THE EMPLOYMENT LAW REVIEW

Eleventh Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For the past decade, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. When updating the book each of the past 10 years, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 11 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 11th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

This 11th edition also holds a special place in my heart because it is the first that I have prepared as a shareholder of Epstein Becker & Green, PC (EBG). I joined EBG at this time in part because, in 2019, EBG established an alliance with Deloitte Legal to provide clients with comprehensive and global services relating to employment law and workforce management. The alliance brings together Deloitte Legal's global reach and the strength of its multidisciplinary business approach with EBG's United States labour and employment attorneys and workforce management experience to form a global delivery model. Through this alliance, EBG and Deloitte Legal offer comprehensive employment law and workforce management services to clients. I firmly believe that this alliance is the 'wave of the future', to be able to offer clients integrated professional services, and this notion parallels the mission and purpose of this text.

In 2020 and looking into the future, global employers face growing market complexities, from legislative changes and compliance, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, negotiating collective bargaining arrangements or responding to increasing public attention around harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources

professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

Our most recent general interest chapter still focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, and the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2019 in nations across the globe, and one of our general interest chapters discusses this. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement bring-your-own-device programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work, and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these five general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 44 jurisdictions around the world. A special thank you to the legal practitioners across the

globe who have contributed to this volume for the first time, including Sedrak Asatryan, Janna Simonyan and Mary Serobyan (Armenia), Stefan Kühteubl and Martin Brandauer (Austria), Ignacio García, Fernando Villalobos and Soledad Cuevas (Chile), Tingting He (China), Jan Procházka and Iva Bilinská (Czech Republic), Véronique Child and Eric Guillemet (France), Guy Castegnaro, Ariane Claverie and Christophe Domingos (Luxembourg), Jack Yow (Malyasia), Charlotte Parkhill and James Warren (New Zealand), Petra Smolnikar, Romana Ulčar and Tjaša Marinček (Slovenia), Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas (Spain) and Caron Gosling (United Kingdom). This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associates, Ryan H Hutzler and Anastasia Regne, for their invaluable efforts in bringing this 11th edition to fruition.

Erika C Collins
Epstein Becker & Green
New York
February 2020

Chapter 20

HONG KONG

Jeremy Leifer[1]

I INTRODUCTION

Hong Kong's employment environment and its employment legislation are widely recognised as being generally employer-friendly. The legislation applying to employees in Hong Kong is a combination of statutory and common law. The common law origins of Hong Kong employment law include decisions of the courts of other common law jurisdictions, in particular the English courts.

The principal piece of employment legislation providing protection to employees is the Employment Ordinance (EO). Since its enactment a little over half a century ago, it has not seen any general overhaul of its underlying principles, but instead has been amended piecemeal to address particular issues as they have arisen. Certain local structural constraints have ensured that only modest reforms have tended to occur. The result is that while the EO provides an important basis for protection for employees, when compared with other jurisdictions that have more advanced labour laws, Hong Kong has fallen some way behind.

In addition to the EO, there is legislation relating to employment in respect of minimum wages, employee compensation, health and safety, discrimination and insolvency.

The EO applies to any employee with employment in Hong Kong. It prescribes the minimum rights and benefits to be enjoyed by any such employee. It also contains a no-contracting-out provision, which will render void any term of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the EO.

The relevant courts and tribunals in which employment claims can be bought are:

a the Minor Employment Claims Adjudication Board – for claims of up to HK$8,000;

b the Labour Tribunal – this specialist tribunal seeks to provide a quick, simple, cheap and informal forum for resolving disputes between employers and employees.[2] Legal representation is generally not permitted. The Tribunal's jurisdiction includes claims arising under employment legislation, principally the EO and the Minimum Wage Ordinance;

c the District Court – generally, claims falling outside the Labour Tribunal's jurisdiction will be heard in this court;

d the High Court – for appeals from the Labour Tribunal, and for claims falling outside the Labour Tribunal's jurisdiction exceeding HK$1 million;

1 Jeremy Leifer is a partner at Proskauer Rose LLP.

2 Legislative Council Brief for the Administration of Justice (Miscellaneous Provisions) Bill 2014 (22 April 2014).

e the Court of Appeal – for appeals from the District Court or the High Court; and
f the Court of Final Appeal – for appeals from the Court of Appeal.

