

Corporate Commercial Client Alert

Employment & Pensions

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Deacons employment team wishes you and your family a very healthy and prosperous Year of the Tiger!



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Employment Law Review 2021-2022

Cynthia Chung and Elsie Chan

In this Review, we provide a snapshot of the most significant developments in Hong Kong employment law throughout 2021, as well as an outlook for 2022 in respect of the likely changes.

Part One: Review of 2021

January 2021 Launch of the Greater Bay Area Youth Employment Scheme
<p>The Hong Kong Government launched the Greater Bay Area Youth Employment Scheme (“Scheme”) on 8 January 2021.</p> <p>The Scheme is aimed at encouraging enterprises with operations in the Greater Bay Area (“GBA”) to recruit Hong Kong university graduates to work in the Mainland cities of the GBA. The participating enterprises will be granted a monthly allowance of HK\$10,000 for each eligible graduate engaged up to 18 months. The Scheme will provide 2000 places, with around 700 places designated for innovation and technology posts.</p> <p>Employers in Hong Kong may consider participating in the Scheme and grasping the opportunities arising from the GBA development. Issues such as dual employment contracts, employment benefits and related tax issues may need to be considered.</p>
January 2021 Stand-by days held not rest days
<p>Requiring an employee to be on stand-by duty on a statutory rest day will disqualify the day as a rest day. In Breton Jean v HK Bellawings Jet Limited [2021] HKDC 46, the employee was a pilot with no fixed working day, and was required to be accessible on his work phone at all times except for annual leave. The District Court upheld the employee’s claim for rest day pay, considering that the employee was not entitled to abstain from working when required to be on call, regardless of whether he was actually called to perform flying duties on such stand-by days.</p> <p>Failure to grant at least one rest day every seven days is an offence. Employers are advised to clearly inform their employees of their statutory rest days, and ensure that employees are entitled to abstain from working for not less than 24 hours on a statutory rest day.</p> <p>For more details on the case, please see our client alert dated 31 March 2021.</p>
February 2021 Statutory minimum wage remains unchanged at HK\$37.5 per hour
<p>The statutory minimum wage in Hong Kong will remain at HK\$37.5 per hour following a report by the Minimum Wage Commission. This is the first time the rate has not changed since the introduction of statutory minimum wage in 2011. Before the next round of review, the rate of HK\$37.5 will apply, until 30 April 2023 at the earliest.</p>
March 2021 No Settlement Agreement due to unilateral mistake
<p>In the context of unilateral mistake, a party cannot enforce a contract on terms which he knew or should have known to not reflect the other party’s intention.</p> <p>In Zhang Qiang v Cisco Systems (HK) Limited [2021] HKCU 1126, a Settle Agreement was reached between the employee and the company in respect of a series of complaints made by the employee. However, it was later discovered that the Settlement Agreement contained a typo which mistakenly stated the compensation to be at “HK\$64,4910.46” while it was intended to be “HK\$64,491.46”. The employee refused to sign the revised letter and claimed for the sum as misstated. The Court found that the employee had been aware of the unilateral mistake and as a result of which, no Settlement Agreement was reached between the parties.</p>

Employers are reminded to check the terms of agreements with their employees, especially accuracy of sums payable. Upon discovery of mistake, clear written clarifications should be made to the employee as soon as possible to mitigate future dispute or liability.

For more details on the case, please see our [client alert dated 3 June 2021](#).

April 2021

Reimbursement of maternity leave pay scheme open for applications

Beginning from 11 December 2020, statutory maternity leave under the Employment Ordinance has been extended from 10 weeks to 14 weeks. For maternity leave pay during the additional 4 weeks, employers can apply to the Reimbursement of Maternity Leave Pay Scheme (“**Scheme**”) for reimbursement, subject to a cap of HK\$80,000 per employee.

To apply for the reimbursement, the following requirements should be satisfied:

- the employee has been employed by the applicant and is entitled to maternity leave and maternity leave pay under the Employment Ordinance;
- the employee has taken her maternity leave and the applicant has paid maternity leave pay for all of the fourteen weeks;
- the employee’s confinement occurred on or after 11 December 2020; and
- the maternity leave pay paid to the employee for the additional four weeks has not been and will not be covered or subsidised by other government funding.

