

# GALL



June 2018

## Employment Spotlight: Redundancy in Hong Kong

Whether you are an employee or an employer, it pays to have an understanding of the law regarding redundancies. While last year saw significant job cuts across the finance and aviation industries, redundancies can occur in any industry at any time due to a range of political, technological and economic factors.

### How can a redundancy situation arise?

The definition of redundancy is wide and includes (amongst other) situations where an employer ceases or intends to cease business operations, or where business requirements for work of a particular kind ceases or diminishes.

Redundancy situations can therefore result from factors such as decreased customer demand, reorganisation or reallocation of duties, or technological changes. Any of these factors may have the effect that the business requires fewer employees to undertake the remaining work.

### What happens during a redundancy situation?

It is best practice for employers and employees alike, to talk through circumstances where redundancy is a potential outcome. While there is also no statutory requirement for consultation in Hong Kong in redundancy situations, such dialogue can produce “win-win” situations:

- employees who agree to be redeployed in alternative roles will keep their jobs and may be able to develop a wider range of skills and opportunities; and
- employers may be able to retain experienced employees and staff morale, and minimise disruption.

Consultation may not resolve all situations. Employers may therefore have to consider selecting certain employees to make redundant. In these circumstances, it is suggested that employers should:

- first determine a ‘pool’ of employees from which to select certain employees for redeployment and/or redundancy;
- identify fair and objective selection criteria to assess these employees against;
- treat employees equally; and
- ensure that employees are not selected for discriminatory reasons (sex, marital status, pregnancy, disability, family status, race, colour, descent, or national or ethnic origin), which may breach certain anti-discrimination laws in Hong Kong.

Employees who are made redundant may be entitled to a severance payment, in addition to other payments as set out further below.

# GALL

Both employees and employers should remain cognisant of what is provided for in employment policies or employee handbooks. If such documents are contractually binding, they may contain contractual obligations relating to redundancy processes or severance payments which are enforceable.

Moreover, the Employment Ordinance (Cap. 57) (“EO”) provides that it is unlawful for an employer to terminate the employment of, or give notice of termination to an employee who has:

- suffered a work-related injury entitling him to compensation under the *Employees’ Compensation Ordinance* (Cap. 282) (unless consent of the Commissioner for Labour has been obtained); or
- suffered temporary incapacity for a period not exceeding three days in circumstances in respect of which the employee is entitled to claim employees’ compensation.

It is also unlawful for an employer to terminate an employee’s employment in the following circumstances:

- where the employee is undertaking jury service under the Jury Ordinance (Cap 3);
- where the employee is absent from work on sick leave and in receipt of sickness allowance, other than where summary dismissal is justified under section 9 of the EO;
- where the employee has given evidence under the Factories and Industrial Undertaking Ordinance (Cap. 59);
- where the employee has a spent conviction, and the employer terminates the employee’s employment on the basis of the conviction or failure to disclose it;
- where the employee is taking accrued statutory annual leave; and
- where the employee is a female employee on a continuous contract of employment who has given notice of her pregnancy to the employer. This does not prevent an employer from terminating the employee’s employment where summary dismissal is justified under section 9 of the EO, or in the first 12 weeks of the employee’s probationary period.

## Practical considerations - what happens next after the decision to make an employee redundant?

There are a number of practical considerations that both employees and employers should address after the decision to make an employee redundant. We have set out these considerations by way of a checklist, and further discussed some of these matters further below.

## Termination payments

### *Severance*

Under the EO, where an employee has been employed for at least 24 months, he or she is entitled to a severance payment equating to two-thirds of the last full month’s salary, or \$22,500 (whichever is lower), multiplied by the number of years’ service. A pro-rata amount applies in respect of any incomplete year.

The limit on severance payments is \$390,000.

On making any severance payment, an employer is required to provide an employee with a written statement setting out how the amount of the severance payment has been calculated.

Employees should bear in mind that there are a number of situations where they may lose their entitlement to a severance payment. These can include where an employee unreasonably refuses an employer’s offer of renewal or re-engagement

# GALL

under a new contract, or an employer's offer of "suitable employment in relation to the employee" which is "no less favourable to the employee".

## ***Other common payments***

In addition to the above statutory severance payments, employers may also be required to make further payments including:

- contractual severance payments in excess of the above statutory minimum;
- wages up to and including the date of termination of employment;
- payment in lieu of notice (if applicable);
- payment in lieu of accrued but untaken annual leave;
- allowances and/or reimbursement of personal expenses contracted and incurred by the employee (such as for food, travel, housing, cost of living);
- bonuses and/or commissions;
- deferred compensation including stock or stock options; and
- payment to the Mandatory Provident Fund scheme or other occupational retirement scheme (eg. ORSO)

## **Penalty for failure to pay termination payments**

An employer who fails to make payments due upon termination of employment (see under "Termination payments" above) as soon as practicable and in any case not later than 7 days after the day of termination, is liable to a fine and guilty of a criminal offence for which they may be imprisoned for three years.

For severance payments only, an employer must make payment not later than two months from the receipt of a notice from an employee who is claiming a severance payment.

