THE EMPLOYMENT LAW REVIEW

Thirteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For each of the past 12 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, 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 25 years, and I can say this holds especially true today, as the past 13 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 13th 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.

Speaking of changes, we have now been living with the covid-19 pandemic for more than two years. In 2020, we entered a new world controlled and dictated by a novel coronavirus, one that spread at a rapid pace and required immense government intervention. The ways in which governments responded (or failed to respond) shed light on how different cultures and societies view, balance and respect government regulation, protection of workers and employee privacy. Employment practitioners around the globe have been thinking about and anticipating the future of work for a decade. But with the onslaught of covid-19, the future of work was foisted upon us. Covid-19 has expedited the next decade of technological advancement and employer–employee relations, causing entire industries and workplaces to change in real time and not over the course of years.

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2021, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

The other general interest, cross-border chapters have all been updated. The #MeToo movement continues to affect global workforces. 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.

The chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. The covid-19 pandemic initially caused significant challenges to mergers and acquisitions (M&A). Deal activity slowed substantially in 2020, negotiations crumbled and closings were delayed. Although uncertainty remains about when merger and acquisition activity will return to pre-pandemic levels, it appears that businesses and financial sponsors once again have begun to pursue transactions. Parties already have begun to re-engage on transactions previously put on hold and potential sellers appear willing to consider offers that provide a full valuation. The content of due diligence may change because the security of supply chains, possible crisis-related special termination rights in key contracts and other issues that were considered low-risk in times of economic growth now may become more important. 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 2021 for multinational employers across the globe. 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. Particularly in the time of covid-19 and remote working, 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 the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 38 jurisdictions around the world.

Covid-19 aside, in 2022, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on 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.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing from the first year. 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 Faegre Drinker associates, Katherine Gordon, Caroline Guensberg, Charlotte Marshall and Kerry Zaroogian, and my law partners, Alex Denny, Nicole Truso and Jill Zender, for their invaluable efforts in bringing this 13th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2022

Chapter 19

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 England.

The principal piece of employment legislation providing protection to employees is the Employment Ordinance (EO). Since its enactment in 1968, there has not been any general overhaul of its underlying principles; however, it has been amended periodically to address particular issues as they have arisen. Certain local structural constraints have ensured that only modest or compromise reforms have tended to occur. The result is that although 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 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 within a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the EO.

The relevant courts and tribunals in which employment claims can be brought 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;

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.

1 Jeremy Leifer is a partner at Proskauer Rose.

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

II YEAR IN REVIEW

i Extension of period of maternity leave

In July 2020, legislation was passed to amend the maternity protection provisions of the EO, to extend the period of maternity leave from 10 to 14 weeks. This came into effect on 11 December 2020. The Reimbursement of Maternity Leave Pay Scheme is now available to employers who have paid maternity pay for weeks 11 to 14 of an employee's maternity leave, through the Labour Department's website.

ii Amendments to Sex Discrimination Ordinance

An amendment to the Sex Discrimination Ordinance was passed in March 2021 to protect a breastfeeding woman from harassment. This adds to the statutory anti-discrimination protection for a breastfeeding woman introduced in 2020, both of which apply to the workplace as well as to any applicant for employment.

iii Amendments to Employees' Compensation Ordinance

In April 2021, the Employees' Compensation Ordinance was amended to extend protection to employees travelling to and from places of work in 'extreme conditions' (being a super typhoon or other natural disaster of a substantial scale), by treating such travel as being in the course of employment. The Ordinance operates on a no-fault basis to ensure that an employee is compensated regardless of fault, and for which an employer is required to maintain compulsory insurance cover.

iv Amendments to Employment Ordinance to increase number of statutory holidays

In July 2021, the EO was amended to increase progressively the number of statutory holidays (which an employer is required to grant to an employee) from 12 days to 17 days so that it would be on a par with the existing number of general holidays. The five additional days of statutory holidays would fall on days that are general holidays, with one being added every two years, starting in January 2022.

III SIGNIFICANT CASES

i BFAM Partners Hong Kong Limited v. Gareth John Mills and Segantii Capital Management Limited

The decision of the High Court in this case,[3] in which an injunction was granted against the employee defendant to enforce a six-month non-compete covenant, reiterates the point that in the context of these types of covenants, each case will be fact specific, and the outcome may differ between cases where the same length of restriction is in place. The employee was an IT professional employed by the plaintiff, an institutional asset management firm, with the title of Head of Platform Technology. The employee resigned and very shortly afterwards began working for a competitor, despite being reminded of his various post-termination restrictions. The plaintiff became aware of this fact when the employee returned the plaintiff's cheque in payment for the non-compete covenant, using an envelope that showed the name of the new employer. The Court accepted that the employee had had access to two categories

3 [2021] HKCFI 2904.

of information associated with the products and services contemplated under the covenant, namely (1) confidential information that the employee could not use or disclose during his employment without breaching his duty of fidelity to his employer, which, in the absence of an express covenant, he would be at liberty to use after his employment had ended, and (2) trade secrets. These were legitimate interests that could be protected by the covenant. The Court rejected the defence argument that the plaintiff was not entitled to rely on matters subsequent to the time the employment contract was signed to assess whether the covenant was reasonable. What mattered was the parties' intentions, or what they contemplated, at the time the contract was made and the Court could take into account a matter they intended or contemplated might arise later, in this case the employee's subsequent promotion from this original position when the chief technology officer went on extended sick leave. As for the 6-month restriction, the court was influenced by evidence from the plaintiff of the 6-month life-cycles of trading strategies of a hedge fund manager.

