Mastering the Discontinuance of Employment

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- During these times of economic uncertainty in Hong Kong, unavoidably the thoughts of many employers will turn to cost cutting, which includes the question of workforce reduction.
- Before embarking on this difficult task, it is important for the employer to appreciate the redundancy process, as well as the different ways in which an employment contract and the employer-employee relationship may be brought to an end.

It is worth noting that Hong Kong law has no overarching regime for unfair dismissal, nor is there a requirement to consult with employees prior to a termination of employment. However, be aware that the Labour Department has its own set of guidelines on the management of employee retrenchment. This is a mixture of recommended non-binding good practice and restatement of the law, and where a redundancy programme is to be implemented, the Labour Department would expect employers to follow its guidelines.

Different types of employment termination

It is important to be aware at the outset that there are circumstances provided by the Employment Ordinance (EO) when it is a criminal offence to terminate an employee, unless the employer has the right to dismiss the employee for breach of contract. These circumstances include where an employee has given notice to the employer that she is pregnant, or if the employee is receiving medical allowance on a day of sickness.

Termination by giving contractual notice: The EO sets out minimum periods of notice which must be given for one party to terminate the contract. Where the contract is silent on the length of the notice period, and the contract is treated as renewable from month to month — which many contracts are — the minimum statutory notice period is one month. But where the contract does state the length of the notice period, the EO requires that the notice period be the longer of that agreed period or seven days.

Termination by making a payment in lieu of notice: Whether notice is given by the employer or the employee, the EO permits either party to make a payment to the other which is in lieu of giving notice. If the employer makes this payment, this means that the employee will not work out the notice period, but instead the contract will be brought to an immediate end. The payment must be equal to what the employee would have received, had he or she worked out the full notice period. It is important to note that all contractual benefits (with some exceptions such as MPF contributions, as a payment in lieu is not regarded as relevant income) will be payable on the same basis. This payment mechanism can also be used if one party has already given notice, but then wishes to bring the contract to a conclusion before the end of the notice period, by paying out the balance of the notice period. However, this option is available only to the party who first gave the notice of termination.

Summary termination of employment ("summary dismissal" or "termination for cause"): This type of termination is available to an employer only where the employee is in breach of the contract, and gives the employer the right to dismiss the employee immediately, and with no further entitlement to pay or benefits. However, it is not always clear whether a particular breach will justify an employer in taking this step. The courts will apply a test that looks at whether the employee's conduct amounts to a sufficiently serious breach, to indicate that the employee no longer intends to be bound by the contract. This might be a very serious single act, or a series of lesser but repeated acts, which when put together would justify dismissal. In a well-drafted contract, these statutory grounds would be given more breadth and depth, the objective being to inject greater certainty into the scenarios justifying termination. An employer who takes a risk by terminating an employee on less than clear grounds, may face a potentially expensive claim for wrongful dismissal.

Settlements

In some scenarios, particularly where a senior employee is involved, the employer may prefer to "manage" the exit, and a negotiated settlement agreement with the employee may be the better option. This would typically occur where the parting is mutual, but given the employee's status within the organisation, the employer wants to make sure that the departure will have as little impact on the business as possible. The settlement agreement will serve to vary the terms of the employment agreement including provisions such as the agreed exit date, a waiver of all non-statutory claims by the employee, a non-disparagement provision, and ex-gratia payments to incentivise the employee to enter into the settlement and to go quietly. An employer adopting this approach will typically seek to strengthen its contractual position against the departing employee.

Redundancy

The process for an employer to make an employee redundant is not markedly different from that for termination by giving contractual notice. The key difference is that the employee may be entitled to receive a statutory severance payment (SP). If the employee belongs to a trade union it may be necessary first to consult with or give notice to the union.

An employee who has been in continuous employment for at least 24 months, and who is dismissed by reason of redundancy or laid off (both of which have technical meanings under the EO), is entitled to receive a SP. The right to receive a SP will disentitle the employee from receiving a long-service payment (LSP). The LSP is payable in different circumstances, including when the employee is dismissed, has been in continuous employment for no less than five years, and the employer is not liable to pay a severance payment.

A key point here is that whilst most terminal payments must be paid to the employee within seven days of termination, this is not so for a SP. Either it is agreed with the employer and paid within three months of termination, or the employee must have made a written claim for it against the employer within that same period. In the latter case, it must be paid by the employer within two months from receipt of the written claim, unless within that period either party has made a claim to the Labour Tribunal relating to the SP. Practice varies amongst employers as to when to pay the SP, and often it is paid at the same time as all other termination payments.

Notifying the Inland Revenue Department

The employer must remember the obligation to inform the Inland Revenue of the pending termination of any employee at least one month in advance. However, a shorter period will be acceptable where reasonable, such as in an immediate dismissal scenario. Additionally, if the employee is about to leave Hong Kong for more than a month, typically owing to termination of employment, the employer also has a duty to withhold the last month's wages until the employee has obtained tax clearance. Likewise, the employer must not forget to inform the Immigration Department of any termination as soon as possible if the employee was working in Hong Kong on a work visa.

Key takeaways for HR practitioners

- Always carefully plan ahead for any employee termination.
- Check the termination provisions in the employment contract.
- Check whether the employee has been given notice of pregnancy or is on sick leave or receiving medical allowance.
- In a redundancy scenario, check the length of service of the employee to determine whether he or she qualifies for a SP, and preferably consult with affected employees while observing the Labour Department's guidelines.
- Finally, unless it is a very clear case, do not make hasty decisions and be sure to thoroughly investigate every case before reaching a conclusion.

