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Hong Kong

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General labour market and litigation trends

The pandemic remained a dominant theme throughout the last 12 months with various legislative amendments aimed at addressing employment-related issues arising from the Hong Kong Government's anti-epidemic measures.

Many of these anti-epidemic measures, including travel-related restrictions, however, have now been lifted and as a result it is expected that some of the corresponding amendments made to the Employment Ordinance ("**EO**") (Cap. 57) will be suspended. With the reopening of borders and the resumption of "normal" social and economic activities, the focus looks to shift to reinstating Hong Kong as a competitive place to work with Government initiatives designed to attract top international talent to the region.

To this end, on 28 December 2022, the Hong Kong authorities officially launched the Top Talent Pass Scheme, which will allow foreign nationals meeting certain income or educational background requirements to a maximum stay of 24 months in the region. During the 24-month period, which is subject to a three-year extension, eligible applicants will be permitted to work, change employers or establish a business in Hong Kong.

There have been a number of "pro-employee" developments over the last 12 months, namely:

- With effect from 13 April 2023, the Labour Department increased the levels of 18 compensation items, under the Employees' Compensation Ordinance ("**ECO**"), the Pneumoconiosis and Mesothelioma (Compensation) Ordinance ("**PMCO**"), and the Occupational Deafness (Compensation) Ordinance ("**ODCO**"), for the following:
  - employees injured at work or suffering from prescribed occupational diseases;
  - family members of deceased employees;
  - persons suffering from pneumoconiosis or mesothelioma;
  - family members of persons who die as a result of these diseases; and
  - persons suffering from occupational deafness.
- With effect from 1 May 2023, the Statutory Minimum Wage rate in Hong Kong was increased from HK$37.50 to HK$40 per hour.
- Phase 1 of the Mandatory Reference Checking Scheme was launched on 2 May 2023 as an effort to promote and protect the integrity of the banking sector by curbing the "rolling bad apples" phenomenon.
- By 2025, MPF offsetting arrangements will be abolished; a move that is long-awaited and welcomed by employees in Hong Kong.

Although social distancing and mask wearing requirements have now been lifted in Hong Kong, hybrid, flexible and/or remote working arrangements remain popular and/or preferred

alternatives for employees. Whilst there is no specific legislation or regulation governing hybrid, flexible and/or remote work, many employers will continue to offer non-traditional work arrangements in order to remain competitive as regards retention and attraction of top talent.

The heightened focus globally on social justice, and diversity, equity and inclusion will also be a key driver of organisational and legislative change moving forwards.

In the case of *Tan, Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd* [2022] HKDC 622, the Court held that the Plaintiff's termination of employment was due to a "pro-female bias" and subsequently ordered the ex-employer to tender an apology and to pay damages to the Plaintiff for his loss of income.

In general, given recent market and financial conditions driven by the global COVID-19 pandemic, there have been an increasing number of claims involving non-payment of wages and constructive dismissal by employees, as well as by employers seeking to enforce post-termination restrictions including non-solicitation, non-competition and as regards the use of confidential information.

Redundancies, business transfers and reorganisations

Under the Transfer of Business (Protection of Creditors) Ordinance (Cap. 49), the transfer of business refers to a transfer or sale of a business, but does not include, *inter alia*, the sale of stock-in-trade of a business in the ordinary course of its trade. Although business transfers are uncommon in Hong Kong, it should be noted that whenever any business is transferred (with or without goodwill), the buyer will be liable for all of the debts and obligations, including employee liabilities, of the business unless a notice of transfer is given in accordance with the Ordinance.

During a business transfer or restructuring, there is no automatic transfer of employees. In order to effect a transfer of employment upon the sale of a business, a termination and re-hire process and the consent of the employee(s) is required.

It is uncommon for there to be employee representation in the event of a transfer, though trade union representatives are occasionally involved if the union is recognised by the employer. In terms of participation rights, employees generally do not have the right to management or board-level representation, unless otherwise provided for in the employment contract.

There is generally no requirement to consult employees or employee representatives in relation to a business sale or transfer, unless otherwise agreed between the parties. However, if a seller intends to transfer its employees to a buyer, it must terminate the relevant employees in accordance with their existing contracts. The buyer must then make a new offer of employment to the employee. The employee must accept the offer in order to effect the transfer of the employee to the buyer.

In order to avoid triggering severance payment obligations, the buyer should make a written offer of employment not less than seven days before the expiry of the employee's notice period or not less than seven days before the date of termination of employment. The offer from the buyer should be on the same, or no less favourable terms as the terms of employment under the seller and there should also be continuity of employment during the transfer.

If the buyer wishes to change the terms of employment as under the seller, the buyer must obtain the employee's consent or face legal consequences for unreasonable and/or unilateral variation of the terms of employment.

