Hong Kong Employment Law 2019 Review

Produced in partnership with ***Michael Szeto of ONC Lawyers***

Overview of major changes made by the Government on employment law

Major changes that have become effective in 2019 include:

- With effect from 18 January 2019, statutory paternity leave was increased from 3 days to 5 days.
- With effect from 1 May 2019, statutory minimum wage rate was raised from $34.5 per hour to $37.5 per hour.
- From the year of assessment 2019/20, each taxpayer is entitled to a maximum tax deduction of HK$60,000 per year under salaries tax and personal assessment for their premiums paid to qualifying deferred annuities and contributions made to tax deductible Mandatory Provident Fund voluntary contribution accounts.
- The minimum allowable wage for foreign domestic helpers in Hong Kong was increased from $4,520 to $4,630 per month, which applies to all foreign domestic helpers contracts signed on or after 28 September 2019.

Steps forward for rights of same-sex married couples

Although same-sex marriage has not been legalised in Hong Kong, there have been small but important steps forward for equal rights for same-sex married couples. In 2018 and 2019, the following 2 landmark cases have been decided by the Court of Final Appeal (CFA):

1. **Civil servant spousal benefits**: In *Leung Chun Kwong v Secretary for the Civil Service and Another* (2019) 22 HKCFAR 127, [2019] HKCFA 19 (see case discussion here), the CFA recognized that a spouse of a gay senior immigration officer should be entitled to the same spousal benefits that are available to his heterosexual counterparts under the Civil Service Regulations. The CFA found that there was no rational connection between denying same-sex married couples employment benefits and the aim of protecting or not undermining the institution of marriage in Hong Kong.

2. **Election for joint tax assessment**: In *Leung*, the CFA also held that same-sex married couples should be allowed to opt for joint assessment of salaries tax under the Inland Revenue Ordinance (Cap. 112) (IRO). In the CFA's subsequent judgment on relief and costs ([2019] HKCFA 34) (see case summary here), the CFA inter alia ordered that:

   (1) the term "marriage" in section 2 of IRO be interpreted to include same-sex marriage entered into outside Hong Kong according to the law of the place where it was entered into; and

   (2) operation of the remedial interpretation above be suspended for 6 months (such that the remedial interpretation will become effective before the end of the current tax year on 31 March 2020).

3. **Dependant visas**: In *QT v Director of Immigration* (2018) 21 HKCFAR 324, [2018] HKCFA 28 (see case discussion here), the CFA ruled that same-sex couples who are lawfully married or in a civil partnership overseas are eligible to apply for dependant visas in Hong Kong. The CFA found that the Director of Immigration's decision of refusing to grant a dependant visa to a same-sex spouse ran wholly counter to the alleged aim of encouraging talent to join the workforce in Hong Kong. This CFA decision will assist employers who need to deal with issues of dependant visas for same-sex spouses in recruiting international talents.

Do the CFA's decisions imply that same-sex marriage will be recognised in Hong Kong soon? It appears not. In *Leung*, the CFA repeatedly stressed that it was only dealing with the benefits to the same-sex married couples but not legalising same-sex marriage in Hong Kong, and acknowledged that the traditional family institution in Hong Kong constituted by marriage should be protected. Furthermore, on 18 October 2019, the Court of First Instance (CFI) dismissed an application for judicial review in *MK v Government of HKSAR* [2019] 5 HKLRD 259, [2019] HKCFI 2518. The CFI held that the right to marry under Article 37 of the Basic Law has no application to same-sex couples and the Government has no positive obligation to provide legal framework for recognition of same-sex relationships, affirming the position that whether there should be a legal framework for the recognition of same-sex relationships is a matter for legislation.

Real benefit to employer required when amending employment contracts

The Court of Appeal (CA) in *Wu Kit Man v Dragonway Group Holdings Limited* [2018] 2 HKLRD 117, [2018] HKCA 107 discussed the legal principles for amendments of contracts and clarified what can amount to good consideration supporting the amendments.

