

# Hong Kong

## Introduction

Labor law in Hong Kong is governed primarily by the Employment Ordinance. The Employees' Compensation Ordinance also addresses various aspects of the employment relationship. Hong Kong does not currently have legislation allowing collective bargaining and is not a heavily unionized jurisdiction.

Unlike many other jurisdictions, Hong Kong does not have "at will" employment. All employment is contractual and must be terminated in accordance with the contractual terms or as otherwise provided by law.

## Termination Of Employment

The circumstances in which a contract of employment may be terminated are as follows:

- (a) By agreement by both parties: a contract terminates automatically at the end of any agreed fixed term or on the mutual consent of both parties.
- (b) By notice or by payment of wages in lieu of notice: either party to a contract of employment may terminate a contract by giving to the other the requisite length of notice. Notice may be oral or in writing. The period of notice is commonly agreed upon as an express term of the contract. Except in the case of contracts that are stated to be probationary, the minimum length of notice that can be specified is seven days. A probationary contract can be terminated by either party without notice during the first month and on seven days' notice thereafter. In the absence of an agreed notice period, the employee will be entitled to one month's notice (unless the contract has a fixed term). In determining the length of notice to be given, statutory annual leave is not included nor is any period of statutory maternity leave.

Additionally, either party may terminate a contract of employment without notice, by payment by the terminating party of a sum equal to the average amount of "wages" as defined in the Employment Ordinance (EO) (see Calculating the Severance below) corresponding to the notice period.

The EO permits both the employer and the employee to waive their right to notice or to a payment in lieu of notice. This waiver will not contravene section 70 of the EO, which provides that any term of a contract of employment that purports to extinguish or reduce any right, benefit or protection upon the employee by the EO is void. Note that the EO only permits the parties to waive their rights to notice at the time notice is required to be given. Therefore, it is not possible to provide for such a waiver in the employment contract.

- (c) Summary dismissal: an employer may terminate a contract of employment without notice or payment in lieu if the employee, in relation to his or her employment:
- Wilfully disobeys a lawful and reasonable order;
  - Misconducts him or herself, such conduct being inconsistent with the due and faithful discharge of his duties;
  - Is guilty of fraud or dishonesty;
  - Is habitually neglectful in his or her duties; or
  - On any other ground on which he or she would be entitled to terminate the contract without notice in accordance with common law.
- (d) Summary termination by employee: an employee may terminate his or her contract of employment without notice or payment in lieu, if:
- He or she reasonably fears physical danger by violence or disease, such danger not being contemplated under his contract of employment;
  - He or she has been employed under his contract for not less than five years and he is certified as being permanently unfit for a particular type of work for which he is engaged under his contract of employment;
  - He or she is subjected to ill treatment by the employer; or
  - He or she is entitled to terminate his contract on any other ground without notice at common law.

The EO also provides that the fact that an employee takes part in a strike does not entitle his or her employer to terminate the contract summarily.

The burden of proof is on the employer to show that summary termination was justified. Where an employer is seeking to summarily dismiss an employee for misconduct, an employer should ensure it has carried out proper investigations to justify the dismissal. If the grounds are regarded by the courts as inadequate to justify summary dismissal, the termination will be held to be wrongful, and the employer will be liable to pay to the employee termination payments which would have been payable had the contract been lawfully terminated.

- (e) Deemed termination by employer: an employee may terminate the contract without notice or payment in lieu if any wages are not paid within one month from the day on which they become due to him or her under the EO. The contract shall be deemed to be terminated by the employer and the employer shall be deemed to have agreed to pay to the employee a sum equal to the amount of wages that would have accrued during the notice period.
- (f) By operation of law: should external events make it impossible for employment to continue, or should the employment be rendered illegal, or should the employer be insolvent or die, the contract may be terminated.