Business protection and restrictive covenants

Employers often rely on restrictive covenants or Post Termination Restrictions ("**PTRs**") in their employment contracts to protect their legitimate business interests and to restrict the activities of a former employee following the termination of his employment. Common examples of restricted activities include the restriction of an employee from joining competitors, poaching employees, soliciting clients or customers, or dealing with clients or suppliers.

Confidentiality clauses are also commonly used by employers to protect their trade secrets and confidential information. Although the duty of confidentiality is implied in all employment contracts, express provisions which define an employer's confidential information are usually embedded in employment contracts and generally continue to apply even after the employment relationship has ended. While employers cannot restrain an employee from using their general skills and knowledge, employers can attempt to restrict employees from misusing or disclosing any trade secrets or confidential information in order to protect a legitimate business interest.

PTRs that amount to restraint on trade are *prima facie* void and unenforceable. The courts will enforce PTRs only where it can be demonstrated that such restrictions are for the reasonable protection of the employer's legitimate interests and are no wider than reasonably necessary.

Whether or not a PTR is deemed enforceable will be highly sensitive to the individual facts of each case. There is no legislation that governs the enforceability of PTRs. Accordingly, precedents are a helpful benchmark of enforceability but are not determinative.

When drafting PTRs, employers should bear in mind that the onus is on the party seeking to rely on the PTR to show that it is reasonable and enforceable. PTRs should not be general in nature and should be clearly defined as to duration and geographic scope. They should also take into account the nature and role of the employee, the employee's seniority as well as the nature of the confidential information and knowledge retained by the former employee.

In the case of *BFAM Partners (Hong Kong) Limited v Gareth John Mills & Anor* [2021] HKCFI 2904, the court accepted that a six month non-compete period was appropriate and enforceable because the nature/role of the employee was concerned with trading strategies with six-month life cycles.

Courts in Hong Kong readily provide judicial relief to those seeking to enforce post-termination restrictions so long as it can be shown that the post-termination restrictions are reasonable in the interests of the contracting parties and reasonable in the interests of the public. For example, employers can seek to obtain a springboard injunction from the court in order to prevent an employee from obtaining a "head start" as a result of his or her misuse of the former employer's confidential information.

In the recent Court of First Instance case of *DCL Communication Limited v Lam Yim Chi Julia and Reach Technology Solutions Limited* [2023] HKCFI 98, the Court dismissed the Plaintiff's application for a springboard injunction to restrain the 1st Defendant (a former employee of the Plaintiff) and the 2nd Defendant (the 1st Defendant's new employer) from using or disclosing any part of the Plaintiff's confidential information, including client lists, in circumstances where there was no post termination restraint of trade clause in the 1st Defendant's employment contract with the Plaintiff; and where the Plaintiff's case that the Defendants had used its confidential information to obtain new contracts and entice customers away was mere suspicion. The Court also held that the 1st Defendant was entitled to rely on the general knowledge that she had retained "in her head".

Discrimination protection

There are four anti-discrimination ordinances in Hong Kong, namely, the Sex Discrimination Ordinance ("**SDO**")(Cap.480), the Disability Discrimination Ordinance ("**DDO**")(Cap.487), the Family Status Discrimination Ordinance ("**FSDO**")(Cap.527), and the Race Discrimination Ordinance ("**RDO**")(Cap.620) (collectively, "**Anti-discrimination Ordinances**"). Generally, it is unlawful to discriminate an individual on the grounds of (amongst others) sex, race, colour, breastfeeding, marital status, disability, family status, and/or pregnancy. These are commonly referred to as "protected characteristics".

Under the Anti-discrimination Ordinances, there are two types of discrimination: direct; or indirect discrimination. Direct discrimination occurs if/when an employer treats an individual with one of the protected characteristics less favourably than an individual who does not have such characteristics or attributes. For example, refusing to hire or promote an employee because the employee is pregnant.

Indirect discrimination occurs when an unjustifiable requirement or condition is applied uniformly to all job applicants or employees, but where the application of that requirement would have a disproportionate effect on a particular group of persons because of a protected characteristic or attribute. For example, subjecting both men and women to the same physical assessment criteria.

Victimisation is another form of discrimination and occurs when an individual is treated less favourably than other individuals because that individual has, intends to or is suspected of (i) making allegations of unlawful discrimination or harassment, (ii) giving evidence, or (iii) taking steps to make a complaint under one of the Anti-discrimination Ordinances.

The SDO, DDO and RDO also prohibit sexual, disability and racial harassment. Sexual harassment includes any unwelcome sexual advance or request for sexual favours, or any unwelcome conduct of a sexual nature, in circumstances where a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated. It also includes the creation of a sexually hostile environment.

Disability harassment is unwelcome conduct towards an employee in relation to his/her disability or that of an associate. Similarly, racial harassment refers to unwelcome conduct or conduct that creates a hostile environment on account of a person's race, or on account of the race of that person's near relative.

