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Healthcare Employment Law Alert - October 2010

Overview

Welcome to Richards Butler in Association with ReedSmith's October 2010 Employment Law Alert. In this edition, we cover employment law developments in Hong Kong covering a wide range of medical related employment law issues which are tailored to your interest.

If you require any further information regarding any of the cases please do not hesitate to contact us.

Recent Decisions

1. Leung Ka Lau v Hospital Authority [2009] HKEC 1707

Employees' compensation claim for being rostered on-call on a statutory holiday or on a rest day

Overview

Doctors have been dedicated to serving the Hong Kong community well, particularly at times when there were a great shortage of doctors. It is quite frequently the case that doctors are required to work extremely long hours beyond the normal hours as stipulated in their employment contracts in order to care for patients around the clock.

This case concerns claims by doctors employed by the Hospital Authority ("**HA**") over an entitlement to compensation as a consequence of being assigned on-call duties beyond their normal hours. Contractually, HA doctors are required to work 44 hours a week, namely a 5.5 day week, working from 9 am to 5 pm on weekdays and from 9 am to 1 pm on Saturdays, with Sundays off. The doctors concerned in this case are those who are rostered on "*non-resident calls*", that is, to be on-call whilst away from the hospital when such on-call duties may fall outside their normal working hours, on a statutory holiday or a statutory rest day.

<u>Decision</u>

The doctors successfully claimed compensation in the Court of First Instance for "*rest days*" and "*holidays*" but lost their claim on compensation for overtime worked. The case went to the Court of Appeal which upheld the decision of the lower court. However, the Court of Appeal held that employees who were on

non-resident call on a rest day or a statutory/public holiday but not called upon to provide patient treatment that day should only receive nominal damages.

Both the HA and the doctors appealed to the Court of Final Appeal. The central issues that the Court of Final Appeal had to consider were as follows:

1. "**overtime issue**" - the doctors asserted a contractual right to time off or, in default, to monetary compensation, for working on-call after normal hours, where no rest days or holidays are involved;

2. "**nominal damages issue**" - the doctors sought to overturn the Court of Appeal's decision that doctors rostered on-call so as to be deprived of a rest day are only entitled to nominal damages if it turns out that they are not in fact required to provide any patient treatment on that day;

3. "**entire day issue**" - the HA challenged the Court of Appeal's decision that compensation awarded to a rostered doctor who is in fact called on to provide patient treatment on a rest day should be limited to the hours actually worked, that is, the time actually spent providing treatment to patients, and not for loss of the entire day; and

4. "**holiday compensation issue**" - the HA argued that compensation is claimable in relation to statutory holidays only if and to the extent that the rostered doctor actually had his holiday interrupted by being required to administer patient treatment.

1. Overtime

The Court of Final Appeal found that the letters of appointment provided no basis for the doctors to claim for overtime compensation since the letters were held unambiguously to state that the doctors concerned were expected to work overtime and to perform on-call duties, sometimes working on shifts in order to provide a 24 hour coverage. However, it was not suggested that there would be any extra compensation for such work. Such a package was offered by the HA and accepted by the doctors and there was no provision in the HA's Human Resource and Administration Manuals or in its rules and regulations to displace the position evident in the letters of appointment which took effect as the prevailing contractual documents.

2. Nominal damages

The HA accepted that there was a breach of obligations on its part to grant rest days under the Employment Ordinance (Cap.57) ("**EO**"), which is defined as *'a continuous period of not less than 24 hours during which an employee is entitled to*

abstain from working for his employer'. When a doctor is on non-resident call, it is common ground that he is required to remain within 30 minutes of the hospital; he must not drink alcohol and he must remain mentally ready to respond to calls for his services. Accordingly, he is not entitled to abstain from working for the HA. It follows that a day rostered on non-resident call could not qualify as a rest day under the EO.

The Court of Final Appeal held that when a doctor is on-call on a rest day, the fact that he may or may not actually be required to treat any patient is irrelevant as the doctor’s loss is the loss of a rest day which entitles him to abstain from work. The Court of Final Appeal was of the view that nominal damages was inappropriate. The damages awarded should aim to place the doctor in the position he would have been in if the HA had duly granted him a rest day in accordance with its obligations under the EO. Therefore, it was held that damages should be equivalent to a full day's wages (at the doctor's then applicable salary) where a rest day has been missed and cannot practicably be replaced by an alternative day off.

3. Entire day

It follows from the nominal damages issue above that doctors who have worked on a rest day are entitled to be compensated on the basis of the loss of an entire day. Whether or not they are required to provide their professional services and for how long in the course of the day spent on-call is irrelevant.