## **Restrictions On Termination**

The EO and the Employees' Compensation Ordinance prohibit the termination of employment in certain circumstances:

- (a) An employer may not terminate the employment of a pregnant employee who has at least four weeks' service and who has served notice of her pregnancy. This protection applies from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work after giving birth or, if applicable, the date on which the pregnancy otherwise ends. These protections do not apply where the employee is working any agreed probationary period not exceeding 12 weeks (or the first 12 weeks of any probationary period exceeding 12 weeks).
- (b) An employer may not terminate the employment of any employee who is on paid statutory sick leave.
- (c) An employee who gives evidence or information in connection with the enforcement of the EO or relating to any accident at work, co-operates in any investigation of his employer or who is involved in trade union activity, or who serves jury duty, may not be dismissed because of those circumstances.

- (d) An employer is not, unless specific approval of the Commissioner for Labour is obtained, entitled to give notice of termination of the employment of an employee who has suffered incapacity within the meaning of the Employees' Compensation Ordinance, before resolution of the appropriate claim in accordance with that ordinance.

Breach of these prohibitions is a criminal offence.

## **Employee's Entitlements Upon Termination**

On termination, an employee will be entitled to accrued contractual entitlements (see Statutory and Contractual Entitlements below).

In certain circumstances, the employee may additionally be entitled to a severance payment or a long service payment under the EO (see both Severance Payments and Long Service Payments below). If the employee is covered by any employee benefit plans, their effect should be taken into account (see Calculating the Severance below for offset of payments under retirement schemes or contractual gratuity schemes against severance or long service payments).

If either party terminates the contract of employment other than in accordance with the EO, the sum equal to the amount that would have accrued under the EO will be payable by the party terminating the contract to the other party. If a party gives notice but does not fulfil that notice period, that party will have to pay the sum that is owing for the remainder of the notice period.

A dismissed employee may also be able to claim the additional remedies detailed at Termination Without Valid Reason below where he or she is unreasonably dismissed or the employer unreasonably varies his or her terms of employment.

## **Statutory And Contractual Entitlements**

Unless the employment contract provides more than the statutory entitlement, an employee's entitlements upon termination will be determined by the EO. Entitlements upon termination will generally be the following:

- If termination is by way of dismissal by the employer, payment of "wages" (as defined in the EO) in lieu of notice if insufficient notice is given;
- Any accrued but unpaid wages;

- Payment in respect of any accrued but unused annual leave; and
- Reimbursement of expenses incurred by the employee for the employer.

No account need be taken of a discretionary bonus. There is a presumption that any bonus will be contractual in the absence of a written term confirming that it is discretionary. If the bonus is contractual (such as a Chinese New Year bonus or “thirteenth month payment” commonly will be), a proportionate part of the bonus should be paid if the employee has worked more than three months in the period by which the bonus is calculated and is dismissed other than by way of summary dismissal. If the employee has worked less than three months in the relevant period, no bonus need be paid (unless the contract says otherwise).

Even if a bonus is specified to be payable at the discretion of the employer, case law suggests that the employer’s discretion to decide whether or not to pay such a bonus is not unfettered and that the employer must act in good faith when exercising its discretion. For example, if an employment contract stipulates that the discretionary bonus is payable based in the employee’s performance, a bonus should be paid to the employee upon termination of his or her employment if the performance of the employee has been good during the year.

The employee may also be entitled to other contractual payments on termination in certain circumstances for example, stock awards. The employer’s policies and procedures should also be checked to assess what contractual entitlements an employee is entitled to on termination, such as an enhanced redundancy payment.

The EO was amended in 2007, changing the calculation for the following statutory payments:

- Payment in lieu of notice;
- Damages for wrongful termination of contract;
- End of year payments;
- Maternity leave pay;
- Damages for termination of contract during an employee’s pregnancy or maternity leave;
- Sickness allowance (statutory sick pay);
- Damages for termination during sick leave;

- Holiday pay; and
- Annual leave (vacation) pay.

These payments must be calculated with reference to the average wages earned by an employee during the 12 months immediately before the relevant date. For example, an employee's annual leave pay and wages in lieu of notice would be calculated by reference to his or her average wages over the 12 months preceding the employee's last day of employment.