Facts

In May 2015, the employee entered into an employment contract with the employer, pursuant to which she was employed to assist the employer in its listing application. In October 2015, the employer issued an addendum to the original contract offering a cash bonus to the employee (notwithstanding that the employee was not asked to perform any extra duty). In December 2015, the employer terminated the employment without providing the cash bonus. The employee claimed for the cash bonus in the Labour Tribunal, which ruled in favour of the employee. The CFI reversed the Labour Tribunal's decision on the basis that the addendum was unenforceable due to lack of fresh consideration. The employee appealed to the CA.

Decision

The ultimate test for consideration for variation of terms of employment is whether there is a real benefit to the employer. In applying the test, whilst the CA accepted that as a starting point non-exercise of the right of termination of an employment contract by an employee may amount to good consideration, the court will have to look at the overall circumstances of the case to see if the continuance of employment of an employee did provide a real benefit to the employer which can provide consideration for the amendment.

The CA discussed an earlier case *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd* [2011] 1 HKLRD 10, where the employer varied the standard terms of employment contracts of all cabin attendants when there was competition from other airlines offering similar packages. It was in this special context that the CA held that the employee had provided sufficient consideration by refraining from resigning.

In the present case, as there was insufficient exploration of the facts by the Labour Tribunal to assess whether the employer had obtained a real benefit or obviated a disbenefit in making the addendum, the CA allowed the employee's appeal and remitted the case back to the Labour Tribunal for a re-trial on the question of consideration for the addendum.

Employers and employees should bear in mind the importance of showing consideration in order to enforce amendments to employment contracts.

Know more about the case here.

CFI affirms extended scope of springboard injunctions and importance of restrictive covenants

A "springboard" injunction is a type of injunction typically sought by employers to remove the unlawful advantage that a former employee and his/her new employer have gained through unlawful activities, traditionally in cases of misuse of confidential information. In *McLarens Hong Kong Ltd v Poon Chi Fai, Corey & Others* [2019] 3 HKLRD 403, [2019] HKCFI 1550, the CFI affirmed the English High Court's position that extends the scope of springboard injunctions, and discussed the importance of restrictive covenants when springboard relief is sought in a team move scenario.

Facts

9 former employees of the plaintiff employer resigned en masse to join a new employer, a competitor of the plaintiff. Their resignation was followed by solicitation of the plaintiff's clients, who directed the plaintiff to transfer their files to the new employer. Importantly, the employment contracts of the 9 employees contained no restrictive covenants.

The plaintiff argued that springboard injunctions should be granted against the 9 employees to the effect that they should be restrained from engaging in competing business in the United Kingdom, Hong Kong or China and soliciting the plaintiff's customers for 6 months for inter alia their breaches of duties of fidelity owed to the plaintiff, which required them to inform the plaintiff about the conducts of other employees which were detrimental to the plaintiff's interests.

Decision

Citing *QBE Management Services (UK) Ltd v Dymoke & Others* [2012] IRLR 458 (the English leading authority in springboard injunctions), the CFI affirmed that springboard relief is not confined to cases of misuse of confidential information, but is available to prevent any future or further economic loss to a previous employer caused by former employees taking an unfair advantage of any serious breaches of their employment contracts.

The CFI considered that it is of importance that the relevant employment contracts contained no restrictive covenants. Hence, as a matter of commercial and practical reality, the 9 employees could have easily left the plaintiff to join the new employer without committing any wrong. On the whole, the CFI found that the plaintiff had failed to prove the creation of a springboard by reason of the failure to inform the plaintiff of the en masse exodus, and decided that the course which seemed to carry the lower risk of injustice was not to grant springboard injunctions.

Employers should note that a springboard injunction will not be granted as a mere substitute relief to assist an employer who has neglected to include enforceable restrictive covenants in employment contracts. Employers should ensure that their employment contracts contain enforceable restrictive covenants, failing which the remedies available to them in the face of team move may be severely limited.

Know more about *QBE* here and *McLarens* here.

Landmark UK Supreme Court decision reforming test for "blue penciling" restrictive covenants

A restrictive covenant in an employment contract is prima facie void as contrary to public policy and, hence, unenforceable unless the employer can show that the covenant is reasonably necessary to protect its legitimate business interest. Where a covenant includes unenforceable parts but these parts can be removed without affecting the remaining parts, the court may "blue pencil", that is, to sever the unreasonable parts so that the remainder of the covenant is enforceable. This is commonly referred to as the "blue pencil" test.