Employers may submit the applications by the later of either:

- 3 months after the last day of the employee’s 14-week statutory maternity leave; or
- 3 months after the Scheme’s commencement date of 1 April 2021.

A Notification of Application Results will be issued to the applicant by email or post within 15 working days upon receipt of a complete application.

For more details on the Scheme, please see our [client alert dated 11 May 2021](#).

April 2021

Summary dismissal upheld of employee engaged in competing business

As a strong and extreme measure to terminate employment, summary dismissal requires a high threshold for employers to meet. Where the employee is engaged in competing business, a summary dismissal may be justified.

In **Cosme De net Co Ltd v Lam Kin Ming** [2021] HKDC 445, the employee had been engaged in secret business selling the same products as his company during his employment, and sought business information from the company which was not required for his role. The District Court held that the employee was in breach of his employment terms and duty of good faith by engaging in competing business, and in breach of confidentiality and intellectual property provisions under his employment contract. As a result, the company was entitled to dismiss the employee summarily.

For more details on the case, please see our [client alert dated 21 September 2021](#).

April 2021

Decision of the Court of First Instance in **Dr Leung Ka-Lau v CIR** [2021] HKCFI 1117

Background

The taxpayer, Dr Leung, was a doctor employed by the Hospital Authority. Dr Leung claimed against the Hospital Authority for rest day pay in respect of the on-call days which fell on statutory rest days. The Court of Final Appeal in **Leung Ka Lau v Hospital Authority** (2009) 12 HKCFAR 924 allowed Dr Leung’s appeal in that regard and the Hospital Authority was ordered to pay Dr Leung substantial damages. The Inland Revenue Department sought to charge the sums Dr Leung received to salaries tax.

Decision of the Court of First Instance

The Court applied the test in **Fuchs v CIR** (2011) 14 HKCFAR 74: if payments are made in return for acting as or being an employee, they are chargeable to salaries tax; if they are paid for anything else, they are not. On that basis, the CFI held that the sums Dr Leung received were not from his employment in a technical sense (i.e., a reward for services he rendered as an employee), but rather they constituted compensation for a breach of his employment contract. The obligation to provide rest days was an implied term of an employment contract and, it followed, the damages awarded to Dr Leung flowed from the breach of contract itself, and not from Dr Leung's past, present, or future services as an employee of the Hospital Authority. Dr Leung was not paid for rendering services as an employee since being "on call" did not itself necessarily entail Dr Leung working that day, but to compensate him for a contractual default caused by his employer.

For more details on the case, please see [our client alert dated 10 May 2021](#).

May 2021

Partial suspension from duties held not the same as suspension from employment

Suspension from employment may entitle an employee to terminate his employment without notice or payment in lieu under section 11 of the Employment Ordinance. However, partial suspension from duties is different from complete suspension from employment and will be governed by contract instead of section 11.

In **Lengler Werner v Hong Kong Express Airways Ltd** [2021] HKCFI 1333, the employee was a pilot and had a verbal dispute with his colleagues, as a result of which the company carried out an internal investigation. Pending the result of the investigation, the employee's flying duties were suspended for around 6 weeks. After 6 weeks and before completion of the investigation, the employee resigned and claimed that the company had constructively dismissed him. The Labour Tribunal found in favour of the employee and the company appealed to the Court of First Instance.

The Court distinguished between complete suspension from employment and partial suspension from duties. It was found that the employee was only suspended from his flying duties but not the other duties, and the employee continued to be paid during the suspension. His suspension was not governed by section 11 but made pursuant to his employment contract and handbook which allowed the company to suspend an employee from work during any investigation. Therefore, the employee was held not entitled to treat himself as constructively dismissed.

Employers are reminded of the implications of suspending an employee under section 11 of the Employment Ordinance. To partially suspend an employee from work, employers should ensure that they have proper contractual mechanisms in place.

For more details on the case, please see our [client alert dated 6 July 2021](#).

June 2021

Termination notice period enforceable before commencement of employment

Notice period for termination of employment can be enforced even before the commencement of employment contract. Such provision generally will not be regarded void as a penalty clause under the modern approach to penalty according to the Court of Appeal.

