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# Looking back and looking forward: developments in employment law and predictions for 2024

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### Introduction

With the retreat of the COVID-19 pandemic and the dismantling of its associated restrictions, 2023 was a year of recovery.

During this first proper post-pandemic year, employers have been restructuring and reorganising. This has also been an opportunity for employers to undertake a comprehensive review of their employment-related policies and practices.

This article outlines significant employment-related developments of 2023, and comments on the Hong Kong employment landscape in 2024.

### Major developments in 2023

#### *Protection for work injuries*

The levels of nine compensation items under the Employees' Compensation Ordinance (Cap. 282) have been increased since 13 April 2023, including the following categories:

- the ceiling of monthly earnings for calculating compensation for death and permanent total incapacity;
- the minimum monthly earnings for calculating periodical payments during work injury sick leave;
- compensation for death and permanent total incapacity;
- compensation for employees requiring attention by another person;
- surcharge on late payment of compensation;
- funeral expenses; and
- cost of supplying and fitting, and repair and renewal of, a prosthesis or surgical appliance.

Employers are reminded to review their employees' compensation insurance policies and discuss with their insurance brokers to ensure that their coverage is sufficient in the light of these increases.

Separately, the Occupational Safety and Occupational Health Legislation (Miscellaneous Amendments) Ordinance 2023 was gazetted and came into effect on 28 April 2023. It amended the Factories and Industrial Undertakings Ordinance (Cap. 59) and the Occupational Safety and Health Ordinance (Cap. 509), as well as their subsidiary legislation, to increase the maximum penalties for occupational safety and health offences, to enhance their deterrent effect.

Employers should regularly review their occupational safety and health related policies to ensure a safe and healthy work environment for their employees and minimise the risk of prosecution.

#### *Increase in minimum wage*

With effect from 1 May 2023, the minimum wage in Hong Kong has increased from HK\$37.5 to HK\$40 per hour (approximately £3.70 to £4). The monetary cap on the requirement for employers to record the total number of hours worked by employees has accordingly increased from HK\$15,300 to HK\$16,300 per month (approximately £1,536 to £1636).

Employers should ensure that their employees are paid not less than the statutory minimum wage. Failure to do so will not only attract civil liability but could also result in criminal liability (not just on the part of the employer but potentially also to its directors, managers, secretary or other officers).

#### *Repeal of covid-19 vaccination-related provisions under EO*

In 2022, the Employment Ordinance (Cap. 57) (EO) was amended to include provisions relating to a legitimate covid-19 vaccination request (vaccination provisions) made by employers. The vaccination provisions provided that it will not constitute an unreasonable dismissal if an employer dismisses an employee due to their failure to comply with a vaccination request.

On 16 June 2023, the vaccination provisions were repealed. Non-compliance with a legitimate covid-19 vaccination request is now no longer a ground for dismissal of an employee.

#### *Constructive dismissal resulting from reduction of salary without effective "lemon clause"*

A "lemon clause" allows an employer to reduce an employee's salary and/or terminate their employment (or take some other form of action) without incurring significant costs and/or legal liabilities when certain specified conditions are met (eg, the employee's performance fails to meet a certain standard). Lemon clauses are not uncommon in employment contracts in the financial services industry. The case of *Cunnington Guillaume Serge Charles v Qantex Capital Markets Limited*<sup>(1)</sup> involved the consideration of a lemon clause, and whether the employer was entitled to reduce the employee's wages.

In this case, the employee alleged that when he had been appointed as a Responsible Officer, the lemon clause had been suspended. When the employer began paying him a reduced salary, he alleged that he had been constructively dismissed and claimed both the difference in his salary and payment in lieu of notice. He succeeded in the Labour Tribunal, and the employer appealed.

The Court had to examine the parties' dealings and determine the extent to which the parties had agreed to suspend the lemon clause, and the duration of that suspension. It held that there was an agreement that the lemon clause would be suspended whilst the employee remained as a Responsible Officer. Accordingly, there was no basis for reducing the employee's salary, and the decision of the Labour Tribunal was upheld. The Court noted that the parties had accepted that a unilateral reduction of the claimant's salary would amount to constructive dismissal.

The case emphasises the importance of clear and unambiguous communication with employees, particularly when it comes to important issues such as wages. Employers are reminded that any variation of employment terms should be recorded in writing and accepted by the employee in writing.