## **Immigration obligations**

If an employee's sponsorship is terminated as a result of redundancy, the parties should notify the Immigration Department as soon as possible.

Non-local employees who take up alternative employment without the permission of the Immigration Department may breach their conditions of stay and be liable to prosecution.

## **Taxation obligations**

An employer has obligations to notify the Inland Revenue Department ("IRD") if an employee intends to leave Hong Kong, and to withhold all monies payable to such an employee. Such withholding is for a period of one month from the filing of the notification to the IRD, or until the IRD has issued a "letter of release".

## **Mandatory Provident Fund (MPF) reform - Potential abolition of "offsetting arrangements" in relation to severance payments**

### ***Background***

# GALL

The MPF scheme is a fundamental aspect of Hong Kong's retirement protection system. It operates by requiring both employers and employees to make compulsory contributions into an MPF fund.

However, when an employee is made redundant, an employer is allowed to use its MPF contributions to offset the amount of severance payments or long service payments payable to the employee under the EO.

On 11 October 2017, the Chief Executive's Policy Address<sup>1</sup> recognised that at the present time, over \$3 billion of accrued benefits from employers' MPF contributions were being used each year for offsetting severance payments or long service payments.

The Government subsequently "made clear its stance that the 'offsetting' arrangement should be abolished", and would be consulting with the business and labour sectors, "with a view to putting forward a proposal in the coming months."

In November 2017,<sup>2</sup> the Labour Department published a paper addressed to the Legislative Council Panel on Manpower. The paper set out the need to appoint a Chief Labour Officer who would assist in drawing up a preliminary proposal to implement the abolition of the "offsetting" arrangement.

## ***Impact for employers and employees***

It appears it will be some time before any such proposal is finalised and implemented. Employers and employees should monitor developments in this space closely and in the meantime, consider making submissions to their relevant employer and employee associations.

## ***Checklist of practical considerations following a redundancy decision***

### ***Notification***

- ✓ Has the employee been notified of the decision in writing?
- ✓ Is the notification clear as to the employee's last day at work and termination payments?

### ***Termination payments***

- ✓ Is the employee entitled to any statutory or contractual severance payment?
- ✓ Has the employee been paid all other applicable termination payments within 7 days including:
  - outstanding wages or salary;
  - accrued but untaken annual leave;
  - payment in lieu of notice;
  - any statutory pro rata end of year bonus;
  - any other contractual entitlements
- ✓ Have these termination payments (other than severance pay) been made within seven days of the date the employment is terminated?

### ***Immigration obligations***

- ✓ If an employee's sponsorship is terminated, has the Immigration Department been notified by the parties?

---

<sup>1</sup> <https://www.policyaddress.gov.hk/2017/eng/speech.html>

<sup>2</sup> <https://www.legco.gov.hk/yr17-18/english/panels/mp/papers/mp20171121cb2-321-3-e.pdf>

# GALL

## *Taxation obligations*

- ✓ Has the employer notified the Inland Revenue Department if an employee intends to leave Hong Kong?
- ✓ Has the employer withheld all monies payable to an employee intending to leave Hong Kong (for a period of one month from the filing of the notification to the IRD, or until the IRD has issued a “letter of release”)?

## *MPF obligations*

- ✓ Has the employer arranged for the last payment of the employee’s mandatory contributions on or before 10 days after the last day of the calendar month following the employee’s termination of employment?
- ✓ Has the employer notified the MPF scheme trustee about the employee’s termination of employment within 10 days after the last day of the calendar month in which the employee left the company? (this can be done by a written notice or in the remittance statement)
- ✓ Has the employer given written notice to the MPF scheme trustee regarding the date of cessation of employment?
- ✓ Where a severance or long service payment has been made to the employee, has the employer considered whether to apply to the MPF scheme trustee to withdraw the relevant amount from the employee’s accrued benefits to offset the severance or long service payment?

## Contacts



**Nick Gall**  
Senior Partner  
+852 3405 7629  
nickgall@gallhk.com



**Joni Wong**  
Associate  
+852 3405 7616  
joniwong@gallhk.com



**Andrea Randall**  
Partner  
+852 3405 7630  
andrearandall@gallhk.com



**Wilson Cheung**  
Associate  
+852 3405 7658  
wilsoncheung@gallhk.com



**Katherine Jones**  
Senior Associate  
+852 3405 7686  
katherinejones@gallhk.com

All material contained in this article are provided for general information purposes only and should not be construed as legal, accounting, financial or tax advice or opinion on any specific facts or circumstances and should not be relied upon in that regard. Gall accepts no responsibility for any loss or damage arising directly or indirectly from action taken, or not taken, which may arise from reliance on information contained in this article. You are urged to seek legal advice concerning your own situation and any specific legal question that you may have. For employment law matters, please feel free to make enquiries with Andrea Randall (andrearandall@gallhk.com / +852 3405 7688), Joni Wong (joniwong@gallhk.com / +852 3405 7616) or Wilson Cheung (wilsoncheung@gallhk.com / +852 3405 7658).