The general test for harassment is whether a reasonable person would have anticipated that the person being harassed would feel offended, humiliated or intimidated.

Workplace harassment occurs when one "workplace participant" harasses another "workplace participant" of the same employer. A "workplace participant" can be an employer, employee, a contract worker, the principal, a commission agent, a partner in a firm, an intern or volunteer.

Employers can be held vicariously liable for any acts of discrimination and harassment committed by workplace participants in the course of employment. Liability will not arise if the employer is able to demonstrate that all reasonably practicable steps were taken to prevent the unlawful conduct from occurring.

Although discrimination under the Anti-discrimination Ordinances cannot be justified, there are some exceptions. For instance, the SDO, DDO and RDO provide for exceptions where a particular gender, not having a disability, or being of a particular race are "genuine occupational qualifications".

Under the DDO it is also a defence for an employer to show that the alleged act of

discrimination is justified because the employee, due to his/her disability, is unable to carry out the "inherent requirements" of the job, or where reasonable adjustments made to accommodate the employee's disability would cause "unjustifiable hardship" to the employer.

Employers can also rely on the affirmative action defence which is a defence to a claim of sex, marital status, pregnancy, disability, family status or race discrimination. Employers are required to take positive action targeting individuals that fall within the protected characteristic category by providing them with equal opportunities in employment.

The Anti-discrimination Ordinances enable individual employees who feel that they have been subject to discrimination to seek the assistance of the Equal Opportunities Commission ("**EOC**"). At any time, or if conciliation is not reached through the assistance of the EOC, individuals may bring a civil action directly to the District Court to seek remedies for any loss or damage they have suffered as a result of being discriminated against or harassed within 24 months from the time when the treatment complained of occurred. Possible remedies available to individuals in District Court proceedings include:

- a declaration that the respondent has engaged in discriminatory conduct under one of the Anti-discrimination Ordinances and an order that the respondent shall not repeat or continue such conduct;
- an order that the claimant be employed, reinstated or promoted;
- an order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the victim;
- an order that the respondent pay the claimant damages by way of compensation (including injury to feelings) for any loss or damage suffered as a result of the respondent's discriminatory conduct;
- an order that the respondent shall pay the claimant punitive or exemplary damages; or
- an order declaring void in whole or in part any contract or agreement made in contravention of the Anti-discrimination Ordinances.

An award for compensation will usually be for financial loss being the amount required to put the claimant in the position he/she would have been in but for the discrimination. There is no statutory cap on compensatory awards for discrimination.

There has been increasing attention in the media as regards equal pay. Equal pay refers to female employees being entitled to the same level of pay as their male counterparts for the same kind of work. While there are no specific provisions in any of the Anti-discrimination Ordinances mandating that employers must offer equal pay, it is unlawful under the SDO for an employer to treat a woman less favourably than a man. A female employee can claim equal pay if she is receiving less pay than a male employee performing equal work for the same employer and there is no explanation for the difference in the pay other than sex. Equal work would be work that is of broadly similar nature and if there are any differences in tasks performed, such differences are indiscernible and not significant regarding the demands of the employee. Employers can assess whether two roles/titles are equal by comparing the job contents and demands on the workers through a job evaluation process.

When lodging a complaint, the female employee can use one or more male employees as her comparators. A comparator would be: (i) an individual of different gender working for the same employer; (ii) performing equal work or work of equal value; and (iii) receiving more pay than the complainant.

Given the complexity and sensitivity surrounding equal pay, many companies have adopted equal pay self-audit processes in order to identify and address any pay inequalities between males and females within their organisation.

When handling discrimination claims, or where there is a settlement between the parties, employers should ensure confidentiality at every stage of the process. Given the sensitive nature of these claims, it is not uncommon for employers to require a claimant to sign a non-disclosure agreement with a non-disparagement condition in order to protect the reputation of the employer.

Protection against dismissal

Under Hong Kong employment law, governed primarily by the EO, both the employer and the employee, have the statutory right to terminate an employment contract by giving the other party due notice or payment *in lieu* of notice. Accordingly, it is normally relatively straightforward for employers to terminate an employment contract in this way and making the relevant termination payments, including severance or long service payment if the employee qualifies based on years of service.

If an employer terminates a contract of employment without serving the requisite notice or payment *in lieu* of notice, or where a summary dismissal is not justified, the termination will be deemed to be a wrongful repudiation of the contract, entitling the employee make a claim of wrongful dismissal and to receive termination entitlements and potentially damages. However, damages are usually limited to what the employee would have received by way of net remuneration had the requisite notice been given.

In *Lam Siu Wai v Equal Opportunities Commission* [2021] HKCFI 3092, the Court also confirmed that a contractual right to terminate can be exercised unreasonably or capriciously so long as the right is exercised in accordance with the specific terms of the contract unless such terms are inconsistent with the provisions of the EO.

