

Redundancy – The law in Hong Kong

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In the current climate, it is inevitable that some employers may have to contemplate making redundancies to trim overhead costs in order to survive. Many industries in Hong Kong have been heavily impacted by the pandemic, forcing employers to make difficult decisions in respect of business operations and the retention of employees.

This article is the first in a series which will explore the legal and practical issues facing employers and employees in the event of a redundancy situation. In this first article, we will set out some of the key general legal principles.

Legal rights and obligations of employees and employers

In Hong Kong, the Employment Ordinance (Cap. 57) (EO) sets out the minimum legal obligations and entitlements of an employee dismissed by reason of redundancy.

Often, employees have additional contractual rights which contain enhanced benefits on redundancy. These rights are usually found in contracts of employment as well as ancillary documents such as deferred compensation agreements (for e.g. stocks, shares, options agreement).

In addition, employees may acquire further rights and entitlements through the employer's custom and practice. These might be policies which have been followed without exception for a substantial period of time – in this case it may be incorporated to the employees' contracts.

What constitutes dismissal by reason of redundancy?

A redundancy situation may arise in one or more of the following situations:

- When the employer closes or intends to close their business, or part of their business, for which the employee was employed.
- When the employer has ceased, or intends to cease, business in the place where the employee was employed.
- When the employer's requirements for employees to carry out work of a particular kind have ceased, diminished or are expected to cease or diminish.

Courts in Hong Kong are generally reluctant to interfere with an employer's redundancy decisions, preferring only to enquire where there is an allegation that a genuine redundancy situation cannot be reasonably justified.

Redundancy consultation process

There is no legal requirement in Hong Kong to hold employee consultations in a redundancy situation. That said, consultations are often carried out as a matter of best practice as it allows the employer and employee(s) to have an open dialogue on whether redundancy can be avoided (for e.g. the affected employee may be willing and able to be retrained and/or otherwise be redeployed) and, if not, give the parties an opportunity to agree departure terms to allow employees to move on amicably.

Severance payment

Employees who have been dismissed due to redundancy are generally entitled to severance payment from their employer, provided that the employee has been employed under a continuous contract for a minimum period of two years and has not resigned prior to termination.

An employee will lose their right to the severance payment if they have unreasonably refused an offer of suitable re-employment or re-engagement. The offer may either be:

- a contract renewal or re-engagement under a new contract, where the terms do not differ from the previous contract; or
- an offer in writing of suitable employment under a new contract with different terms which are no less favourable than the previous contract.

In either case, the offer must be made seven days before the employment is due to terminate or, if the employer is making payment in lieu of notice, seven days before the employer has undertaken to make a payment in lieu of notice. The renewal or re-engagement must also be effective on or before the date of termination.

What amounts to an “unreasonable” refusal of an offer will be considered on a case by case basis on account of the specific factual circumstances of the individual employee. A similar assessment would also need to be made to determine whether the offer was a suitable one and whether the terms were less favourable or not.

In addition to severance payment, an employee may also be due further contractual and/or statutory payments on termination. We will address the issue of terminal payments separately in our upcoming article.

Legal risks

Pursuant to the EO, 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 them to compensation under the Employees’ Compensation Ordinance (Cap.282) (unless consent of the Commissioner for Labour has been obtained);
- has suffered temporary incapacity for a period not exceeding three days in circumstances in respect of which the employee is entitled to claim employees’ compensation;
- is undertaking jury service;
- is absent from work on sick leave and is in receipt of sickness allowance, other than where summary dismissal is justified;
- has given evidence under the Factories and Industrial Undertaking Ordinance (Cap. 59);
- has a spent conviction, and the employer terminates the employee’s employment on the basis of that conviction or failure to disclose it;
- is taking accrued statutory annual leave; and
- has given notice of her pregnancy to the employer, where the employee is on a continuous contract of employment and has completed the first 12 weeks of her probationary period.

In addition, employees who feel unlawfully targeted for termination may take legal action against their employers in the Courts and Tribunals in Hong Kong. Typical claims include:

- Discrimination: this is where an employee has been selected for redundancy due to a protected characteristic. In Hong Kong, protected characteristics include gender, family status, disability or race.
- Unreasonable dismissal/ breach of contract: this is where the reason given for the termination (i.e. redundancy) was not in fact the true reason for the dismissal. Instead the employee may allege that they were dismissed in order to reduce or extinguish a right, benefit or protection pursuant to the EO.

We will develop and discuss the legal arguments which might be deployed by the employee to advance a claim against an employer in our upcoming article.

Conclusion

It is important for employers and employees to be aware of their rights and obligations in the event of a redundancy situation. Where a redundancy is not handled properly, it can open the employer up to both criminal and civil liabilities. Where employer or employee is unclear of their rights and obligations in the redundancy context, they should seek independent legal advice.

Stay tuned for our next articles in this series – we will explore the factors employers should have in mind when considering whether to (or when to) make redundancies. We will also examine claims which might be commenced against an employer, discuss termination payments in the event of a redundancy as well as highlight practical matters and considerations for both employer and employees on redundancy.

Please do not hesitate to contact Andrea Randall (andrea.randall@rpc.com.hk / +852 2216 7208), a Partner and Head of the Employment Practice in Hong Kong for any employment law related queries you may have.

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