In **Law Ting Pong Secondary School v Chen Wai Wah** [2021] 3 HKLRD 185, the school recruited Mr Chen as a teacher for the school term to commence on 1 September 2017. The teacher initially accepted the offer but later terminated the contract before the school started.

The Court of Appeal ordered the teacher to make payment in lieu of three months' notice to the school in accordance with his employment contract. Adopting the approach to penalty clause in **Cavendish Square Holding BV v Talal El Makdessi** [2015] UKSC 67, the Court found that the school had a legitimate interest in the performance of the contract which went beyond compensation, and helpfully commented that generally, the law against penalty clauses may not apply to payment in lieu of notice clauses in the context of employment, subject to actual drafting.

For more details on the case, please see our [client alert dated 13 August 2021](#).

June 2021

New protection against breastfeeding discrimination and harassment

Amendment to the Sex Discrimination Ordinance came into force on 19 June 2021 to protect women against breastfeeding discrimination and harassment.

Both direct and indirect discrimination is prohibited. In other words, an employer must not treat a woman less favourably on the ground that she is breastfeeding, or apply a requirement which can be complied with by a considerably smaller proportion of breastfeeding women than people who are not breastfeeding and which is detrimental to breastfeeding women but is not justified.

The protection against harassment prohibits unwelcome conduct where a reasonable person would have anticipated that the breastfeeding woman would be offended, humiliated or intimidated, and conduct which creates a hostile or intimidating environment for the breastfeeding women.

It is vital that the employers be aware of this amendment and take steps to prevent workplace discrimination and harassment. A claimant does not have to prove that the unfavourable treatment was intentionally applied to obtain damages. Employers can also be vicariously liable for the unlawful conduct of their employees in case of failing to take practicably reasonable steps to prevent such conduct.

In the workplace context, the protection not only covers existing and prospective employees, but also extend to contractors, commission agents, partners, interns, volunteers and service users of employment agencies.

June 2021

Payment of bonus shares to former employee held not taxable

When an employment relationship comes to an end, it is not uncommon for the parties to enter into a termination agreement setting out the departing employee's rights and obligations. A question naturally arises as to whether, and to what extent, these benefits are chargeable to salaries tax.

In **Heath Brian Zarin v CIR** [2021] HKCFI 1846, the Court of First Instance ("CFI") considered this question in the context of bonus shares vested and paid pursuant to a termination agreement, and ruled that the income concerned did not constitute income "from" employment and fell outside of the salaries tax regime.

Background

The taxpayer, Mr. Zarin, was employed by a bank and was accorded with the right to participate in the bank's discretionary bonus scheme. In 2012, Mr. Zarin was granted a restricted share award under the scheme, on which terms the shares would vest in three tranches in 2013, 2014 and 2015 respectively. The share plan ("**Plan**") provided, among others, that:

- The rules of the Plan did not form part of the employment contract.
- The award shares would vest on the dates specified in the Plan, provided that Mr. Zarin remained continuously employed within the group or left as a good leaver (including being terminated on redundancy).
- If Mr. Zarin left as a good leaver and had entered into a termination agreement, any unvested award shares would not vest until he had complied with, or was released from his obligations under, that termination agreement.

The employment was terminated on the ground of redundancy, and the parties entered into a termination agreement in June 2013. Having complied with the terms of the termination agreement, Mr. Zarin received two sums in 2014 and 2015 representing the final two tranches of the award shares. The Inland Revenue Department assessed the payment to salaries tax, and Mr. Zarin appealed.

Decision of the Court of First Instance

The Court allowed the appeal and held that the payment did not constitute income "from" employment chargeable under s.8(1) of the Inland Revenue Ordinance. Referring to authorities including **Fuchs v CIR** (2011) 14 HKCFAR 74 and **CIR v Poon Cho Ming** [2019] HKCFA 38, the Court confirmed that in ascertaining whether a sum is from employment for salaries tax purposes, one needs to ascertain the substance of the bargain for the payment and the purpose of payment. If the payment in question were in substance a reward or inducement for past, present or future services rendered as employee, it would be income "from" employment chargeable to salaries tax. If the payment were made for some other reason, it would not qualify as a taxable income.

