomura had reasonable and proper cause to issue a warning letter to the employee and make the Bonus Decision, having considered his conduct and performance.

#### *The Braganza duty*

Similar to the duty of mutual trust and confidence, the court found that the Braganza duty only applies during the course of employment and does not fetter an employer's contractual right to terminate employment. As to the nature of the duty, the court confirmed that the test to be applied is:-

- whether, in making the decision, the employer took into account all relevant considerations, excluding irrelevant considerations, and
- whether the result was so outrageous that no reasonable decision-maker could have reached it (the focus is on whether there is some logical connection between the evidence and the reasons for the decision to award a nil bonus).



After reviewing the evidence, the court concluded that Nomura did consider all relevant factors (and excluded irrelevant ones) when deciding not to award a bonus (or award zero bonus) to the employee. The Bonus Decision was based on an array of relevant factors, including the SFC's findings relating to the employee's conduct and performance. There is also nothing on the facts that suggests the Bonus Decision was so outrageous that no reasonable employer could have reached it.

#### *The anti-avoidance term*

Regarding Nomura's decision to terminate the employee's employment, the court found that such right may only be restricted by the anti-avoidance term (i.e. an employer must not exercise its contractual right to terminate an employee's employment in order to avoid the employee becoming eligible for a bonus).

The court concluded that the termination could not have been for the purpose of avoiding to pay the employee the bonus, as Nomura had already considered the employee for a bonus

award and decided not to award a bonus (or award zero bonus) before giving the notice of termination to the employee.

### Conclusion

The court's decision provided ample guidance and increased certainty for employers in Hong Kong regarding the implied duties that might apply in the context of awarding a discretionary bonus and terminating an employment contract. In particular, whilst each case will turn on its own facts, it has been made clear that the threshold for discontented employees to rely on these duties is high and the court would generally be slow to intervene these employment decisions.

The decision also affirms the employer's contractual right to terminate an employee's employment without cause by notice, which shall remain unfettered by the application of the duty of mutual trust and confidence and the Braganza duty.

- END -

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