## **Severance Payment**

An employee who has been employed under a continuous contract for a period of not less than 24 months immediately prior to dismissal and is dismissed by reason of redundancy or lay-off is entitled to severance pay.

Dismissal by reason of redundancy is dismissal by the employer attributable wholly or mainly to one of the following facts:

- The business for the purposes of which the employee was employed is to cease;
- The business in the place where the employee was employed is to cease;
- The need for the employee's particular kind of work has ceased or diminished or is expected to cease or diminish; or
- The need for the employee's kind of work in the place where he or she was so employed has ceased or diminished or is expected to cease or diminish.

Under the EO, an employee who has been dismissed by his employer is presumed to have been dismissed by reason of redundancy.

An employee is deemed to have been "laid off" if his employer fails to provide him with work of the kind he is employed to do (unless he received payment in lieu):

- On more than half of the total number of normal working days in any period of four consecutive weeks; or
- On more than one-third of the total number of normal working days in any period of 26 consecutive weeks;

excluding any rest day, statutory holiday, annual leave or lockout by his employer, and whereby he is not entitled to any remuneration under the contract for such period.

If not mutually agreed and paid, the employee must make a written claim for severance payment, by notice in writing to the employer, before the end of the period of three months beginning at the relevant date. The relevant date is the date of termination of the employee's contract of employment or, in the case of a contract terminated without full notice being served or by payment in lieu of notice, the date on which notice would expire if it had been served in full. If there is a question as to the right of the employee to the payment, or as to the amount of payment, a claim must be filed, within three months of the relevant date, with the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board.

The employer must make the severance payment to the employee not later than two months from the receipt of notice by the employee, unless a claim has been filed and is pending with the Labour Tribunal or the Minor Employment Claims Adjudication Board. If the Labour Tribunal or the Minor Employment Claims Adjudication Board finds in favour of the employee, the employer must pay the employee such sum within 14 days from the date on which it is ordered to make payment. An employer that fails to comply with this requirement is liable on conviction to a fine.

## **Long Service Payment**

An employee who has worked for a minimum of five years continuously for his or her employer is entitled to a long service payment if:

- He or she has been dismissed for reasons other than misconduct and is not entitled to severance payment;
- He or she terminates his contract without notice due to becoming permanently incapacitated; or
- He or she terminates his contract, and at the relevant date, is not less than 65 years of age.

If an employee who has worked continuously for his or her employer for a period of five years dies while in the service of that employer, the employer must make a long service payment to the employee's spouse, issue, parent or his or her

personal representatives (note that set-off provisions will apply - as discussed in Calculating the Severance below). Where two or more persons are entitled to the long service payment, for example, where an employee leaves no spouse but has three children, the entitlement must be divided equally among such persons.

## **Calculating The Severance/Long Service Payment**

Severance and long service payments are calculated using the same formula:

$2/3 \times \text{monthly wage} \times \text{years of service}$  (pro rata for any incomplete year).

“Monthly wage” means the last full month’s “wages” (as defined below), unless the employee elects to have his or her wages averaged over the 12 month period immediately preceding termination. Monthly wage in excess of HK\$22,500 is however disregarded. For example, in the case of an employee whose monthly wage is HK\$23,000 (or any other figure in excess of HK\$22,500), the amount of HK\$15,000 (i.e.  $2/3 \times \$22,500$ ) is used in the calculation for each year of service (pro rata for any incomplete year of service).

“Wages” means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his or her contract of employment, but does not include:

- (a) The value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (b) Any contribution paid by the employer on its own account to any retirement scheme;
- (c) Any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (d) Any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (e) Any travelling allowance which is of a non-recurrent nature;
- (f) Any travelling allowance payable to the employee to defray actual expenses incurred by him or her by the nature of his or her employment;

- (g) The value of any travelling concession;
- (h) Any sum payable to the employee to defray special expenses incurred by him or her by the nature of his or her employment;
- (i) Any end of year payment or any proportion thereof which is payable under Part IIA;
- (j) Any gratuity payable on completion or termination of a contract of employment; or
- k) Any annual bonus, or any proportion thereof which is of a gratuitous nature or which is payable only at the discretion of the employer.