Applying the above principles, the Court found that the main purpose for releasing the award shares was to procure that Mr. Zarin provide potentially long-term assistance in a litigation in which the Company was involved instead of rewarding him for services provided in the course of his employment. The Court placed much weight on the provision in the Plan stating that in case a good leaver entered into a termination agreement pursuant to the cessation of his employment, the award shares would not have vested unless and until the awardee's obligations under such agreement have been complied with or waived. It was on this basis that the Court considered that the Plan envisaged a situation whereby an awardee might have to provide some fresh consideration unrelated to employment in order to become entitled to vesting.

For more details on the case, please see our [client alert dated 7 July 2021](#).

July 2021 Extending employees' compensation protection to commute under "extreme conditions"

From 2 July 2021, the coverage of the Employees' Compensation (Amendment) Ordinance extends to employees who are injured or die due to accidents when commuting to or from work during the period of extreme conditions.

Such accident is deemed to arise out of and in the course of employment if it happens whilst Tropical Cyclone Warning Signal No.8 or above or the Red or Black Rainstorm Warning Signal is in force or during extreme conditions. An employee will be protected under the amended Ordinance if he commutes to or from his place of work by a direct route within four hours before or after his working hours.

Employers may need to review their policies for adverse weather conditions to align with this new amendment.

July 2021 Increase of statutory holidays

Statutory holidays in Hong Kong will be increased from the existing 12 days to 17 days progressively from 2022 to 2030 to align with general holidays.

The five additional statutory holidays will be added in accordance with the following timeline:

1. From 2022 onwards: the Birthday of the Buddha, being the eighth day of the fourth lunar month;
2. From 2024 onwards: the first weekday after Christmas Day;
3. From 2026 onwards: Easter Monday;
4. From 2028 onwards: Good Friday; and
5. From 2030 onwards: the day following Good Friday.

Part Two: Outlook for 2022

Abolition of MPF offsetting mechanism

Under the current offsetting mechanism, an employer may offset the statutory long service payment and severance payment paid to an employee against the value of the employer's contribution to the employee's Mandatory Provident Fund ("MPF") scheme.

Early in 2018, the Government mapped out a plan to gradually abolish the MPF offsetting mechanism. The proposal included requirements for employers to set up designated accounts to fund the additional expenses in termination payments and provision of a Government subsidy programme up to 25 years to employers. (For more details on the 2018 Policy Address, please see [our client alert dated 15 October 2018](#).)

After much debate, the Chief Executive's 2021 Policy Address announced that a draft bill will be introduced in the coming year to carry out the abolition. It will involve amendment to several legislations including the Employment Ordinance, the Mandatory Provident Fund Schemes Ordinance and the Occupational Retirement Schemes Ordinance. It is expected that the bills will be passed in 2022 and the mechanism may be fully abolished in 2025.

Raise of penalties for occupational safety and health related offences

Penalties under the occupational safety legislations have remained unchanged for 20 years. In the 2021 Policy Address, the Government reiterated the importance of protecting occupational safety and health, and envisaged its plan to amend the relevant legislations to raise the penalties.

The two main legislations concerned are the Occupational Safety and Health Ordinance and the Factories and Industrial Undertakings Ordinance. The current maximum penalty is a fine of HK\$500,000 and imprisonment of 12 months. Preliminary proposals from the Labour Department include increasing the maximum fine to HK\$6 million or 10% of the concerned entity's turnover capped at HK\$50 million (whichever is higher), and the maximum imprisonment term to three years.

The proposals are under consultation. The amendment bills are expected to come out in 2022.

Pilot Rehabilitation Programme for Employees Injured at Work

The Government plans to launch a Pilot Rehabilitation Programme for Employees Injured at Work ("**Pilot Programme**") in 2022. The Pilot Programme will be targeted at injured employees from the construction industry, with a view to helping them recover and return to work early. The participating employees will be provided with private out-patient rehabilitation treatment services under a case management approach.

Employers are reminded of their legal duties to ensure employees' safety in the workplace. In respect of a returning employee who sustained injuries at work, an employer may need to make reasonable accommodations and should be careful not to violate the Disability Discrimination Ordinance. The launch of the Pilot Programme in the coming year will provide additional support to the eligible employees. Employers in the relevant industry may wish to encourage their injured employees to make good use of the services under this Pilot Programme.

Want to know more?

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