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EMPLOYMENT SPOTLIGHT : REDUNDANCIES IN HONG KONG

Part 1

Employers may be making more redundancies than usual as Hong Kong finds itself facing a time of political and economic uncertainty. Whether you're an employer or employee, it pays to have a basic understanding of the law regarding redundancies.

How and when do situations arise whereby you may need to make someone redundant?

The definition of redundancy is wide and includes (amongst other) situations where an employer either shuts down or intends to shut down its business, or reduces the size of its work force.

Redundancy situations can result from factors such as reduced 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.

How do you make someone redundant?

There is no regulatory framework in Hong Kong that governs the redundancy process nor are employers required to consult their employees prior to making him or her redundant. In general, employers can select which employees to terminate so long as the employee has not been selected due to discriminatory reasons (for e.g. due to his disability, gender, race or family status) or where it is otherwise unlawful to do so.

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.

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

- where the employee is undertaking jury service;
- where the employee is absent from work on sick leave and is in receipt of sickness allowance, other than where summary dismissal is justified;
- 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 that 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, or in the first 12 weeks of the employee's probationary period.

It is usually best practice for employers and employees alike, to talk through circumstances where redundancy may be avoided and if so, this may produce "win-win" situations. This may include:

- employees who agree to be redeployed in alternative roles could 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 in different roles.

Consultation may not resolve all situations though. 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 (for e.g. sex, marital status, pregnancy, disability, family status, race, colour, descent, or national or ethnic origin), which may breach anti-discrimination laws in Hong Kong.

Employees who are made redundant may be entitled to statutory severance payment, in addition to other payments.

When considering contractual entitlements on redundancy, both employees and employers should be aware of what is provided for in employment contracts as well as employee handbooks and/or any redundancy payments made by way of custom and practice.

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Part 2

Practical considerations after an employee is made redundant

Employers should be prepared to address a number of practical considerations after a decision to terminate an employee by reason of redundancy is made:

1) Statutory severance payment

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

The cap on statutory severance payments is HK\$390,000.

Employees should bear in mind that there are a number of situations where they may lose their entitlement to a statutory severance payment. These can include where an employee unreasonably refuses an employer's offer of suitable alternative employment in relation to the employee which is "no less favourable" to the employee.

2) Other common payments

In addition to the above statutory severance payment, 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);
- any maternity leave pay due;
- accrued end of year payment;
- any sickness allowance due;
- any payment of bonuses and/or commissions; and
- any deferred compensation including stock or stock options where termination accelerates vesting.

3) Penalty for failure to pay termination payments

An employer who fails to make termination payments due as soon as practicable and in any case not later than 7 days after the day of termination, may be liable to criminal prosecution. If found guilty, the maximum penalty is a fine and/or up to three years imprisonment.

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Part 3

Practical considerations after an employee is made redundant

Other post termination considerations

A departing employee can cause significant damage to an employer's business by engaging in inappropriate post termination conduct such as misusing the employer's confidential information, taking company property, or poaching clients and/or employees from the employer. Accordingly, in order to protect the employer's business, the employer should consider whether to include any restrictions on the employee's activities following his termination. These restrictions are usually incorporated in the employment contract or are sometimes agreed on termination by way of a separation agreement.

Confidential information

Whilst common law implies certain obligations on employees not to misuse information which amounts to a trade secret or certain information imparted through a duty of confidence, for greater protection for an employer's confidential information, the employer may agree to further contractual duties of confidentiality. These contractual confidentiality clauses should be carefully drafted to fit the particular circumstances relevant to the employer and the relevant departing employee, setting out whether or not these contractual obligations also apply following termination.

Return of company property

It may be sensible for employers to consider including an express clause in the employee's employment contract and/or separation agreement requiring the employee to return all company property and/or delete any confidential information and materials relating to the business of the employer prior to his or her departure.

Such confidential information may include customer lists and records, electronic data and office files, which if disclosed, may be very valuable to a competitor and cause significant damage to the employer. Office equipment, such as keys, laptops and credit cards, should also be returned on termination.

Employers should put in place a handover procedure prior to termination. Depending on the significance of or the value of the confidential information and/or office equipment, it may be appropriate for an employer to obtain a signed declaration from the employee that he or she has returned all company property.

Post termination restrictive covenants ("PTRs")

In certain circumstances, the departure of an employee could have an adverse effect on an employer's business particularly if the departing employee joins a direct competitor, solicits and/or poaches clients and staff. Accordingly, an employer can agree certain PTRs to protect its business from such conduct.

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PTRs in contracts which restrict an employee's activities, especially after his/her employment has ended, are considered prima facie unenforceable as being contrary to public policy. Two conditions must be fulfilled if the restraint is to be held valid. First, the employer has shown a legitimate interest to protect, in relation to that employee's employment. Second, the PTR must be shown to be no wider than is reasonably necessary for the protection of that interest.

If a PTR is held to be unreasonable, it will be struck down and will not be enforced unless the offending parts can be severed by applying the "blue pencil" test. Courts cannot enforce a restriction of lesser extent which would have been reasonable. However, if only part of a PTR is unreasonable, individual words or phrases may be ignored, so permitting a reasonable call to stand.

It follows that when drafting PTRs, employers should take care to ensure that the PTRs are reasonable in scope when properly construed.

Retaining employee records

There are various statutory obligations which require employers to keep certain records such as identity records, employment records, leave records and records in relation to the employee's right to work. Such records must be retained for a minimum of 6 months after the termination of the employment and should generally be retained for a longer period in case of any future disputes.

Part 4

Common Matters to Consider Following a Redundancy

Notification

- ✓ Has the employee been notified of the decision in writing?
- ✓ Does the notification clearly identify the employee's last day at work and termination payments?

Termination payments

- ✓ Is the employee entitled to any statutory and/or contractual severance payment?
- ✓ Has the employee been paid all other applicable termination payments within 7 days 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);
 - any maternity leave pay due;
 - accrued end of year payment;
 - any sickness allowance due;

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- any payment of bonuses and/or commissions; and
- any deferred compensation including stock or stock options where termination accelerates vesting.

Immigration obligations

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

Taxation obligations

- ✓ Has the employer notified the Inland Revenue Department if an employee intends to leave Hong Kong?
- ✓ Is the employer required to withhold monies payable to an employee intending to leave Hong Kong?

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?
- ✓ Has the employer given written notice to the MPF scheme trustee regarding the date of cessation of employment?
- ✓ Where a statutory severance 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 statutory severance service payment?

Other obligations and considerations

- ✓ Employee to return all company property and/or delete any confidential information and materials relating to the business of the employer prior to his or her departure.
- ✓ Employers should consider whether any post termination restrictions are necessary and in place.
- ✓ Employers to keep certain records such as identity records, employment records, leave records and records in relation to the employee's right to work.

For further information in relation to redundancies and other employment law related matters, please do not hesitate to contact Andrea Randall (andrearandall@gallhk.com/+852 3405 7688), or Joni Wong (joniwong@gallhk.com / +852 3405 7616).

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