II YEAR IN REVIEW

Discrimination legislation (miscellaneous amendments) bill

In our 2017 review, we referred to the response to the 2014 Discrimination Law Review conducted by the Equal Opportunities Commission (EOC) on Hong Kong's discrimination laws, which identified 27 areas of higher priority for legislative reforms or other actions. The government responded by introducing a bill in late 2018 to amend the four discrimination ordinances to take forward eight of the EOC's priority recommendations. These include new provisions to:

a introduce express provisions in the Sex Discrimination Ordinance prohibiting direct and indirect discrimination on the ground of breastfeeding;
b provide protection from direct and indirect racial discrimination and racial harassment by imputation in the Race Discrimination Ordinance; and
c expand the scope of protection from sexual, disability and racial harassment between persons working in a common workplace.

Significantly, these steps do not include the consolidation and rationalisation of the four existing anti-discrimination ordinances into a single unified ordinance, which would have simplified the overall legislative framework. The bill has been delayed passing through the committee stage, but is expected to emerge as two separate pieces of legislation, and somewhat stronger than the original bill.

III SIGNIFICANT CASES

Leung Chun Kwong v. Secretary for the Civil Service and the Commissioner of Inland Revenue (Court of Final Appeal)

In our 2018 review, we included this landmark case,[3] which had then reached the Court of Appeal (CA), on the issue of the limited recognition of same-sex marriage in two separate contexts involving discrimination based on sexual orientation. In 2019, the case reached the Court of Final Appeal (CFA).

Hong Kong's statute law restricts recognition of marriage to heterosexual marriage. The applicant is a Hong Kong civil servant who had entered into a same-sex marriage in New Zealand. He then applied to the Civil Service Bureau to update his marital status to an officer's family to obtain benefits available under the Civil Service Regulations (CSR). He had also sought to apply to the Commissioner of Inland Revenue for joint tax assessment with his spouse. The CA upheld the decision of the Court of First Instance, which confirmed the Commissioner's decision against the applicant (the Tax Decision). The CA also upheld the original decision made under the CSR (the Benefits Decision), reversing the decision of the Court of First Instance. The CFA reversed the CA, basing its decisions on its 2018 ruling in *QT v. Director of Immigration*, which was also a discrimination claim arising out of a same-sex marriage in the context of an application for a dependant visa (as discussed

3 FACV No. 8 of 2018.

in our 2018 review). The CFA agreed that the protection of the institution of marriage in Hong Kong was a legitimate aim and that differential treatment directed to that aim could be justified. However, the real question was whether the differential treatment of the appellant was rationally connected to that legitimate aim of the protection of the marriage in the context of this case. The CFA concluded that there was no rational connection in either the Benefits Decision or the Tax Decision.

For the Tax Decision, it could not logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits or a joint assessment to taxation. As for the Benefits Decision, the CFA treated the suggested rational connection between the differential treatment and the legitimate aim as all the more illogical when taking into account the government's published policy as an equal opportunities employer. Additionally, there was no administrative difficulty posed by the appellant's case.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The normal principles for the formation of a contract under Hong Kong law apply to the creation of an employment contract. Although there is no requirement for a contract to be in writing, a written contract is always advisable for an employer as there are certain basic minimum compliance requirements for an employer under the employment protection legislation. An employer would be well advised to have clarity around these terms in all circumstances. An employee must also sign the employment contract, if it is in writing.

Fixed-term employment contracts are permissible under Hong Kong law, although these generally tend to be seen in the context of specific projects or for the most senior levels of management.

The key provisions recommended for inclusion in an employment contract are:

a term;
b job title;
c scope of job responsibilities and duties;
d probation period;
e salary;
f bonuses (contractual or discretionary);
g other benefits, such as medical insurance and housing;
h annual leave;
i sick leave;
j period of contractual notice and right to make a payment in lieu of notice;
k termination for breach or summary dismissal;
l confidential information;
m governing law and jurisdiction; and
n personal information collection statement (PICS).

An employment contract would usually be entered into before the term of the contract commences, but it should in any event be entered into no later than that time. The parties may amend or change an employment contract at any time after it has been entered into, and should do so in writing. Care should be taken by an employer to ensure that if an employee is giving up any rights, or accepting any new obligations, any change to the contract complies

with Hong Kong's contractual rules, requiring the presence of some fresh consideration to ensure the enforceability of the employee's amended obligations. If there is any doubt as to the presence of consideration, the amendment should be executed by the employee as a deed under seal. Care should also be taken to ensure that the contract is not changed by oral agreement. This could occur if the elements for a variation were present and satisfied, and, if so, an employer may be found to have inadvertently agreed to an amendment to the contract.

ii Probationary periods

Probation periods in employment contracts are permitted under Hong Kong law and it is customary to use them.