There are special rules if the employee is not paid on a monthly basis, and special rules that apply to overtime.

### Overall Limit

There is an overall limit on the amount of the award of HK\$390,000.

### Set-off

The employer is entitled to deduct from a severance or long service payment any gratuity based upon length of service, or any retirement scheme payment representing employer's contributions, paid to the employee. The reverse also applies, such that any gratuity or retirement scheme payment made to an employee by an employer will be reduced by the amount of any severance or long service payment made to such employee. These set-off provisions do not apply to an employee's own contributions, including any sum payable by way of interest thereon. The employer should contact the pension provider to determine the amount of the benefit derived from its contributions to the scheme.

### No Entitlement

There is no entitlement to severance/long service payment by reason of dismissal if:

- The contract of employment is summarily terminated by the employer without notice or payment in lieu in accordance with the EO (see paragraph (c) of Termination of Employment above); or

- The employer serves notice of termination of the contract of employment but the employee leaves service before the expiration of notice without the prior consent of the employer, or leaves service without having made a payment in lieu to the employer; or
- (Severance only) not less than seven days before the relevant date, the employer, the new owner or an associated company of the employer has offered to renew the contract of employment, or re-engage the employee under a new contract on the same terms and conditions or on terms that are no less favourable, and the employee unreasonably refuses the offer (nor is the employee deemed to have been dismissed).

### **Change In Ownership Of The Business**

On a change of ownership of a business:

- There is no entitlement to severance payment if at least seven days before the relevant date the new owner offers suitable employment on the same terms and conditions or on terms that are no less favourable which the employee unreasonably refuses;
- An employee who satisfies the necessary conditions, (i.e., has been employed under a continuous contract of employment for not less than five years) and who is not re-engaged by the new owner will be entitled to a long service payment (whether or not he unreasonably refused an offer of re-engagement from the new owner).

### **Re-employment By Associated Company**

The provisions in the section immediately above also apply to the situation where an associated company of the employer offers the employee new employment. When the new associated company re-engages an employee, the employee's continuity of employment is not broken and his period of employment is counted as beginning when the employee was first employed by the original employer.

### **Termination Without A Valid Reason**

In two situations, an employee may be entitled to additional remedies on termination. First, unreasonable dismissal arises where, at the relevant date, the employee has been employed under a continuous contract for at least 24 months and the employer,

without a valid reason and the employee's consent, intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by the EO. Second, if the employer, without a valid reason and the employee's consent, varies the terms of employment of any employee (irrespective of the length of service), again intending to extinguish or reduce any right, benefit or protection conferred or to be conferred on the employee by the EO, the employee may also be entitled to such remedies. In such situations, the employer may be ordered to reinstate or re-engage the employee, or make a terminal payment, provided that he or she does not have a valid reason for the dismissal or variation. Resignation by the employee in these circumstances will be treated as a dismissal by the employer (giving rise to severance payments if the employee has been employed for more than two years).

An employer will be deemed to have the requisite intention unless it can show a "valid reason" for the dismissal or variation. Valid reasons are:

- A reason related to the conduct of the employee;
- A reason related to the capability or qualification of the employee for performing work of the kind which he or she was employed by the employer to do;
- That the employee was redundant, or other genuine operational requirements of the business;
- That the employee could not continue to work in the position which he or she held without contravention of the law (either on his or her part or on that of his or her employer); or
- Some other reason of substance warranting the dismissal.

Reinstatement means that the employee is to be treated as if he or she had never been dismissed.

Re-engagement, on the other hand, need only be in employment comparable to that from which the employee was dismissed or in other suitable employment. The employee may be re-engaged by the employer or by a successor of the employer or an associated company.