4. Holiday compensation

As with rest days, a doctor who is on-call during a statutory or public holiday is deprived of that holiday and such breach should be compensated by providing damages equivalent to a full day's wages (at the doctor's then applicable salary) and not merely in nominal damages.

Practical Implications

Should an employer expect or require an employee to work overtime, such a requirement should be clearly provided for in the employment contract and/or employee handbook forming part of the employment contract.

Furthermore, merely rostering employees "on-call" may result in a failure on the employer's part to comply with its statutory obligation to grant employees a statutory rest day or statutory holiday as required under the EO. If employers require employees to work on a rest day, consent from the employee is required and a substitute rest day should be provided within 30 days after the original rest day. If employees are required to work on a statutory holiday, employers

must provide employees with an alternative holiday in accordance with the EO. An employer who without reasonable excuse fails to grant statutory holidays or rest days is liable to prosecution and, upon conviction, to a fine of HK$50,000.

2. Sexual Harassment in the workplace

Overview

There have been cases where doctors have been sued for sexual harassment of their colleagues in the workplace. It is important for employers to ensure that the doctors whom they employ do not commit such conduct, otherwise employers run the risk of being held vicariously liable for the acts committed by the doctors.

*Civil sanctions - Sex Discrimination Ordinance (Cap.480) ("**SDO**")*

Employers should be aware of the provisions set out in the SDO.

Under the SDO, a person sexually harasses another if that person:

i) makes an unwelcome sexual advance;
ii) makes an unwelcome request for sexual favours; or
iii) engages in other unwelcome conduct of a sexual nature

which a reasonable person, taking into account all the circumstances would have considered offending, humiliating or intimidating.

The SDO provides that it is unlawful for a person who is employed by another person at an establishment in Hong Kong to sexually harass a man or a woman who is employed by that second-mentioned person. Significantly, it also provides that anything done by an employee in the course of his/her employment shall be treated as done by the employer, whether or not it was done with the employer's knowledge or approval.

There is a limited defence for employers' regarding their liability for acts committed by employees under the SDO. The SDO provides that an employer will not be liable if:

"*it took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.*"

Therefore, if an employer takes adequate steps to prevent employees from committing discriminatory acts, the employer may avoid liability for acts committed by employees under the SDO.

Civil sanctions - Common law

Sexual harassment is a legally recognised tort in Hong Kong.

In sexual harassment cases, damages are awarded for injury to feelings and like in defamation cases, apart from ordinary compensatory and aggravated compensatory damages, punitive and exemplary damages may also be awarded.

At common law, an employer is liable for a tort committed by an employee against another if the employee's tort was so closely connected with his/her employment that it would be fair and just to hold his/her employer vicariously liable.

This common law position is re-affirmed in a recent Hong Kong Court of Final Appeal decision. The Court of Final Appeal referred to a UK case which stated the following:

"*Cases which concern sexual harassment or sexual abuse committed by an employee should be approached in the same way as any other case where questions of vicarious liability arises. I can see no reason for putting them into any special category of their own.*"

Therefore, if a doctor is found to have sexually harassed a colleague, both the employer and the doctor may potentially be made the subject of civil proceedings in like manner both under statute and common law.

Medical Registration Ordinance (Cap.161)

Under section 21 of the Medical Registration Ordinance, if the Medical Council of Hong Kong is satisfied that a doctor has been convicted of an offence or guilty of misconduct (i.e. sexual harassment of a colleague), it may, among other things, impose the following sanctions in its discretion:

- order the name of the registered practitioner to be removed from the General Register or the Specialist Register (or for such period as it may think fit);

- order the name of the registered medical practitioner to be reprimanded;

- make any of these orders but suspend the application, subject to such conditions as the Medical Council may think fit, for a period not exceeding three years; or

- order that a warning letter be served on the registered medical practitioner.

Practical Implications

Employers may potentially be held vicariously liable in civil proceedings for sexual harassment acts committed by doctors against their colleagues. In order to reduce the risk of being held vicariously liable for sexual harassment acts committed by doctors, employers should:

- formulate a clear policy on sexual harassment and ask all doctors to sign a declaration stating that they have read and understood the policy and will comply with the same;
- remind their doctors to maintain good medical practice as the bringing of claims not only causes reputational damage to the doctors, but also to the employers as well;
- monitor and observe whether the policy is working in practice; and
- update the policy as required and communicate the policy to all staff on a regular basis.

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 Healthcare Employment Law Alert informative relevant to your business. If you have any questions, please do not hesitate to contact Ms. Catherine Leung by email at ckyleung@rsrbhk.com or by telephone at 2507-9833.

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Disclaimer: The information contained in this article is intended to be a general guide only and is not intended to provide legal advice.

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