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Employment Law Alert - December 2010

Welcome to our December 2010 edition of the 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. Minimum Wage Ordinance ("Ordinance") - Are you ready?

1.1. The Minimum Wage Bill was passed by the Legislative Council on 17 July 2010 and was gazetted on 23 July 2010. The Ordinance will come into force on **1 May 2011** - Labour Day. For the first time, Hong Kong has established a statutory minimum wage ("**SMW**") rate which is set at **HK$28** per hour.

Minimum Wage Commission

1.2. Under the Ordinance, the Minimum Wage Commission ("**Commission**") is required to provide a report on the recommended SMW rate to the Chief Executive at least once every two years. The Chief Executive must, as soon as practicable after receiving a report, cause a copy to be published. The Chief Executive may adjust the SMW rate having regard to the recommendation by the Commission, but the Chief Executive is not bound by the recommendation. After the Chief Executive proposes the SMW rate, the Legislative Council will either approve or reject it. The Legislative Council cannot amend it.

Who does the Ordinance apply to?

1.3. The Ordinance applies to all employers, employees and employment contracts which he/she is engaged subject to the following limited exceptions:

1.3.1. a person to whom the Employment Ordinance (Cap. 57) ("**EO**") does not apply (e.g., a person who is a member of the family of the proprietor of the business in which he/she is employed and who lives in the same dwelling as the proprietor or an employee as defined in the Contracts for Employment Outside Hong Kong Ordinance);

1.3.2. a person who is engaged under a contract of apprenticeship registered under the Apprenticeship Ordinance (Cap.47);

1.3.3. a domestic worker who lives in the employer's household free of charge;

1.3.4. a student intern (i) undergoing a period of work arranged by a specified education institution in connection with an accredited programme; or (ii) resident in Hong Kong and undergoing a period of work arranged by an institution in connection with a non-local education programme for which the work is a compulsory or elective component of the requirements for the award of an academic qualification; and

1.3.5. a work experience student (i) enrolled in an accredited programme; or (ii) resident in Hong Kong and enrolled in a non-local education programme. The work experience student must be less than 26 years old at the commencement date of the contract in order to be entitled to exempt student employment for up to 59 days.

Calculating the Statutory Minimum Wage

1.4. In light of the Ordinance coming into force, employers must ensure that they pay their employees at or above the SMW in order to comply with the Ordinance.

The SMW is calculated as follows:

The number of hours worked by an employee in a wage period

x

HK$28 (i.e., the **SMW rate**)

1.5. If the wages payable to an employee are less than the SMW for the employee for that wage period, the Ordinance has the effect of modifying contracts of employment so that an employee is entitled to additional remuneration covering the shortfall of payment between the employee's salary and the SMW.

"Hours worked" and "Wages"

1.6. The *'hours worked'* by an employee in a wage period includes:

1.6.1. any time during which the employee is in attendance at a place of employment (regardless of whether the employee is provided with work or training at the time); and

1.6.2. travel time in connection with the employee's employment (but excludes travel time between the employee's place of residence and his/her place of employment).

1.7. "*Wages*" have the same meaning as the EO. Wages are widely defined under the EO to include all remuneration, earnings, allowances, commission, overtime pay, tips and services charges. However, the Ordinance provides that certain deductions allowable under the EO must be counted as part of the wages under the Ordinance. For example, deductions for damage to or loss of property or equipment belonging to the employer and deductions (with the written consent of an employee) for the recovery of any loan made by the employer to the employee must be counted as part of the wages when calculating the SMW.

Record keeping obligations

1.8. In addition to the existing record keeping obligations required under the EO, the Ordinance imposes additional requirements on employers to keep a record of the number of hours worked by an employee in a wage period if the wages payable in respect of any wage period is less than HK$11,500.

1.9. In essence, if an employee earns less than HK$11,500, an employer must keep proper records of the total number of hours that are hours worked by the employee in a wage period together with certain other employment records. Employees who earn more than HK$11,500 will not trigger the record keeping obligations required under the Ordinance.

Practical Implications

1.10. Employers will need to review their employees' existing salaries to ensure that they pay their employees at or above the SMW when the Ordinance comes into force on 1 May 2011.