The consent of the employer and employee to any order for reinstatement or re-engagement is required. If either of them do not consent, or such an order is considered inappropriate, the employee may be entitled to a terminal payment. The terminal payment may include:

- Wages and any other payments due to the employee under his or her contract of employment; and
- Statutory entitlements under the EO to which the employee:
  - is entitled on dismissal and (which) have not been paid; and/or
  - might reasonably be expected to be entitled upon dismissal had he or she been allowed to continue in employment to attain the qualifying length of service required for the entitlement under the EO. This element will be calculated pro rata to the actual length of service of the employee. For example, where an employee with four years' service is dismissed without a valid reason, he or she will be entitled to four-fifths of the long service payment due for an employee with five years' service.

## **Termination Without A Valid Reason And In Contravention Of Statute**

An employee may be entitled to an additional payment where he is dismissed other than for a valid reason *and* in contravention of any of the statutory restrictions on termination detailed at Restrictions on Termination above.

In these circumstances, if no award for reinstatement or re-engagement is made, the employer may be ordered to pay compensation of up to HK\$150,000. This liability is in addition to any separate liability of the employer under the EO to make payments to the employee and/or to pay any fine.

In determining and calculating an award for compensation, the circumstances of the case will be taken into account, which will include:

- The circumstances of the employer and the employee;
- The employee's length of service;
- The manner of dismissal;
- Any loss of the employee attributable to the dismissal;

- The chances of the employee obtaining new employment;
- Any contributory fault of the employee; and
- Any payment which the employee is entitled to receive under the EO, including any terminal payment.

## **Notification Requirements**

Where an employer ceases (or is about to cease) to employ in Hong Kong any person, the employer should notify the Inland Revenue on Form IR 56F at least one month before that person's employment terminates. The Inland Revenue may accept shorter notice where reasonable.

If the employer ceases or (is about to cease) to employ a person who is about to leave Hong Kong for a period exceeding one month, the employer must notify the Inland Revenue on Form IR 56G at least one month before the expected date of departure. The Inland Revenue may accept shorter notice where reasonable. If the employee will leave Hong Kong, the Inland Revenue Ordinance provides that the employer should not make any further payments of any kind (including salary) for a period of one month from the date on which this notice is given, except with the written consent of the Inland Revenue. The Inland Revenue Department will give consent to the employer to make payments once the employee has settled his outstanding tax liability and the ordinance provides a defence for the employer in any legal proceedings in respect of the employer's failure to pay the employee during this period.

Apart from notification to the Inland Revenue, the employer is required to notify the trustee of the mandatory provident fund scheme of the termination of employment prior to the next contribution date or according to the relevant scheme.

The employer should also notify the Immigration Department of termination of employment where it has sponsored the employee's work permit.

The employer has no obligation under the laws of Hong Kong to notify any other government agency or third party of the termination of employment of any employee.

## Discrimination

Hong Kong has anti-discrimination legislation: the Sex Discrimination Ordinance, Disability Discrimination Ordinance and Family Status Discrimination Ordinance. Under these laws, it is unlawful to discriminate on the ground of race, sex, marital or family status, pregnancy or disability in Hong Kong. Sexual harassment and disability harassment are also prohibited. Anti-race discrimination legislation was enacted in 2008, with the majority of operative provisions scheduled to come into force in 2009.

The legislation prohibits both direct discrimination (treating a person less favourably than another person on the ground of that person's race, sex, marital status pregnancy, disability or family status) and indirect discrimination. Indirect discrimination, similar to "disparate impact" discrimination in some jurisdictions, occurs when the same requirement or condition is applied to all persons, but it has a disproportionate effect on a particular group because of a protected characteristic; the requirement or condition cannot be shown to be justified and is to the individual's detriment.

An employer that is found guilty of discrimination can be sued for damages, including injury to feelings. It is important to ensure that the employee's employment is not terminated based on any of these discriminatory grounds. A profile check should be done on the employee who is to be dismissed, for example, to see whether he or she has recently returned from a long sick leave or has a history of persistent absences due to illness.