The EO provides that, regardless of whether a notice period is expressly provided in the contract, during the first month of employment, while an employee is on probation, the contract may be terminated by either party without notice or payment in lieu of notice. After expiry of the first month and during the remainder of the probation period, a minimum of seven days' notice must be given or, if longer, the agreed notice period.

iii Establishing a presence

If a company that is incorporated outside Hong Kong establishes a place of business in Hong Kong (i.e., a branch), it must apply to the Hong Kong Companies Registry for registration as a non-Hong Kong company within one month of the date of establishing a place of business. It must also register with the Hong Kong Inland Revenue Department (IRD). If a non-Hong Kong company without a place of business in Hong Kong hires an employee locally, the requirement to apply for registration may be triggered by the activities of that employee in Hong Kong if those activities amount to the carrying on of a business by the employing company in Hong Kong. Whether a business is being carried on is a factual question that will depend on the circumstances. This possible outcome could be avoided if the company were instead to engage an independent contractor to represent it in Hong Kong, which it would do by entering into a contract with that person clearly describing that person's status (e.g., as a local agent or consultant) and the scope of the services to be provided.

Before establishing a branch in Hong Kong, or appointing an agent in Hong Kong to act on its behalf, the non-Hong Kong company would need to consider whether profits sourced from those activities (whether directly or through an agent) would be subject to Hong Kong profits tax. Hong Kong's tax system is territorial and generally will only tax profits that have been generated locally. Profits tax is charged if (1) the person carries on a business in Hong Kong, (2) profits have been earned from that business in Hong Kong, and (3) those profits have arisen in or been derived from Hong Kong (i.e., they must have a Hong Kong source).

Given the nature of Hong Kong's tax system, questions relating to the creation of a permanent establishment have tended to have less prominence in the determination of any liability for profits tax.

A company that hires employees must provide the following statutory benefits: sickness allowance, annual leave, statutory holidays, rest days, contributions to employees' mandatory provident fund (MPF), and maternity and paternity leave.

Assessment for salaries tax on the remuneration and benefits paid to or received by the employee is made directly on, and therefore is the liability of, the employee, not the employer. The employer must file returns with the IRD reporting the commencement and termination of employment of an employee, as well as an annual return reporting aggregate

remuneration and benefits paid to that employee for the prior tax year. The employer does not have any tax-withholding responsibilities for the employee's salaries tax liability, except when the employer is aware that the employee intends to leave Hong Kong for more than one month, typically on termination of employment.

V RESTRICTIVE COVENANTS

Hong Kong law permits the inclusion in employment contracts of post-termination restrictions (restrictive covenants). The following restrictions are typically included:

a non-competition with the business of the ex-employer;
b non-solicitation of employees of the ex-employer;
c non-solicitation of customers of the ex-employer; and
d non-dealing with customers of the ex-employer.

The approach of the Hong Kong courts to these types of clauses is, at the outset, to treat them as unreasonable on the basis that they are in restraint of trade on the employee, and thus unenforceable. To reverse this presumption, the burden of proof is on the employer to demonstrate that the scope of the restriction is no wider than is strictly necessary to protect the legitimate business interests of the employer. In considering whether any such restriction is enforceable, the courts will generally have regard to the following three components:

a the scope of the restricted activities;
b the duration of the restriction; and
c the geographical scope of the restriction.

Given the small size of Hong Kong's territory, the courts tend to adopt a very restricted approach to the enforceability of these types of clauses. Consequently, the scope for employers to impose these types of restrictions on their employees can be quite limited. Great care needs to be taken in drafting the wording of the clause. It is also normal to include in a contract of employment express non-compete obligations that apply during the contract term.

Commonly, in the case of more senior employees, an employer will include an express garden leave provision in the contract, to be able to control the activities of the employee once he or she has given notice of resignation. The limitations on the duration of garden leave are not clear. In addition, any restrictive covenant period should interlock with the garden leave provision so that the duration of the covenant is reduced by any period actually spent on garden leave.