The EO provides that an employer may dismiss an employee for any of the following reasons:

- the conduct of the employee;
- the capability or qualifications of the employee for performing his/her work;
- redundancy or other genuine operational requirements of the business;
- statutory requirements; or
- other substantial reasons.

This apparent requirement for the employer to have a specific reason for termination often leads to employees thinking they will have a substantial claim. In practice, however, the remedies are limited and therefore such claims tend to be rare. An employee who has been employed under a continuous contract for a period of not less than 24 months who is wrongfully dismissed without a valid reason, can make a claim in the Labour Tribunal for unreasonable dismissal. However, the usual remedy is simply to receive the normal termination payments which the employer has already paid at the time of termination.

The EO does provide some further protections to employees. Dismissal of an employee under any of the following circumstances is prohibited and unlawful:

- The employee is pregnant and has served notice of pregnancy.
- The employee is on paid sick leave.
- The employee is away on jury duty.
- The employee is a member of and participates in the trade union activities.
- The employee has a claim pending under the Employees' Compensation Ordinance.
- The employee is giving evidence or information in any proceedings or inquiries relating to the EO and/or the Factories and Industrial Undertakings Ordinance.
- The employee has suffered injury at work and has neither entered into an agreement with the employer concerning compensation nor been issued a certificate of assessment.

An employer who wrongfully dismisses an employee under any of the restricted categories above will be guilty of an offence and subject to a fine. The employee would also be entitled to make a claim for unlawful dismissal and, if successful, obtain an award of compensation from the Labour Tribunal of up to HK$150,000 and seek an order for compulsory reinstatement or re-engagement.

The EO sets out two broad legal considerations when terminating an employee (unless the employee belongs to a restricted category as above):

Termination by Notice

Also known as termination without cause. Under such termination, the employer is not required to provide cause for dismissal.

- Under the EO, either the employee or the employer can terminate a contract by providing a written or an oral notice to the other party, or by making a payment *in lieu* of notice.
- The contract will generally state the notice period (of at least seven days) and any additional requirements to be fulfilled by the parties.
- In absence of an agreed period of notice in the contract, either party may terminate the contract by giving at least one month's notice.
- Probationary periods – there is no requirement to provide any notice period for the first month of any probationary period and it can be as little as seven days thereafter. Accordingly, both the employer and employee can legally terminate the relationship quickly during the probationary phase if their paths are not aligned.

Termination for Cause

This is also known as summary dismissal. In specific (and generally serious) circumstances, an employer is entitled to terminate immediately, without notice or payment *in lieu*, if the employee has:

- intentionally disobeyed an otherwise lawful and reasonable order;
- conducted themselves in a manner that has stopped them from fulfilling their duty of due diligence, care and competence;
- not performed their duties of fidelity and good faith; and/or
- engaged in fraudulent or otherwise dishonest activities.

It should be noted that the employer bears the burden of proof in this case as summary dismissal without just cause may result in grounds for wrongful dismissal of the employee.

Termination by mutual agreement

Employers and employees are also entitled to terminate employment by mutual agreement. Provided the parties agree, no notice is required, although such arrangements typically involve a payment to the employee in excess of any statutory entitlements in return for the employee agreeing to release the company from any claims.

The arrangement is normally confirmed in a written document, variously referred to as a settlement, separation, compromise or mutual termination agreement. Such agreements can be helpful to achieve an amicable and smooth exit with certainty for both parties.

Employees have certain statutory rights upon termination. In cases where the employment contract provides additional entitlements upon termination, employers should take due care to factor in such contractual obligations.

Depending on the circumstances, statutory entitlements may include the following:

- All outstanding wages up to the last day of employment (*pro rata*), including payment in respect of accrued but untaken annual leave (*pro rata*).
- Payment *in lieu* of notice, if notice or full notice is not given.

- Monies relating to bonus (*pro rata*) and any other end of the year payments (if applicable).
- Any payment in relation to retirement scheme benefits.
- Statutory severance and long service payment:
  a. Statutory severance is due to an employee who has been continuously employed for at least 24 months and is dismissed by way of redundancy.
  b. Statutory long service payment is due to an employee employed continuously for at least five years where the termination by the employer is for a reason other than summary dismissal.
  c. An employee is not entitled to both statutory severance and statutory long service payment.
  d. Both these statutory payments are currently capped at HK$390,000.

Statutory employment protection rights

The EO is the main piece of legislation that provides for the protection of the wages of employees, and that regulates general conditions of employment. The EO prescribes minimum statutory benefits and protections for employees if they are under a "continuous contract" (i.e. the employee has worked a minimum of 18 hours every week for a period of four or more weeks) including rest days, paid annual leave, sickness allowance, and parental leave pay.

For examples of statutory employment protection, see the "Mandatory/Statutory Notice Periods" section above.