In *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2019] 3 W.L.R. 245, the UK Supreme Court expressly rejected the old "blue pencil" principles laid down in *Attwood v Lamont* [1920] 3 K.B. 571 and reformed the 3 criteria in determining severability of a post-employment restrictive covenant as follows:

1. the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
2. the remaining terms continue to be supported by adequate consideration; and
3. the removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.

It is noteworthy that *Tillman* is the first decision in 100 years that goes beyond the English Court of Appeal, where the UK Supreme Court considered severance of post-employment non-compete restrictive covenants and its ruling shifted the long-accepted interpretation of the principle of severability. Applying those 3 criteria to the non-competition covenant in issue, the UK Supreme Court held that the unenforceable words therein should be severed, and restored an injunction against the employee to enforce the covenant (subject to removal of the unenforceable words).

Although Hong Kong courts are not bound by English precedents, they are persuasive and Hong Kong courts have often sought guidance from them. Employers should be aware of the potential implications of *Tillman* when drafting employment contracts and keep an eye out for further development.

Know more about the case here.

Lessons for employers to prevent an employee from backing out of job offer before commencement

The CFI's ruling in *Law Ting Pong Secondary School v Chen Wai Wah* [2019] HKCFI 2236 demonstrates the importance of careful drafting to cover termination of employment contract before commencement.

Facts

On 17 July 2017, the employer issued an Offer of Appointment to the employee, and the employee signed on the (i) Conditions of Service and (ii) Letter of Acceptance to indicate his acceptance of the employer's offer. The Conditions of Service stated that the employment would commence on 1 September 2017, whilst the Letter of Acceptance stated that the employment contract would come into immediate effect upon acceptance of the contract. The Conditions of Service further provided that the employee was required to give 3 months' notice in writing or make a payment in lieu of notice (or a combination of both) in order to terminate the employment contract. On 22 August 2017, the employee backed out of the accepted offer without giving notice or payment in lieu of notice.

The employer contended that the employment contract came into immediate effect upon signing of the Letter of Acceptance (i.e. on 17 July 2017) and termination of his contract would require giving of notice or payment in lieu of notice as set out in the Conditions of Service. The employee argued that his employment would not commence until 1 September 2017 and thus he was not liable to make any payment in lieu of notice. The Labour Tribunal decided against the employee, who appealed to the CFI against the Labour Tribunal's decision.

Decision

It is trite that an acceptance by the offeree must "mirror" the offer made by the offeror. In the present case, the Offer of Appointment inter alia provided that *"[i]f you wish to accept this offer of appointment… **under the conditions set out in the attached Conditions of Service** …, please sign both copies of the Letter of Acceptance; and both copies of the Conditions of Service…and return one copy of each document to me direct or through the Principal."* (emphasis added)

The CFI held that the terms in the Letter of Acceptance should not be considered to constitute part of the employer's offer. The offer was only subject to terms of the Conditions of Service (which contained no provision specifically referring to the Letter of Acceptance), and thus it was clear that the employee's employment would not commence until 1 September 2017. The employee's act of signing the Letter of Acceptance was simply to comply with the prescribed mode of acceptance in the Offer of Appointment.

Employers should bear in mind that getting an employee to sign on various documents does not necessarily mean that the terms therein will become part of the contractual terms. Careful drafting work is essential to ensure that all the relevant terms have been duly incorporated in employment contracts.

Know more about the case here.

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Michael is a litigation partner of ONC Lawyers and heads the firm's Employment practice. He has many years of experience in handling complex commercial disputes, cases involving shareholders' disputes and regulatory matters under the Securities and Futures Ordinance, bankruptcy and insolvency matters, debt recovery and mortgagee actions. He frequently advises on various contentious and non-contentious employment matters, covering contract reviews, termination disputes, injunctive relief, discrimination and harassment claims, data privacy matters, as well as advice on matters relating to team moves, remuneration packages and employee incentive schemes. He is a frequent author of employment articles in industry publications and presenter to legal and HR professionals.