VI WAGES

i Working time

Currently there are no maximum working hours regulations in Hong Kong, nor are there any regulations as to the amount of night work that may be performed, and in neither case does the government have any concrete proposals for introducing any such regulations. Nevertheless, a person employed under a continuous contract is entitled to one rest day in every seven days and to all statutory holidays.

Under the Minimum Wage Ordinance, the current minimum wage, which was set on 1 May 2019, is HK$37.50 per hour.

ii Overtime

Overtime work is not regulated by legislation. Consequently, the right of an employer to ask an employee to work overtime, the rate of overtime pay and the amount of overtime that the employee may be asked to work, will be determined in each case by the terms of the contract of employment between the employer and employee.

VII FOREIGN WORKERS

Any person seeking to work in Hong Kong who does not have the right of abode in Hong Kong (i.e., permanent residence) must first obtain a work visa from the Hong Kong Immigration Department.

There is no requirement for an employer to keep a register of employees holding work visas, and there is no upper limit on the number of such employees that an employer may have. When applying for a visa, the applicant must demonstrate that he or she is in a job that is relevant to his or her academic qualifications or work experience and that cannot readily be taken up by the local workforce. Typically, this would require the employer to demonstrate that efforts have been made to search for suitable candidates in the local labour market. Successful applicants will normally be permitted to extend their stay in Hong Kong on a two–two–three years pattern without other conditions of stay, after which they may be eligible for right of abode status.

An employee holding a work visa will be subject to tax on his or her remuneration and benefits on the same basis as a local employee. If that employee's employment is located in Hong Kong (i.e., generally he or she performs his or her work in Hong Kong), he or she will have the benefit of statutory protection provided under local employment laws. This is likely to be the case even if the contract of employment is governed by a different governing law. An employee holding a work visa may be able to claim an exemption from the MPF scheme if the employee is already a member of a provident or retirement scheme outside Hong Kong. The exemption will cease to apply if the employee acquires right of abode status.

VIII GLOBAL POLICIES

A company is not required by law to apply its global policies, and in particular its internal discipline rules, to employees working in Hong Kong. While this will be a matter of policy for the employer, the presence of and adherence to a mature set of disciplinary rules can provide an effective evidential trail to demonstrate due grounds for dismissal of an employee in breach of contract. There is no requirement that these rules be agreed or approved by a representative body (if any) of the employees, or that they be filed with, or approved by, any government authority. It is not essential for employees to have agreed to the rules, but it is recommended that they be incorporated into the employees' contracts of employment.

As mentioned in Section II, Hong Kong has four separate pieces of legislation dealing with discrimination. Under each of these, an employer can incur vicarious liability for acts of discrimination against an employee, regardless of whether the employer knew about the act or whether it was carried out with its approval. The employer will have a defence to a claim for discrimination if it can prove that it took such steps as were reasonably practicable to prevent an employee from carrying out that act, or from carrying out acts of that description in the course of the employee's employment. Given this, it will be important for the employer to include in its internal rules a robust anti-discrimination policy. This should be backed

by training for employees, particularly those in the human resources department, on the employer's anti-discrimination practices. A record should be kept of the application of these rules and the policy to be able to support the aforementioned defence. The EOC has published codes of practice for each of the areas of discrimination covered by the legislation and these should be used as reference points for the drafting of any internal rules on discrimination applicable to Hong Kong-based employees.

There is no requirement that an employer's rules must be written in any particular language. However, it is important that the employer be sensitive to cultural and linguistic differences between employees of different ethnic backgrounds to ensure that all employees are able to read and understand these rules in their first language.

At the time that the employee signs his or her employment contract, he or she should be asked to sign an acknowledgement that he or she has received a copy of the rules and has read and understood them. The rules would ordinarily be posted on the employer's intranet, but it is also good policy to distribute a hard copy of the rules to each employee.

IX PARENTAL LEAVE

Female and male employees are entitled to statutory maternity and paternity leave, respectively, and are entitled to receive maternity and paternity pay, paid by the employer, provided that she or he has been employed under a continuous contract for no fewer than 40 weeks before the start of the scheduled leave.

Maternity leave is for a continuous period of 10 weeks, and a further period of unpaid leave of up to four weeks for illness or disability occasioned by the pregnancy or birth. The rate of statutory maternity pay is four-fifths of the employee's average daily wage. Paternity leave is for five days, and paternity leave pay is payable at the rate of four-fifths of the employee's average daily wage.