Restrictions on working time

Employees under a continuous contract are entitled to a rest day for a period of at least 24 hours in every period of seven days. Under the EO, rest days must be granted in addition to any statutory holiday, or alternative or substituted holiday to which an employee is entitled under the Ordinance. The EO is silent as to whether the rest day is to be paid or unpaid, but in the absence of any specific agreement in the employment contract, in practice it is generally accepted that a rest day will be treated as paid and covered by monthly wages.

Annual leave

Employees who have been employed under a continuous contract for not less than 12 months are entitled to paid annual leave. The number of days of annual leave to which an employee is statutorily entitled will depend on the employee's length of service, starting with seven days following the first year of service and increasing to 14 days after nine years of service. Statutory annual leave cannot be forfeited.

Employers are free to provide contractual leave entitlements in excess on the minimum statutory requirements, however, employers should distinguish clearly between statutory annual leave and contractual annual leave to avoid the risk that an employee's annual leave is, collectively, treated as statutory in nature, i.e. cannot be forfeited.

Any rest day or statutory holiday falling within a period of annual leave will be counted as annual leave and another rest day or holiday must be substituted *in lieu* of those days.

If any employee falls sick after the commencement of a period of annual leave, the sickness period will be counted as annual leave. A period of sickness which commences prior to the annual leave period will not be counted as annual leave and will only commence once the sickness period is over.

Holiday pay

Employees who have been employed for less than three months preceding a statutory

holiday are entitled to holiday pay under section 40 of the EO. Holiday pay should be paid to the employee no later than the day on which the employee is next paid their wages after the statutory holiday. The daily rate of holiday pay is a sum equivalent to the average daily wages earned by an employee in the 12-month or shorter period preceding the period(s) of statutory holiday(s).

When calculating holiday pay, employers are reminded to exclude periods in which the employee is not paid his wages such as rest days, statutory holidays, annual leave, sick leave, maternity leave, etc. and the sum paid to the employee for such periods. Under section 40A of the EO, employers are prohibited from making any payment to their employees *in lieu* of a statutory holiday. Failure to pay holiday pay can warrant the employer liable to prosecution and upon conviction to a fine of HK$50,000.

Maternity leave

A female employee is entitled to 14 weeks' paid maternity leave if she has been employed under a continuous contract for no less than 40 weeks immediately preceding the date of confinement or scheduled maternity leave. If the employee has been employed for less than 40 weeks before the commencement of her maternity leave, then absent to any agreement with her employer, she will be entitled to 14 weeks' maternity leave without pay provided that the employee has given notice of her pregnancy and her intention to take maternity after her pregnancy confinement.

In the case of a miscarriage on or after 24 weeks, the employee will still be entitled to paid maternity leave provided that she has been in continuous employment for 40 weeks.

Maternity leave pay is payable at a rate of four-fifths of an employee's daily average of wages earned by the female employee during either (a) the 12 months immediately before the date of commencement of maternity leave, or (b) the shorter period before the date of commencement of maternity leave. When calculating the average daily wages, the employer must exclude any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee. However, the maternity leave pay for weeks 11 to 14 is subject to a cap of HK$80,000. After the payment of 14 weeks' maternity leave pay, employers can apply for reimbursement of the cost of the additional four weeks of statutory maternity leave pay through the Reimbursement of Maternity Leave Pay Scheme. Additionally, any day on which such an employee is absent from work by reason of such miscarriage will be counted as a sickness day.

Paternity leave

A male employee under a continuous contract is entitled to five days of paternity leave if he is the child's biological father, and has notified his employer of his intention to take paternity leave. To request for paternity leave, the employer must notify the employer of his intention to take paternity leave and set out the dates on which he intends to take leave at least three months before the expected date of delivery; or, if he has not notified the employer as set out above, the employee must notify his employer of each intended date of leave five days before such date. If required, the employer may require the employee to provide a written statement declaring that the employee is the child's father, along with details of the name of the child's mother and the expected/actual date of delivery.

Paternity leave pay is payable at a rate of four-fifths of an employee's daily average of wages earned by the male employee during either (a) the 12 months immediately before the date of commencement of paternity leave, or (b) the shorter period before the date of commencement of paternity leave. When calculating the average daily wages, the employer

must exclude any paternity leave, rest day, sickness day, holiday or annual leave taken by the employee. If the child is born dead or dies after birth, the employee can be entitled to paternity leave pay provided that the employee can produce a medical certificate certifying the delivery of the child and, if needed, a written statement.

Adoption leave

There is no statutory adoption leave in Hong Kong. However, employers can make specific provisions to include adoption leave within their company policies and/or make the decision to extend statutory/contractual parental leave entitlements to employees who are adoptive parents.

