



## Employment Law Alert - October 2010

Welcome to our October 2010 edition of Employment Law Alert, in which we consider several recent employment law developments in Hong Kong covering a wide range of regular issues for human resources practitioners and in-house lawyers.

### 1. **Recent Decision - Personal liability to pay outstanding wages**

[HKSAR v Lor Wai Por \(unrep., HCMA 888/2009, \[2010\] HKEC 1182\)](#)

- 1.1 The appellant was a director and shareholder of a company and was the sole proprietor of the company prior to its incorporation. The company employed four electricians who were all owed wages by the company. One of the four employees resigned as a result of the unpaid wages and the other three were dismissed by the appellant without notice.
- 1.2 Upon the application of one of the former employees, the company was wound up. Subsequently and with the assistance of the Labour Department, proceedings were commenced against the company/its liquidator and the appellant in the Labour Tribunal. A consent order was made by the Tribunal for payment by the company and proceedings against the appellant were withdrawn. The order was for payment by instalments by the company but no such payment was made.
- 1.3 The appellant admitted that by failing to pay the outstanding wages within seven days of the relevant wage period, or of the termination of employment without notice, the company had wilfully, and without reasonable excuse, contravened sections 23, 25 and 63C of the Employment Ordinance. It was further admitted by the appellant personally, by his pleas of guilty and his admission of the brief facts, that the offences in question were committed with his consent or connivance or neglect as a director of the company and that he had thereby contravened section 64B(1) of the Employment Ordinance.
- 1.4 The Magistrate imposed a community service order of 160 hours on the appellant and an order under section 65(1) of the Employment Ordinance, directing the appellant to pay a total of HK\$261,270, being unpaid wages and other payments due to the four employees. The appellant appealed against the order made pursuant to section 65(1) of the Employment Ordinance and argued that the Court had no jurisdiction to make the order because he was not the employer as defined in the Employment Ordinance and that at all material times, the employer was the company.



Sections 2 and 65 of the Employment Ordinance

- 1.5 Section 2 of the Employment Ordinance defines employer as meaning "*any person who has entered a contract of employment to employ another person as an employee and the duly authorised agent, manager or factor of such first mentioned person*".
- 1.6 Section 65 provides that an employer convicted of an offence under the Employment Ordinance shall, if the Court so orders, pay any wages or other sums outstanding at the time of the conviction, and in respect of which the offence was committed. It should be noted that the Court is not obliged to make an order for the employer to pay the outstanding wages and that the Court is given a discretion, although such discretion must be exercised reasonably in the circumstances of the case.

Decision

- 1.7 The Judge held that the words of section 2 of the Employment Ordinance allow for more than one employer and include any person who has entered into a contract of employment and the duly authorised agent. The crucial question was whether or not the appellant was "*duly authorized*" and it was unnecessary to determine whether the "*corporate veil*" should be "*pierced*". It was further stated that the rationale behind the definition of employer is to cater for situations where a corporate employer is wound up and employees have no remedy against the corporation. The employees should nevertheless have a continuing remedy against the duly authorised manager/agent who is convicted of an offence.
- 1.8 Since it was clear from the facts that the appellant was a duly authorised manager or agent of the company and that he had been convicted of an offence under the Employment Ordinance in respect of wages and other sums outstanding at the time of the conviction, it was held that the appellant was liable to pay the unpaid wages and other payments under section 65(1) of the Employment Ordinance.

Practical implications

- 1.9 In view of the definition of employer under section 2 of the Employment Ordinance, a director and shareholder of a company might not be able to use a corporation as a shield in respect of acts or omissions committed by the corporation in contravention of the Employment Ordinance. If it is established that the director and shareholder is the duly authorised agent or manager of the corporate employer, it is unnecessary to determine whether the "*corporate veil*" should be "*pierced*", the director and shareholder would be personally liable, including in the present case, to pay the unpaid wages under section 65(1) of the Employment Ordinance.



1.10 You should note that a failure to pay wages and other entitlements under the Employment Ordinance is a criminal offence and that the director or manager would be personally liable under section 64(B)(1) of the Employment Ordinance if the offence is committed with their consent or connivance or neglect.

1.11 You should also note that in a more recent case, an individual director of a medical equipment company, Mackay Holdings, which was in compulsory liquidation was sued for failure to pay wages to its four employees totalling HK\$310,000. The director was ordered to pay the unpaid wages and was also fined HK\$54,000 in the Eastern Magistrates Court for failing to pay wages to the company's employees.