It is both a civil and a criminal offence for an employer to terminate the contract of an employee who has given notice of her pregnancy until she is due to return to work on the expiry of her maternity leave. There is no equivalent protection for an employee taking paternity leave.

X TRANSLATION

As mentioned in Section VIII, there is no specific requirement that any employment documents must be translated into an employee's first language. However, it is recommended that where it is clear that the employee is not proficient in the language of the contract or the document in question, it should be translated into that employee's first language.

There are no particular formalities required for obtaining a translation, but any translation should be checked and verified by a senior member of staff who is able to do so. If an employee is provided with a contract or document in a language that he or she does not fully understand, there may be scope for misunderstanding, which could lead to or exacerbate a claim by that employee.

XI EMPLOYEE REPRESENTATION

While legislation permitting the formation of trade unions has existed in Hong Kong for many years, despite the number of unions in Hong Kong, levels of employee union participation continue to be low. There is no statutory provision for the recognition of collective bargaining agreements or for works councils of any kind, and there is no requirement for employers to consult employees in situations where such a requirement might typically be found in other jurisdictions, such as in the event of termination of employment or business sales or combinations. Instances of industrial action in Hong Kong are uncommon.

XII DATA PROTECTION

i Requirements for registration

The collection, processing, use, disclosure and transfer of personal data is governed by the Personal Data (Privacy) Ordinance (PDPO). It sets out six data protection principles (DPPs) drawn from the 1981 OECD Guidelines and the EU Directive at the time of its enactment in 1996, with some modifications. The employer as a data user will be required to comply with the DPPs and with the PDPO. Compliance with the PDPO is generally overseen by the Privacy Commissioner. Employers are not required to register with the Privacy Commissioner.

Personal data is defined in the PDPO as any data (1) relating directly or indirectly to a living individual (2) from which it is practicable for the identity of the individual to be directly or indirectly ascertained, and (3) in a form of which the access to or the processing of the data is practicable. Data that would typically fall within this definition would include the employee's name, address, telephone number, and passport and identity numbers.

Before an employer can collect any personal data from an employee, it must first provide the employee with a PICS, which would usually be attached to the employee's offer of employment. Its content should include explicit statements as to the purposes for which the data is to be used, the classes of persons to whom the data may be transferred and whether it is obligatory or voluntary for the individual to supply the data.

If it is later proposed that the data be used for a purpose not expressly included in the PICS, the employer must obtain separate consent from the employee for that use. An employee is entitled to request access to his or her data and to correct it if necessary.

The employer should only retain personal data for as long as is necessary to fulfil its purpose. It is also required to take 'all practicable steps' to ensure that personal data held is protected against unauthorised or accidental access, processing, erasure or other use.

ii Cross-border data transfers

Although the PDPO contains a provision for the regulation of transfers of personal data to a place outside Hong Kong, it has never been enacted.[4] The DPPs, as described in Section XII.i, require that an employee be informed explicitly of the purpose for which the data is to be used (i.e., in a PICS), including a transfer out of the jurisdiction. If the purpose for this

4 In December 2014, the Privacy Commissioner published guidance on cross-border data transfers to help data users to prepare for the implementation of this statutory provision. While no date has been set for this, the Privacy Commissioner nonetheless encourages data users to adopt the recommended practices contained in the guidance.

transfer does not fall within the original purposes stated in the PICS, then the consent of the employee must be obtained. In this circumstance, there is no requirement for a data protection agreement to be entered into.

iii Sensitive data

No distinction is drawn between different types of personal data.

iv Background checks

Background checks are permitted in Hong Kong and are commonly carried out in respect of prospective employees. Criminal record checks made with the Hong Kong police are also permitted in limited situations, with the consent of the prospective employee. Hong Kong has legislation for the rehabilitation of offenders under which certain convicted offences will be treated as spent with the lapse of time, but they will remain on record.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

The usual events by which a contract of employment may be terminated include:

a termination by one party by giving contractual notice to the other;
b termination by one party making a payment in lieu of notice to the other; and
c termination by the employer by summary dismissal (i.e., for cause).

Termination by contractual notice from one party to another

The EO lays down minimum periods of notice that must be given to terminate a contract. Usually, the period of notice in a contract of employment will be longer than that prescribed by the legislation, in which case the longer period must be used. Subject to this, the minimum statutory notice period for a continuous contract (including in a redundancy situation) is seven days.

Hong Kong law does not recognise the concept of termination at will.