ii Lam Siu Wai v. Equal Opportunities Commission

A further decision of the High Court confirmed that when dismissing an employee by giving contractual notice under the contract of employment, an employer has no implied duty of good faith.[4] The contractual right to terminate a contract of employment (whether by the employer or the employee) can be exercised unreasonably or capriciously so long as that right is exercised in accordance with the contract, and no reasons need be given for the termination. The plaintiff's employment with the defendant had been terminated by a payment in lieu of notice as well as all other payments owing to her under her contract. In its letter of termination, the defendant included some general reasons for the termination, which the plaintiff then sought to challenge and which the defendant then sought to defend. The court accepted that the giving of reasons was unnecessary in that there was no legal requirement to do so, and that the employer could not be in a different position for doing so.

iii Yung Wai Tak Abraham William v. Natural Dairy (NZ) Holdings Ltd (in Provisional Liquidation)

The decision of the High Court in this case[5] is a reminder that where an employee is employed by one company within a group of companies, the court may construe that the employee is also employed by a second group company (i.e., has joint employment). In this instance, the court applied the 'overall impression' test to reach its conclusion based on a number of factors, including oral and documentary evidence about the employee's recruitment and his duties and its construction of the employment contract. The employee had been hired by a subsidiary of a listed company to act as the group's company secretary. Given that the stock exchange listing rules required that the company secretary be employed by the listed company, this implied that the employee was working also under a separate employment contract. In the event, the employee was able to obtain judgment against the listed company for unpaid wages, statutory severance payment and payment in lieu owed by the subsidiary. It should be noted that this was the result despite the presence in the employment contract of a term that the employee had no other agreements with the group (including the listed parent).

4 [2021] HKCFI 3092.

5 [2020] HKCFI 2067.

iv Lengler Werner v. Hong Kong Airways Limited

The decision of the High Court in this case[6] shows the importance of employers including in employment terms the right to suspend an employee partially from performance of duties, and in circumstances where the purpose of the suspension may not be to investigate possible grounds for dismissal. In this case, the employee's claim for constructive (wrongful) dismissal was rejected by the Court on the ground that the suspension imposed on him was partial in relation to his duties, rather than total. The Court noted that the statutory right of suspension under the EO gave the employer a right of total suspension of duties only in the context of potential summary dismissal or a criminal prosecution. The employment agreement and employment handbook in this instance gave the employer a right of partial suspension. Given this, there was in the Court's view no doubt that the employee's employment had not been suspended, but only his flying duties for the defendant airline. The employee's claims made on the basis of a total suspension therefore failed.

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 not only to fulfil certain minimum information requirements under the EO but also for the sake of certainty in the employer–employee relationship. 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).

6 [2021] HKCFI 1333.

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 it is 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 the 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 can be avoided if the company engages 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, or appointing an agent 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).

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

Assessment for salaries tax on the remuneration and benefits paid to or received by an 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 former employer;
b non-solicitation of employees of the former employer;
c non-solicitation of customers of the former employer; and
d non-dealing with customers of the former 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. The burden of proof to reverse this presumption is on the employer, who must demonstrate to the court that the scope of the restriction is no wider than is strictly necessary to protect its legitimate business interests. 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 and, therefore, great care is needed 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. The government has no current 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 (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. This will require the employer to demonstrate that efforts have been made to search for suitable candidates in the local labour market. It should also be noted that the Immigration Department has significantly increased its level of scrutiny of sponsors and applicants during the application process. 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 person'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 disciplinary rules, to employees working in Hong Kong. Although 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 of the employees (if any), 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.

Hong Kong has four pieces of legislation dealing with discrimination (the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance, the Race Discrimination Ordinance and the Sex Discrimination Ordinance). 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 employment. Given this, it will be important for the employer to include a robust anti-discrimination policy in its internal rules. 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 Equal Opportunities Commission 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 an employee signs an 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 14 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

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

Hong Kong has legislation permitting the formation of trade unions. There is no statutory provision for the recognition of collective bargaining agreements or for works councils of any kind; neither is there any 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 is a principles-based regime with six data protection principles (DPPs) set out in the PDPO, which are drawn from the 1981 Guidelines issued by the Organisation for Economic Co-operation and Development 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 whereby 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 card 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 not been enacted.[7] 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 of this

7 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. Although 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 to enter into a data protection agreement.

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 one party giving contractual notice to the other;
b one party making a payment in lieu of notice to the other; and
c summary dismissal by the employer (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 gives 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 notice period of 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 notice period, and any other payments to which he or she may be entitled under the contract.

Termination by the employer by summary dismissal (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 will exclude 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 a 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, or 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 an 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 reimbursement of 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.

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

In her 2021 policy address, the Chief Executive announced that draft legislation would be introduced in the 2021–2022 session to abolish the 'offsetting' arrangement under the MPF system (see the final sentence of Section XIII.ii), which has existed since the advent of the MPF system in 2000. This would represent a very welcome and substantial economic change for any employee receiving a statutory severance payment or long service payment.

Appendix 1

ABOUT THE AUTHORS

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