Special protections for workers against detriment/dismissal

It is unlawful for an employer to dismiss an employee under the following circumstances:

i. In accordance with the EO: after notice of pregnancy has been given; where the employee is/has engaged in lawful trade union activities; during a period of statutory sickness leave; and where the employee is/has given evidence or information to authorised persons relating to the employee's employment.
ii. In accordance with the Factories and Industrial Undertaking Ordinance (Cap.59): where an employee is/has given evidence or information to authorised persons relating to the employee's employment.
ii. In accordance with the Employees' Compensation Ordinance (Cap.282): before the employee's compensation formalities have been complied with.

Once an employee has served her notice of pregnancy to her employer, under section 15(1)(a) of the EO, her employer is prevented from terminating her contract of employment unless the employee's conduct warrants a summary dismissal. If breached, an employer will be guilty of an offence and be liable on conviction to a fine of HK$100,000 under section 15(4) of the EO.

An employer is banned from terminating an employee's employment due to the employee giving evidence in proceedings or an enquiry for the enforcement of the EO or in any proceedings or enquiry relating to safety at work. If an employer does terminate an employee on the account of "whistleblowing" in these circumstances, the employer shall be guilty of an offence and be liable upon conviction to a fine of HK$100,000. A court or magistrate may also award an employee compensation. Such an award will be payable by an employer.

Worker consultation, trade union and industrial action

Worker consultation

Employers are not required by statute to conduct workers' consultations for changes in business operations or employment practices including terminations, changes in employment terms or mergers and acquisitions. There is also no statutory recognition of collective bargaining agreements in Hong Kong, meaning that principles of contract as to the incorporation of any collective bargaining agreements will prevail. In other words, even if a trade union enters into an agreement with an employer, the employee would only benefit from the terms of the agreement if the terms are incorporated into the individual employee's contract of employment, which is in practice, fairly uncommon.

The Labour Relations Division of the Labour Department is responsible for overseeing labour relations in the private sector. The Workplace Consultation Promotion Division was set up in 1998 to promote the EO, as well as to encourage voluntary negotiation between employers and employees.

Trade unions

As above, there is no collective bargaining law in Hong Kong and trade union recognition by employers is fairly uncommon. Trade union membership in Hong Kong is also low compared to many other jurisdictions, but there are in any event protections in the Basic Law and legislation governing trade unions which need to be adhered to.

Article 27 of the Basic Law provides that Hong Kong residents have the freedom of association, and the freedom to form and join trade unions.

Under the EO, employees have the right to: (1) associate with other persons for the purpose of forming or applying for the registration of a trade union; (2) the right to be a member/officer of a trade union; and (3) the right, at any appropriate time, to take part in the activities of the trade union.

The EO also provides protection against anti-union discrimination where employers are prohibited from: (1) preventing/deterring an employee from exercising any of the above rights; (2) dismissing, penalising or discriminating against an employee for exercising the above rights; and (3) making it a condition in an offer of employment that an employee must not exercise the above rights.

The Trade Unions Ordinance ("**TUO**")(Cap 332) sets out the rights and duties of trade union members. The TUO together with the Trade Union Registration Regulations make provisions for the registration and regulation of trade unions. A registered trade union is required to draw up and register a set of rules with the Registrar of Trade Unions. Upon registration, the trade union and its members are provided with various immunities such as immunity from civil action in respect of trade disputes between employers/employees or in relation to disputes concerning terms of employment, or in relation to other aspects of running the trade union.

An employer who prevents or deters an employee from exercising his/her trade union rights may be liable for an offence, carrying a fine and potential imprisonment.

Industrial action

Article 27 of the Basic Law also guarantees freedom of association and freedom to strike, including the freedom of assembly, procession and of demonstration.

A strike may consist of employees simply refusing to attend work or it can take the form of a public procession, a public meeting, an unlawful assembly or riot. If the strike takes on any of these public forms, trade union members must observe their obligations under the Public Order Ordinance (Cap. 245) including, for example, the provision of notice to the Commissioner of Police prior to the strike.

The Commission of Police has the authority to prohibit or restrict the freedom of assembly or a strike if considered reasonably necessary in the name of national security, public safety, public order and or protection of rights and freedoms of others.

Going on strike and/or other industrial action involves the unilateral cessation or withdrawal of the employee's labour, and will therefore usually amount to a breach of contract on the part of the employee. If the breach is not expressly provided for in the contract of employment, Courts will look beyond the express provisions and consider whether the unilateral disruption to the employer's business in in breach of the employee's implied obligation of fidelity or good faith. In *Secretary of State v ASLEF* [1972] ICR 19, the Court of Appeal held that there was an implied term in all employment contracts that employees would not carry out their contracts with the intention and result of frustrating their employer's business.

Employee privacy

The collection and use of personal data, including personal data collected and held by employers is governed by the Personal Data (Privacy) Ordinance (Cap.486) ("**PDPO**"). Employers who are "data users" (i.e. a person who, either alone or jointly with other persons, controls the collection, holding, processing or use of personal data) must comply with the PDPO Data Protection Principles in relation to the collection, holding, accuracy, use and security, and data subject access and correction in relation to the personal data of their prospective, current and/or former employees.