1.11. The record keeping obligation required for those employees who earn less than HK$11,500 in a wage period will likely impose an additional administrative burden and possibly increase business costs for employers in order to comply with the Ordinance. Employers will need to consider how to keep a proper and accurate record of the number of hours worked by their employees. The use of electronic access cards to record an employee's time of entering and leaving the office may be helpful. However, employers may need also to consider the circumstances in which an employee is required to work off-site without being present in the employee's usual place of employment.

2. Recent Decision - A claim for a right to extend employment beyond the contractually agreed retirement age

Demery v Cathay Pacific Airways Ltd [2010] 4 HKLRD 99

Facts

2.1. The plaintiff employee was a former commercial airline pilot of the defendant employer Cathay Pacific and was retired on his birthday in accordance with the employer's Conditions of Service 1999, which provided that "*the normal retirement age is 55*". The defendant did not offer any extension of employment to the plaintiff beyond his 55th birthday.

2.2. The plaintiff brought proceedings against the defendant alleging breach of employment contract and "*unreasonable and unlawful dismissal*" under Part IVA of the EO.

Breach of Employment Contract under Conditions of Service 1999

2.3. The plaintiff's claim was made on the basis that: (a) the defendant had since at least 1988 offered extensions of employment to a number of officers when they had reached the retirement age of 55; and (b) since 2007 the defendant had an internal written policy and it was also the defendant's practice to offer a one or two-year extension of employment to every officer employed upon reaching the age of 55.

2.4. Therefore, the plaintiff claimed that he had a reasonable and legitimate expectation of being offered further employment until a higher normal retirement age subsequent to his 55th birthday.

2.5. For that reason, the plaintiff claimed that in dismissing him, the defendant failed to give three months' notice or payment in lieu thereof in accordance with the terms of the Conditions of Service 1999. The plaintiff further claimed that the defendant failed to hear and act upon the plaintiff's grievance in accordance with the procedures stated in the Conditions of Service 1999 and as a result, failed to pay wages pending the grievance procedures, which the plaintiff estimated to be equivalent to one month's wage. In total, the plaintiff claimed four months' wages totalling HK$946,646.50 for the loss and damage suffered.

Unfair Dismissal under Part IVA of the Employment Ordinance

2.6. The plaintiff, who was an active member of two registered trade unions, claimed that under s.21B of the EO, he was entitled to protection against anti-union discrimination for his membership and participation in those trade unions.

2.7. The plaintiff claimed that the termination and dismissal of his employment by the defendant was without any valid reason and sought to claim that he was dismissed by the defendant for his active involvement with the two trade unions. The plaintiff therefore claimed that he was unreasonably and unlawfully dismissed in contravention of the EO.

2.8. Further, the plaintiff also argued that he was unfairly dismissed on the basis that the normal retirement age was no longer 55. The plaintiff's argument was premised on the legal position in England that an employee had a right not to be unfairly dismissed. In this regard, the plaintiff submitted five English judgments in employment cases, and sought to rely on s.64(1)(b) of the English Employment Protection (Consolidation) Act 1978 by drawing the analogy from them.

2.9. Accordingly, the plaintiff sought remedies including an order for reinstatement or re-engagement, an award of terminal payments and award of compensation.

Decision

2.10. The plaintiff's claims were struck out by the Master, and the plaintiff appealed. The Court of First Instance dismissed the appeal on the basis that the plaintiff had no reasonable cause of action for his claims, both in respect of the breach of contract and in respect of the EO.

2.11. The Court held that the legal position in the United Kingdom was very different from that in Hong Kong. In the United Kingdom, the employee's right not to be unfairly dismissed by his employer is largely entrenched in English statue law. As the law stands in the United Kingdom, it is theoretically possible for an employer to have "*unlawfully dismissed*" an employee if his employment was terminated upon his reaching the contractual retirement age, but it can be shown that the normal retiring age in the undertaking in which the employee was employed is higher than the contractual age. However, the English cases referred to by the plaintiff regarding claims for unfair dismissal were not applicable to this case as there was no equivalent or similar statutory provisions in Hong Kong.

2.12. In the present case, the contractually agreed retirement age was stated to be 55, and in the absence of any variation to the agreement, the normal retirement age of the plaintiff was 55. As such, the plaintiff's employment was held to have come to an end by effluxion of time due to his retirement. There was no question of dismissal or termination and thus the plaintiff's claims for breach of contract and under the EO fell apart.

