

## Employment, Privacy & Discrimination

### Amendments to an Employment Contract Must Be Supported by Fresh Consideration

#### Introduction

On 24 May 2017, the Court of First Instance in *Wu Kit Man v Dragonway Group Holdings Limited* HKLA 15/2016 considered an appeal from the Labour Tribunal, which serves as an important reminder that amendments to an employment contract must be supported by fresh consideration. In this case, the Court ruled that any additional entitlement granted to an employee by an amendment to an existing employment contract will be unenforceable if the employee is only required to carry out his or her existing duty that is already stipulated in the original contract.

#### Background

The respondent employee (the “**Employee**”) was appointed as a senior manager of the appellant employer (the “**Employer**”) on 12 May 2015 to assist the Employer to apply for listing. On 19 October 2015, an amendment titled “addendum” (the “**Addendum**”) was made to the original employment contract, which stated that:

*“If the [Employer] or its holding company ceased the listing plan or [the Employee] leave the [Employer] for whatever reason before 31 December 2016, a cash bonus of HKD350,000 will be offered to [the Employee] within 10 days after the cessation or termination and in any event no later than 31 December 2016.”*

After the Employee had resigned on 21 December 2015, the Employer refused to pay the bonus and the Employee brought the matter to the Labour Tribunal for adjudication. The Employee successfully argued at the Tribunal level that she was entitled to the cash bonus pursuant to the Addendum. The Employer appealed against the Tribunal’s decision and the Employer’s “lack of consideration” argument was accepted by the Court.

#### Lack of Consideration

Consideration is a fundamental concept in contract but it can sometimes be easily overlooked when an amendment to an employment contract is made.

For a contract to be binding in law, each party to the contract must, among other things, each receive a benefit and each suffer a detriment in return. In a typical employment contract, the remuneration package, i.e. the salary and other employee benefits, is the consideration given

by an employer for the exchange of the employee's service; whereas the labour service provided by the employee is his or her consideration for the remuneration package.

Under the original employment contract, the Employee's duty, i.e. her consideration given to the Employer, was to fulfil her responsibilities including assisting the Employer to apply for listing on the Hong Kong stock market, whereas the Employer's consideration in return was the remuneration offered to her. After considering the relevant evidence and circumstances of the case, the Court ruled that the Addendum did not require the Employee to fulfil any extra duty that did not originally exist under the original employment contract. There was no additional condition attached to the Addendum for the Employee to meet in order to receive the cash bonus. In other words, the Employer did not receive anything from the Employee that could be recognised as consideration. Accordingly, the Addendum was held to be for the Employee's sole benefit and thus was unenforceable due to the lack of consideration. The Court found in favour of the Employer and ordered the Employee to return the cash bonus to the Employer.

## Takeaway

As the case suggests, even if a written amendment to an original employment contract was executed with the consent of both the employer and employee, the parties still face the risk that the amendment is not valid if there is no fresh consideration offered for the exchange of the new promise of the other side. Accordingly, employers and employees should bear in mind that any new responsibilities to be fulfilled by the employees must be expressly stated in the amendment in order to avoid potential disputes. As in the Employee's case, if an employee is merely required to perform his or her existing role (and, therefore, no fresh consideration) under a subsequent amendment to the original employment contract, such amendment would not be binding between the employer and the employee. Alternatively, an employer and the employee may amend an existing employment contract by way of a deed in order to bypass the issue of fresh consideration.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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