



China - Dismissal for professional incompetence in the People's Republic of China

Introduction:

Although a procedure for dismissal for professional incompetence is provided under Chinese labour law, such dismissals are, however, held to be invalid in the majority of court/arbitration proceedings. Employers therefore need to be especially careful in the case of dismissal for professional incompetence to avoid the courts holding them to be invalid with the potential consequence of the reinsertion of the dismissed employee or the payment of an indemnity.

The statutory provision

Article 40 of Law on employment contracts of the People's Republic of China provides that an employer is entitled to dismiss an employee with one month's notice and the payment of an indemnity calculated on the basis of seniority if the employee is unable to perform his work (incompetence in connection with skills) despite training or a change of post.

Practical example:

Mr Y has worked in company B since 1st September 2013 as a director of operations. On 6 August 2015, company B dismissed him for professional incompetence.

Mr Y referred the matter to the labour arbitration commission, demand his reinsertion by company B as from 7 August 2015.

As the claim of Mr Y did not succeed before the labour arbitration commission, he referred the matter to the People's Court of the district of Hongkou of the town of Shanghai, which ordered Company B to reinsert Mr Y retroactively as from 7 August 2015 (judgment at 1st instance). Company B appealed this judgment before the Second Intermediary People's Court of the town of Shanghai, which upheld the judgment at first instance.

The grounds given by these two Courts (1st instance and on appeal) were the following:

- In the event of a litigation concerning dismissal for professional incompetence, the burden is on the employer to prove that the dismissal is lawful.

- The documents submitted by company B to not prove that the conditions for dismissal for professional incompetence had been satisfied: (i) the documents relating to the annual assessment of Mr Y do not prove that Mr Y had not been competent at his job and company B is not able to produce other documents attesting to the professional incompetence of Mr Y, (ii) the training organised by the company for Mr Y was not training aimed at improving his ability to perform his job, and (iii) the change of job of Mr Y as well as the assessment conducted two months after the aforesaid change of job are not within the ambit of the internal regulations and had been specifically implemented for this employee.
- The Courts therefore considered that the dismissal was unlawful and upheld the claim for the reinsertion of the employee.

Analysis:

In litigation relating to dismissal for professional incompetence, the judges examine the following three cumulative conditions in order to decide on the validity of such dismissal: (i) is the employer able to prove that the employee is unable to perform his work properly? (ii) has the employer offered the employee training to compensate for his lack of skills or transferred to the employee to another post? (iii) after the training scheme or change of post, is the employee still unable to perform his work properly?

If one of the conditions above has not been satisfied / demonstrated, the court shall hold that professional incompetence has not been proved and that the dismissal on those grounds is unlawful.

Recommendations from DS Avocats:

In order to mitigate the risks of dismissal for professional incompetence being classified by the courts as unlawful dismissal, we advise employers to:

1. Include a detailed description of the job and functions (with objective or assessable criteria) in the employment agreement (in a section or schedule). If such description is set out in a schedule, it should also be signed by the employee.
2. Before launching the procedure for dismissal for professional incompetence, conduct an assessment to prove that the relevant employee does not satisfy the requirements set out in the job description. It is important that assessment report should be signed by the employee. Failing this the employee may argue before the courts that this report is not valid. There is a risk that the judges do not consider that the report proves the incompetence of the employee and that professional incompetence has, therefore, not been proved.

3. Subsequently to the assessment referred to above, the employer must offer the employee a training scheme to improve his skills, or offer the employee alternative employment suited to his abilities.

4. The employer must reassess the employee after a reasonable period of time following the training scheme or change of job. If the employee still fails to satisfy the requirements of the job description, the employer shall be entitled to dismiss him for professional incompetence, subject to one month's notice and the payment of an indemnity calculated on the basis of seniority.

5. In principle, the dismissal on the grounds of professional incompetence must be notified by letter delivered by hand against signature, or sent to the employee with confirmation of receipt. It is important for the employer to be able to prove that the employee has effectively received such notification. Failing this, the employment agreement will not be terminated.

6. In order to mitigate the risk of liability for improper dismissal, we do, however, recommend negotiating an amicable departure with the employee. A duly drafted and signed amicable termination agreement will protect the employer from any claims by the employee.

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