#### **Full and timely termination payments**

In *Anthony Mackay v Chi-X Asia Pacific Holdings Limited*,<sup>(2)</sup> the Court of First Instance awarded summary judgment in favour of an employee in respect of:

- the unlawful deduction of bank charges from his salary payments;
- the unlawful withholding of salary which the defendant employer claimed to be requested by the Inland Revenue Department (IRD); and
- the unpaid expenses.

Employers are reminded to observe the statutory requirements and time limit for withholding termination payments. Unless an employee intends to leave Hong Kong for a period exceeding one month after their termination of employment, the employer must ensure that all termination payments are made to the employee within seven days following the date of termination. In the event an employee does intend to leave Hong Kong for more than one month, the employer should only withhold any termination payment for a period of one month from the date of filing Form IR56G or until the IRD issues a letter of release (whichever is earlier).

Salaries which are remitted to employees should also be free from any unlawful deductions. For example, any bank charges shall be borne by the employers (unless otherwise agreed with the employee in their employment agreement).

#### **"Labelling" bonus as "discretionary"**

In *Kan Kin Tong v Man Leong Fire Services Ltd*,<sup>(3)</sup> the District Court held that the unpaid bonus, which the defendant employer claimed to be discretionary, was in fact payable under a formulaic incentive payment scheme (calculated based on the employer's net profit) and was contractual in nature. The use of the label as "a discretionary bonus" did not mean that it was discretionary in substance and would be contrary to the stated objective of the bonus scheme. Hence, the bonus formed part of the employee's remuneration or wages under his employment contract.

Employers should review their bonus policies/provisions and the practices that they have adopted in determining and paying bonuses to ensure that there is no inconsistency. The fact that the bonus is labelled "discretionary" will not be decisive in determining whether it is discretionary or contractual in nature, especially when in practice the bonus scheme operates as a contractual arrangement.

#### **Abolition of MPF offsetting mechanism**

The Government announced in April 2023 that the MPF offsetting mechanism will be abolished on 1 May 2025. Thereafter, employers can no longer offset severance and long service payments owed to employees against the MPF benefits derived from employers' contributions.

Previously, the Government planned to introduce the "Designated Savings Accounts for Severance Payment and Long Service Payment Bill", under which every employer will be mandated to set up a Designated Savings Account (DSA) and contribute 1% of their employees' monthly income to the DSA until reaching 15% of all of their employees' annual income for settlement of any severance or long service payment.

The Labour Department's submission to the Legislative Council in July 2023 revealed that the Government has decided not to pursue the DSA proposal due to, among others, the high administration fees involved in running the DSA.

#### **Hong Kong court awarded almost million dollars as damages for pregnancy discrimination**

In *周露娜 v 中旅貨運物流中心有限公司*,<sup>(4)</sup> the District Court held that the employer unlawfully discriminated against an employee because of her pregnancy, in breach of the Sex Discrimination Ordinance (Cap. 480). In addition to paying the employee's legal costs, the employer was ordered to pay the employee:

- her loss of income;
- year-end bonus and
- damages for injury to feelings, totalling approximately HK\$930,000 (£93,330).

Employers are reminded to regularly review their anti-discrimination policies and any relevant measures to ensure that they are operating effectively. They should also ensure that all of their employees understand that any form of discrimination (including pregnancy discrimination) will not be tolerated in the workplace. When it comes to the termination of employment of employees with protected characteristics (eg, pregnancy, sex, race, disability), employers should ensure that their decision to terminate is not based on any of those protected characteristics.

#### **Consideration in support of an employment agreement**

In *AIM Global Holdings Ltd & Ors v Chien Kun Allen & Rising Dragon Global Ltd*,<sup>(5)</sup> the Court was asked to determine the validity of more than one employment agreement of the same employee (ie, dual employment). The Court of First Instance held that, among others, the employee's performance of the Hong Kong employment agreement should amount to valid consideration in support of the PRC employment agreement, given that the PRC company had indeed obtained the benefit of a "direct obligation" which can be enforced by the PRC company against the employee.

Where an employee is subject to more than one employment agreement, employers should make sure that there is sufficient consideration under each agreement.

## **Outlook for 2024**

### ***Increase of statutory holidays***

The Employment (Amendment) Ordinance 2021 introduced changes to the EO such that the number of statutory holidays would progressively increase from 12 to 17 days by 2030.