Termination by one party making a payment in lieu of notice to the other

The EO permits an employer to make a payment in lieu of notice to an employee (including in a case of redundancy), and likewise for the employee to make a payment in lieu of notice to the employer. The payment can be made either at the time that the notice is given or at any time during the period of notice. This is a mutual provision (but available only to the party who gave the notice), so the employee may also use it to bring his or her employment to an early end. A new employer might also 'buy out' the employee from the previous employer.

Assuming that the termination of the employment contract by a payment in lieu of notice is made in accordance with its terms, the employee will be entitled to receive contractual pay and benefits (with some exceptions) that he or she would have received had he or she instead served out the full period of notice of termination, and any other payments to which he or she may be entitled under the contract.

Termination by the employer by summary dismissal (i.e., for cause)

This type of termination permits an employer to dismiss an employee immediately and with no further entitlement to pay or benefits. In a well-drafted contract, the grounds of termination would be clearly laid out. In the absence of express grounds of termination, the EO provides for a number of grounds for summary dismissal, including any ground available at common law.

In the case of senior employees, it is not unusual for an employer and an employee to enter into a settlement agreement if, given the seniority of the employee, the employer may want to manage termination of the relationship in a more discreet way.

ii Redundancies

An employee whose contract is terminated, whether by notice or unlawfully, and who satisfies the eligibility requirements, may be entitled to receive either a statutory severance payment or long-service payment. Entitlement to one form of payment excludes entitlement to the other.

An employee will be entitled to a long-service payment in several situations, including if he or she is dismissed, has been in continuous employment with the employer for no fewer than five years and the employer is not liable to pay a severance payment. The amount of the payment is calculated on the same basis as the severance payment.

An employee will be entitled to a severance payment if he or she has been employed under a continuous contract for a minimum of 24 months and is dismissed by reason of redundancy or is laid off. There is no requirement to notify any government department other than the IRD, and no requirement to notify any trade union, unless the employer is bound by an agreement with the union to do so.

Except for the requirement that the employee must be given a statement of the calculation of the severance payment, termination of an employee's contract for redundancy would follow the same procedure for termination as in a non-redundancy situation.

The amount of a severance payment (or long-service payment) due to the employee is calculated by reference to the number of years of service (pro rata for any part year) and the last full month's wages. For each year of service, the employee will be entitled to receive either two-thirds of his or her last full month's wages or two-thirds of HK$22,500, whichever is less. This sets a ceiling of HK$15,000 on the monthly amount. This amount has not changed for several decades and, consequently, has fallen well behind overall wage levels as compared with those prevailing when it was set. After a statutory payment has been made to an employee, an employer is entitled to claw back the amount of that payment from its mandatory contributions to the employee's MPF account, thereby in all likelihood setting off in full (or very nearly) the statutory payment made to the employee (but see Section II.vi).

iii Notifications to government departments

An employer who wishes to cease to employ a person in Hong Kong must notify the IRD at least one month before the date of cessation. The IRD will accept a shorter notice period where reasonable, such as in the event of a summary dismissal.

Additionally, if an employee is due to leave Hong Kong for more than a month, the employer must notify the IRD at least one month before he or she actually leaves. This requirement does not apply to an employee whose job requires him or her to leave Hong Kong at frequent intervals.

An employer whose employment relationship with an employee holding a work visa has been terminated must inform the Immigration Department as soon as possible.

XIV TRANSFER OF BUSINESS

There is no provision under Hong Kong law for the automatic transfer of contracts of employment upon transfer of the ownership of a business. Consequently, it is necessary in that context for the selling employer to terminate the contracts of employment of all transferring employees, and for the buyer to make offers of re-engagement to those employees.

The EO provides a mechanism for a form of compliant transfer. This requires broadly that the offer of re-engagement must be on terms that are substantially equivalent to those under the existing contract of employment. Subject to the offer being made no fewer than seven days before the transfer of the business occurs, an employee who accepts the offer will be treated as having his or her continuity of employment and statutory protection rights preserved and transferred to the new employment with the buyer.

Conversely, an employee who rejects the offer unreasonably, and who would otherwise be eligible for a severance payment or long-service payment, will lose that statutory protection.

XV OUTLOOK

The main developments to watch in the coming year will be the proposed amendments to the discrimination ordinances and the enhancement of maternity leave. These are both welcome developments.

Appendix 1

ABOUT THE AUTHORS

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