Personal data means any data "relating directly or indirectly to a living individual, from which it is possible and practical to ascertain the identity of the individual from the said data, in a form in which access to or processing of the data is practicable".

As employers are liable to protect the data of their prospective, current and former employees, all practicable steps should be taken to ensure the proper handling and security of personal data including the implementation of adequate security measures.

The monitoring or surveillance in the workplace of employee's emails, internet use, and telephone calls is generally not prohibited, however, in doing so employers must comply with the PDPO if personal data is collected.

The Privacy Commissioner for Personal Data has issued Privacy Guidelines for Monitoring and Personal Data Privacy at Work ("**Guidelines**"). The Guidelines apply to employee monitoring activities where the personal data of employees is collected in recorded form using telephone, email, internet and/or video (including CCTV) monitoring.

In deciding whether to engage in employee monitoring, employers are encouraged to undertake a systematic assessment process referred to as the 3As – Assessment, Alternatives and Accountability. It involves an assessment of the risks and benefits of employee monitoring against the employer's overall business objectives, less intrusive alternatives, and ensuring accountability as regards the handling of personal data obtained from employee monitoring.

In designing monitoring policies and data management procedures, employers are encouraged to follow the 3Cs – Clarity, Communication and Control process. It encourages employers to set out clearly and communicate to employees the purpose(s) of employee monitoring, and to put in place proper safeguards for the control and protection of employee data.

Pre-employment screening is not prohibited in Hong Kong, however, in doing so employers should observe the relevant Anti-discrimination Ordinances, PDPO principles and the Code of Practice on Human Resource Management. Under the PDPO, only personal data that is necessary for the purposes for which it is to be used should be collected. In addition, potential employees should be informed about the purposes for which their personal data is to be collected and used; and personal data collected from potential employees should be adequate but not excessive, and should be relevant to the purpose of identifying whether a candidate is suitable for the job.

Employers who have outsourced their recruiting functions (including background checks) to an external third party remain responsible for taking all practicable steps to ensure that the third party has taken adequate measures to ensure the security of personal data. Where a third party is acting as an agent of the employer or on the employer's behalf, the employer will be liable for any wrongful acts carried out by the third party.

Employers are not prohibited from asking a job applicant whether they have a criminal record, however, employees are generally under no duty to disclose any prior convictions.

An employer may make an offer of employment conditional upon the fulfilment of a medical or drug examination. Testing can be performed before and during the course of employment, provided that the individual has consented to undergo such testing and for the results to be released to the employer. Employers must be careful not to collect excessive health data, which should be limited to the minimum information required to support the medical practitioner's opinion that he or she is fit for employment. There is no rule on whether an employer can refuse to hire an application who does not submit to a medical examination or drug testing.

Other recent developments in the field of employment and labour law

Role of alternative dispute resolution in employment disputes and jurisdictional issues

Hong Kong Courts have long favoured a pro-arbitration approach. Increasingly, employers are referring complex employment matters to arbitration.

In the recent case of *Mak v LA* [2022] HKCFI 285, issues arose as to which forum was appropriate to hear the dispute in circumstances where there were inconsistent dispute resolution clauses in the employee's terms of employment. It also considered whether the Labour Tribunal has the jurisdiction deal with complex employee incentive schemes.

As regards the dispute resolution clauses, the CFI found there was a *prima facie* case of a valid and binding arbitration agreement between the employer and employee and that the dispute relating to the employee's claims for the Deferred Shares fell within the arbitration agreement. Therefore, the parties were referred to arbitration on these claims.

As for the jurisdiction of the Labour Tribunal, it was held in this case that while the Labour Tribunal has the exclusive jurisdiction to hear claims for a sum of money, the relief sought by the employee i.e. "*an order that LA shall redeem all the vested and unvested Deferred Shares immediately, and pay the realised amount to the Employee*" was not a claim for a sum of money simpliciter and therefore not within the exclusive jurisdiction of the Labour Tribunal.

Worker status

The rise of the gig economy, the impact of COVID-19 restrictions and the ensuing debate over flexible working options have brought the issue of independent contractors into the spotlight. An increase in on-demand jobs through app-based platforms, such as for food delivery, courier and ride services, is reshaping the job market. In November 2021 a strike by Foodpanda delivery workers in Hong Kong raised the thorny old question of *whether a specific working arrangement constitutes employment or an independent contractor relationship*. This is important because the legal differences and implications are significant.

Under the Employment Ordinance (Cap. 57) ("EO"), employees enjoy significant statutory rights and protections. The EO also provides that employees cannot contract out of their statutory rights and protections conferred by the EO. Employees are entitled to paid holiday and annual leave, paid sickness and maternity/paternity leave, as well as minimum periods of notice, certain protections against termination and potential termination payments (based on length of service). Employees also receive other protections and benefits, such as minimum wage requirements, pension contributions through the Mandatory Provident Fund scheme and the right to compensation for injuries sustained through workplace accidents.