## **2. Minimum Wage Ordinance**

2.1 As you are probably aware, the Minimum Wage Ordinance ("**Ordinance**") was passed by the Legislative Council on 17 July 2010 and was published in the government gazette on 23 July 2010. The Ordinance will come into force on a day to be appointed by the Secretary for Labour and Welfare by notice published in a gazette.

2.2 The Provisional Minimum Wage Commission ("**Commission**") has completed its work and reached an agreement on the amount of the initial statutory minimum wage ("**Minimum Wage**"). Although the Commission did not disclose the rate agreed upon to the public, it has been widely reported that the Commission recommended that the Minimum Wage should be set at HK\$28. The Commission will advise the Chief Executive of the recommended Minimum Wage. The Chief Executive may amend the Minimum Wage having taken into account the recommendation provided by the Commission, but the Chief Executive is not bound by the recommendation. After the Chief Executive proposes the Minimum Wage, the Legislative Council will either approve or reject it. The Legislative Council cannot amend it.

2.3 We will keep you up to date on any further developments regarding the Ordinance, in particular, as to when the Ordinance will come into force and what the Minimum Wage will be.

## **3. Prevention of Bribery**

3.1 Hong Kong companies and individuals must not participate in bribery and corrupt practices and must comply with the provisions set out in the Prevention of Bribery Ordinance ("**POBO**"). The POBO prohibits an agent (usually an employee) from soliciting or accepting any advantage without the permission from his/her principal when conducting his/her principal's affairs or business. The offeror of the advantage is also guilty of an offence.



- 3.2 More interestingly, employers should be aware of the new UK Bribery Bill which received Royal Assent on 8 April 2010. The Bribery Act 2010 ("**Act**") should come into force some time in April 2011.
- 3.3 The Act sets out four offences namely: the general offence of bribing and receiving bribes, the offence of bribing foreign officials and the failure by a commercial organisation to prevent a bribe being paid for or on its behalf by associated persons (which includes employees, agents or other third parties).
- 3.4 The significance of this piece of legislation is that it will have extra territorial effect. The offences may be prosecuted if:
- a) any act or omission which forms part of the offence occurs within the UK;
  - b) any act or omission which forms part of the offence is done by a British national or a UK incorporated company or by a person who is ordinarily resident in the UK regardless of whether the act or omission took place outside of the UK; or
  - c) the corporate offence (i.e. failure of commercial organisations to prevent bribery) is committed by a foreign incorporated company and carries out business in the UK or a foreign partnership carrying on business in the UK. The bribery does not have to take place in the UK in order for the commercial organisation to be caught under the corporate offence.
- 3.5 Therefore, this Act will impact not only British nationals and UK companies, but also to foreign nationals with residence and/or companies carrying on business in the UK.
- 3.6 Of significance is the corporate offence as it is in effect a strict liability offence. Under the corporate offence, the company may be guilty even if the management of the company did not know of the bribery. The only defence available to organisations is if it has established "*adequate procedures*" to prevent the bribery from happening.
- 3.7 The UK Secretary of State is required to publish statutory guidance on adequate procedures that organisations can put in place to prevent persons associated with them from bribing. It is anticipated that the guidance note will be published in early 2011.



*Penalties under the Act*

3.8 An individual guilty of a bribery offence may be subject to imprisonment of up to 10 years and a company convicted of failing to prevent bribery could receive an unlimited fine.

*Practical Implications*

3.9 If you do business in the UK, you should put in place appropriate anti-bribery policies and procedures to avoid being caught under the Act and to ensure compliance with the existing POBO.

3.10 If you already have anti-bribery policies in place, you should review and update your existing anti-bribery policies which should be communicated to all staff on a regular basis. Further, you should review your training and procedures to ensure that they establish an effective anti-bribery and corruption compliance program.

If you require any further information on any of the above articles please let us know.

We trust that you have found our latest edition of Employment Law Alert informative relevant to your business. Please do let us know if you have any questions. In addition to our Alert, we will be holding a free lunchtime seminar on recent Hong Kong employment law issues at **12:45 p.m. - 2:00 p.m.** on **26 October 2010** at our offices. Lunch will be provided. Please confirm your attendance with Catherine Leung by email at [ckyleung@rsrbhk.com](mailto:ckyleung@rsrbhk.com).

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