終止僱傭關係的技巧

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- 香港經濟狀況不明朗，許多僱主難免要考慮縮減成本，當中無可避免涉及精簡人手的問題。
- 在展開這項艱難的工作前，僱主須瞭解裁員的程序，以及終止僱傭合約和僱傭關係的不同方式。

值得注意的是，香港並無有關不公平解僱的整體法律框架，也沒有規定終止僱用僱員前必須先徵詢僱員的意見。然而，須留意勞工處訂有有關裁員的指引，建議一些沒有約束力的良好做法，同時說明法律要求。僱主如要實施裁員計劃，勞工處期望僱主跟隨指引行事。

終止僱傭的不同方式

首先必須注意，《僱傭條例》規定，除非僱主有權因僱員違反合約而解僱僱員，否則在某些情況下，解僱僱員屬刑事罪行。這些情況包括僱員已給予僱主懷孕通知，又或僱員正在放取病假，並領取疾病津貼。

給予合約通知終止僱傭：《僱傭條例》訂明終止合約通知的最短期限。假如合約沒有訂明通知期，而合約又被視為可按月續約（許多合約均是如此），最短的法定通知期便是一個月。假如合約有訂明通知期，《僱傭條例》規定通知期為合約協定的通知期或七天，以較長者為準。

*給予代通知金終止僱傭：*無論僱主或僱員給予通知，《僱傭條例》均容許給予通知的一方向另一方付款，以取代通知。假如僱主繳付代通知金，僱員便無須在通知期內工作，僱傭合約即時終止。代通知金金額相當於僱員在整個通知期內工作可得的收益。必須注意的是，合約訂明的所有利益，均須按此基礎支付（有若干例外情況，例如強積金供款，原因是代通知金不視作有關入息）。假如一方已給予通知，然後希望在通知期完結前提早終止合約，也可用這個付款機制，支付通知期餘下部分須支付的款項；但首先給予終止合約通知的一方才可選擇這方案。

即時終止僱傭（「即時解僱」或「有理由終止僱傭」）：只有僱主才可用這方式終止僱傭；若僱員違反合約，僱主便有權立即解僱僱員，而無須給予薪酬或利益。然而，在那些違反合約的情況下，僱主才有正當理由採取這步驟，並不清晰。法院的判斷標準，是僱員的行為違反合約的情況，是否嚴重至足以顯示僱員不再有意受合約約束。這可以是極嚴重的單一行為，或一連串較不嚴重但重複的行為，累積起來足以構成正當解僱的理由。草擬得當的僱傭合約，會更深入明確說明這些法定理由，目的是更確定地說明可正當解僱的情況。僱主若冒險以不清晰的理由解僱僱員，可能會面臨不當解僱的申索，而須繳付高昂的賠償。

協議

在某些情況下，特別是牽涉高層僱員時，僱主可能寧可「管理」好僱員離職的安排，與僱員商議一份協議可能是較佳的選項。這情況一般是雙方同意僱員離職，但考慮到僱員在機構內的地位，僱主希望確保該僱員離任對業務的影響減至最低。協議的作用，是更改僱傭合約的條款，條文包括協定離職日期、僱員放棄所有非法定的申索、禁止貶損條款，以及給予僱員特惠金，作為簽訂協議並平靜離職的誘因。採取這做法的僱主，一般會尋求加強合約對自己的保障。

裁員

僱主裁員的程序，與給予合約通知終止僱傭的程序分別不大；最主要的分別，在於僱員或有權收取法定的遣散費。假如僱員是工會成員，便可能有需要先諮詢或知會工會。

連續受僱最少24個月，而又因裁員或停工（兩者在《僱傭條例》下均各有技術涵義）而被解僱的僱員，有權收取遣散費。僱員收取遣散費，便無權獲得長期服務金。僱主在不同情況下須支付長期服務金，包括僱員遭解僱、連續受僱不少於五年，以及僱主沒有支付遣散費的責任。

這裏有一點值得留意。大部分終止僱傭的款項，都必須在終止僱傭後七天內向僱員支付；遣散費卻並非如此。遣散費可在終止僱傭後三個月內，在與僱主協定的日期支付，又或僱員在該同一限期內以書面向僱主申索。在後者的情況下，僱主必須在收到書面申索後兩個月內支付遣散費，除非在該段期間內，任何一方就遣散費向勞資審裁處提出申索。關於何時支付遣散費，不同僱主有不同的做法；許多時候都是在支付所有其他終止僱傭的款項時同時支付。

通知稅務局

僱主必須緊記有責任在最少一個月前通知稅務局將終止僱用僱員；而在合理的情況下，例如即時解僱的情形，較短的通知也可接受。此外，假如僱員即將離開香港超過一個月（普遍因僱傭終止而離港），僱主亦有責任先扣存最後一個月的工資，直至僱員已履行完稅責任為止。同樣，假如僱員以工作簽證在香港工作，僱主必須緊記盡快通知入境事務處終止僱傭的情況。

人力資源專才注意事項

- 終止僱用僱員前，須先小心策劃。
- 查看僱傭合約內的終止合約條款。
- 查核僱員曾否給予懷孕通知、是否正放取病假或正收取疾病津貼。
- 在裁員的情況下，查看僱員的服務年期，確定他或她是否有資格領取遣散費；最好諮詢受影響的僱員，並遵守勞工處的指引。
- 最後，除非情況十分清晰，否則切勿倉促下決定。須仔細研究每個個案，然後才下結論。