By contrast, aside from statutory protection against discrimination, independent contractors are not entitled to any of the statutory rights and protections afforded to employees. Such relationships are based on what is contractually agreed between the company and individual.

This typically means that arrangements are quite fluid, with remuneration based on hourly rates and the ability for either company or individual to terminate without notice or with only very limited notice.

Independent contractor arrangements are generally viewed as more flexible. Contractors normally control when, where and how they provide deliverables; and are free to work for other companies at the same time. Companies in many sectors use such arrangements for particular business needs, especially when these are of a temporary nature or where specific or niche expertise is required. While employees may be seen as more loyal to a company, more knowledgeable about its business and ethos, and providing continuity and stability for the company, independent contractors can be a nimble and cost-effective means of covering business functions.

In practice it is easy for the distinction in status to become blurred. The issue normally arises in the context of a disagreement between individual and company over remuneration, rights and benefits or termination of contract. For example, if a "contractor" arrangement is terminated (or not renewed on expiry of a fixed term), a disgruntled individual who was previously content to be considered as an independent contractor may seek to claim statutory protections or termination payments by claiming that technically they are in fact an employee. Similarly, this situation can arise if individuals feel that their remuneration is affected or that other benefits are being reduced, which would not be permissible if they were considered to be employees.

The difficulty is that there is no set statutory mechanism or test to distinguish definitively between employment and independent contractor status. Accordingly, the Courts in Hong Kong are faced with making decisions in this complex area. Merely labelling a relationship as one or the other, or stating that the "worker" accepts and agrees that the relationship is that of an independent contractor, for example, is not in itself determinative. The approach of the Courts now is to look at all the features of the relationship to develop an "overall impression" in making such decisions.

Repeal of anti-epidemic measures under EO

With the relaxation of the anti-epidemic measures in Hong Kong, the following provisions no longer have effect:

1. a sickness day by reason of compliance with a specific anti-epidemic requirement with a movement restriction;
2. not having a valid reason to have the employee dismissed or to have his/her terms of the employment contract be varied by the employer because of his/her absence from work due to his/her compliance with the relevant restriction; and
3. an employee's failure to comply with a legitimate vaccination COVID-19 request was a valid reason for dismissal or variation of contract.

Training

The Privacy Commission for Personal Data Hong Kong in February 2023 published the Guidance on Data Security Measures for Information and Communications Technology. The Guidance provides data users with suggestions on how to improve their current data security measures and how to comply with the Personal Data (Privacy) Ordinance ("**PDPO**"). The Guidance provides that data users, typically human resources personnel, should be trained on how to handle data security as this can reduce the possibility of any unauthorised risks or disclosure of personal data. For instance, it is recommended that data users should receive training in relation to password management, setting up strong access control and authentication procedures, remote erasure of personal data and encryption of personal data among others.

A public consultation has been launched to review the Code of Practice for Employment Agencies from 21 March 2023 to 15 May 2023. Some preliminary proposals include requiring Employment Agencies ("**EAs**") to set out in the service agreement the amount of fees charged for each category of services, explain to foreign domestic helpers that a change of an employer within the two-year contract period will normally not be approved, provide basic information on boarding facilities for foreign domestic helper job seekers among others.

Statutory Minimum Wage

With effect from 1 May 2023, the Statutory Minimum Wage rate in Hong Kong will be increased from HK$37.50 to HK$40 per hour. The monthly monetary cap for employers' record keeping of hours worked will be increased accordingly to HK$16,300 (currently HK$15,300) per month.

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Felda Yeung joined Gall as a trainee solicitor in 2011 and was promoted to be the firm's first home-grown Partner in August 2022.

Felda has experience in commercial and civil litigation, with a focus on arbitration, contractual disputes and fraud investigations. Recent arbitration related work includes enforcing foreign arbitration awards in Hong Kong and defending applications to set aside arbitration awards. Recent litigation work includes assisting in large-scale cross-border actions worth in excess of HK$1 billion at both the Court of Appeal and Court of Final Appeal stage and obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings.

Felda also co-leads Gall's Employment practice where she acts for both employers and employees on contentious employment law matters.

Felda is a member of the Chartered Institute of Arbitrators. She was also a member of the Hong Kong International Arbitration Centre's HK45 Committee, a group for all young arbitration practitioners in Asia and beyond for two consecutive terms. In December 2022, Felda was invited to join the British Chamber of Commerce's Future Leaders Committee which focuses on addressing the needs of Hong Kong's young professionals through social and educational activities. In early 2023, she was selected as a mentor for the Women in Law Hong Kong's (WILHK) prestigious mentoring programme.

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