In 2024, the first weekday after Christmas Day (ie, 26 December 2024), will be added as a statutory holiday.

### ***Revision to "continuous contract" requirement under EO***

The Labour Advisory Board (the Board) is discussing the potential revision of the "continuous contract" requirement, commonly referred to as the "418" requirement, under the EO. Pursuant to the current "418" requirement, an employee is entitled to comprehensive employment benefits if they have been employed by the same employer for four weeks or more and have worked for 18 hours or more each week.

To enable more employees to enjoy comprehensive employment benefits, the Board has agreed in principle to revise the "418" requirement by using the aggregated working hours of four weeks as the basis for determination of benefit entitlements under the EO. As for the threshold on the total number of working hours within four weeks, the Board is still in discussion, and it is expected that such information will be announced in 2024.

An amendment bill is also expected to be introduced by the government in 2024.

### ***Implementation of the Immigration (Advance Passenger Information) Regulation***

In 2018, the International Civil Aviation Organisation introduced a new requirement under the updated Convention on International Civil Aviation (CICA), which is applicable to Hong Kong.

The CICA requires each contracting state to establish an advance passenger information (API) system. In short, the API system is an electronic communications system whereby personal data of travellers, and their respective aircraft information are collected and transmitted by an airline to the border control agency prior to/after flight departure. By doing so, the border control agency can immediately conduct a border security risk assessment for the issuance of boarding directions in respect of the travellers.

The Government has gazetted the Immigration (Advance Passenger Information) Regulation which seeks to provide legal backing for the implementation of an API system in Hong Kong. The Regulation (except for the parts relating to offences, penalty and defence) will come into effect alongside with the API system in the third quarter of 2024.

### ***(Re)launch of CIES***

The Chief Executive's Policy Address 2023 introduced the (re)launch of the *Capital Investment Entrant Scheme* (CIES), which has been suspended since January 2015. Under the forthcoming CIES, eligible investors who make investments of HK\$30 million (approximately £3 million) or above in assets such as stocks, funds and bonds can apply for entry into Hong Kong. The monetary threshold would triple from the previous threshold at HK\$10 million (approximately £1 million).

Details of the CIES are expected to be announced by early 2024.

### ***Implementation of VPAS***

The Government will implement the pilot vocational professionals admission scheme (VPAS) in respect of the non-local students of designated full-time professional Higher Diploma programmes of the Hong Kong Vocational Training Council (VTC) (Students). The VPAS will run for two years. Starting from the 2024/25 student admission cohort, Students will be allowed to stay in Hong Kong for one year after graduation to seek jobs relevant to their disciplines. During the validity period of the first two renewed visas (ie, the first four years), the graduates must be employed in a position related to their fields of study.

27 full-time Higher Diploma programmes offered by VTC have been approved for inclusion under the VPAS. The approved programmes fall under five skilled trade categories, namely:

- innovation and technology;
- electrical and mechanical services;
- building, civil engineering and built environment;
- aviation, transport and logistics; and
- maritime.

Details of the VPAS are expected to be announced in the first half of 2024.

### ***Review of coverage of severance payment under PWIF***

In the event that an employer closes down its business and is unable to pay severance payment (SP), the Protection of Wages on Insolvency Fund (PWIF) provides a safety net for the employees by releasing SP in the form of an ex-gratia payment to them. In June 2022, the ceiling of ex gratia payment for SP under the PWIF was substantially increased from the first \$50,000 plus 50% of any excess entitlement to the first \$100,000 plus 50% of any excess entitlement.

The Chief Executive's Policy Address 2023 indicated the Government's intention to review the coverage of the ex-gratia payment for SP under the PWIF to enhance protection for employees, especially considering the abolition of the MPF offsetting mechanism mentioned above.

The increase of the ceiling of ex gratia payment for SP under the PWIF was one of the contributing factors to the Government's decision not to pursue the DSA proposal. In view of the abolition of the MPF offsetting mechanism starting from 1 May 2025, it is possible that the government may further increase the coverage of ex gratia payment of SP under the PWIF in 2024.

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**Endnotes**

(1) [2023] HKCFI 1374

(2) [2023] HKCFI 938

(3) [2023] HKDC 515

(4) [2023] HKDC 1115

(5) [2023] HKCFI 1126