2.13. Moreover, the court held that the defendant's change in internal policies did not give rise to any right or entitlement exercisable unilaterally to extend the "*normal*" retirement age. The Court commented that the plaintiff's claim was no more than a complaint that he was not offered any extension of his employment by the employer upon his reaching his agreed retirement age.

Practical Implications

2.14. Employees should not expect to have any contractual right or entitlement to demand extensions of employment beyond their contractually agreed retirement age. Even if there is a written and published internal policy by the employer offering extension of employment, it does not affect the contractually agreed retirement age under the employment contract. The fact that the employer might have offered or in fact extended the employment of some employees does not give any contractual right or entitlement to an employee to demand an extension in the absence of any agreement between them.

2.15. Employers should ensure that internal policy is carefully drafted to avoid any misunderstanding by the employees that their contracts of employment with the employers can be extended beyond the contractually agreed retirement age.

3. Recent Decision - a claim based on an alleged "anti-avoidance" term survives a strike out application on appeal

Tadjudin Sunny v Bank of America [2010] 3 HKLRD 417

3.1. The defendant employer applied to strike-out the plaintiff employee's claim and was initially successful. The defendant asserted that the implied terms of her employment contract could not co-exist with the statutory regime in Hong Kong as provided by the EO and that consequently, the plaintiff's case was legally unsustainable and should be struck out before trial. The plaintiff appealed from the lower court's decision.

Facts

3.2. The plaintiff was employed by the defendant as a vice-president for over seven years. The employment contract was terminated according to terms of the contract in August 2007. The plaintiff's claim was in relation to the performance bonus for the year 2007 which was payable in February 2008, by which time the plaintiff's employment with the defendant had already been terminated.

3.3. The plaintiff argued that there was a breach of an implied term by the defendant, namely not to exercise its right of termination in order to avoid the plaintiff being eligible to the company's performance incentive programme. The plaintiff argued that on English authorities, it was possible to imply into an employment agreement a term that an employee's express power to terminate or dismiss must not be exercised in order to deprive an employee of a benefit expressly conferred by contract.

The Law

3.4. The Court of Appeal in this case took the view that the law relating to a possible implied "*anti-avoidance*" term was an area of law which was still in the process of development and as such, the striking out of such a claim at a preliminary stage prior to trial was held to be inappropriate. The court then observed that although there cannot be an implied anti-avoidance term protective of the employee's interest in remaining employed, a term protecting employees against tactics *calculated* to avoid the payment of a performance bonus *may possibly* be implied.

3.5. The court stated that the EO serves only as an "*irreducible minimum*" in terms of employee protection. Where the existing statutory provisions are found to be inadequate or insufficient to meet the requirement of justice, the common law can be resorted to by the courts to develop the law, such as by implying the necessary anti-avoidance terms, because justice and fair play so requires.

Decision

3.6. The implying of an "*anti-avoidance*" term may not necessarily be incompatible with the statutory regime under the EO. Whether or not the implied terms contended by the plaintiff will in fact be implied greatly depends on the factual matrix of the case relating to the proper construction of the relevant clauses in the employment agreement. In this case there was no "plain and obvious" case for striking out and dismissing the plaintiff's claim outright. Therefore the strike-out action failed.

3.7. It is yet to be seen if the courts hold that such an implied "*anti avoidance*" clause exists.

Practical Implications

3.8. As stated above, we will have to wait to see what the court's position is in relation to whether an "*anti-avoidance*" term can, if at all, be implied into an employment agreement. However, it is clear that courts will not go so far as to interfere with the parties' intentions and imply an anti-avoidance term where it is inconsistent with any express terms of an employment agreement. Therefore, employers should be especially careful when drafting employment agreements and bonus provisions to ensure that no possible term be implied where it need not have been.

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 additional to our Alert, we will be holding a free lunchtime seminar on the Minimum Wage Ordinance and other recent developments in Hong Kong employment law at **12:45 p.m. - 2:00 p.m.** on **12 January 2011** and **19 January 2011** at our offices. Lunch will be provided. Please confirm your attendance with Catherine Leung by email at ckyleung@rsrbhk.com.

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