## Dispute Resolution

### Court System

Certain types of employment disputes fall within the jurisdiction of the Labour Tribunal, while others may be heard or transferred to the Court of First Instance.

The Labour Tribunal provides a relatively inexpensive and informal method of settling certain disputes between employers and employees. The Labour Tribunal Ordinance, which governs proceedings brought in the Labour Tribunal, provides that certain types of claims are within the exclusive jurisdiction of the Labour Tribunal, including the following:

- Claims by employees for wages due;

- Claims for payment in lieu of notice on termination of an employment contract;
- Claims for any other sums due from an employer under the Employment Ordinance or an employment contract; and
- Claims for severance and long service payments.

A party dissatisfied with an award or order of the Labour Tribunal, based on an error of law, may seek leave to appeal to the Court of First Instance (a civil trial court). Should the Court of First Instance refuse to grant leave, this refusal is final.

The Labour Tribunal may not hear cases involving claims for higher wages, better working conditions, enforcement of post-termination restrictions, discrimination, and torts such as negligence or for personal injury. Depending on the amount claimed, these types of claims are heard in the Court of First Instance or the District Court. The availability of alternative procedures for resolving disputes over higher wages, better working conditions and similar employment issues is less certain in that Hong Kong has never had legislation allowing collective bargaining.

Employees may receive advice regarding their rights from the Labour Relations Service of the Labour Department or the Registry of the Labour Tribunal.

Litigation in the courts of Hong Kong is based on an adversarial, common law system. At the trial court level, parties appear before a judicial officer. Some cases can then be appealed to the Hong Kong Court of Appeal and thereafter to the Court of Final Appeal. There is also a Small Claims Tribunal for certain types of disputes involving small sums of money. Parties are not allowed to have legal representation in the Labour Tribunal or Small Claims Tribunal, as these tribunals are intended to be user-friendly, expedient and cost effective.

There is no provision under Hong Kong law to bring a “class action”, namely an action brought by one or more representative on behalf of a class of persons who may not all have been identified. There is, however, a procedure whereby *identified* individuals with the same interest in proceedings may bring or defend those proceedings through one or more representative. These are known as “representative proceedings.” Representative proceedings in employment disputes are rare in Hong Kong. The Labour Tribunal allows such claims to be brought, but, as Labour Tribunal cases are not reported, it is not possible to ascertain how commonly this procedure is used in Tribunal. There is only one reported employment related representative action

brought in the Hong Kong courts, which concerned a claim against the Hong Kong Government for the alleged breach of a contract of employment brought by a representative on behalf of the grades of “Police Research Officer” and “Police Interviewer,” following unilateral changes to the pay scales made by the government. The reported decision deals only with interlocutory procedural issues, but determined that the claim was properly brought as a representative action and revealed a proper course of action, so was not vulnerable to be struck out as the government claimed.

## **Arbitration**

Section 6(2) of the Arbitration Ordinance provides that if legal proceedings are brought in respect of a contract of employment that is within the jurisdiction of the Labour Tribunal and the employment contract contains an arbitration agreement, the court has discretion to stay the proceedings and refer the parties to arbitration. Before ordering the stay of proceedings, the Labour Tribunal must be satisfied that:

- (a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
- (b) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration and remains so.

Notwithstanding the above provision of the Arbitration Ordinance, case law suggests that if an application for stay in favour of arbitration were to be made in the Labour Tribunal in respect of a claim which comes within the jurisdiction of the tribunal and which is covered by an arbitration clause in the relevant contract of employment, the Labour Tribunal would probably be slow to exercise its powers of stay in favour of arbitration as the intent of the Labour Tribunal Ordinance is that there should be a relatively simple and efficient mechanism for resolving employment disputes. Therefore, depending on the relevant facts, an employer may not be able to rely on an arbitration clause to stay a court proceeding even though it is a valid one defined under the Arbitration Ordinance.