



# MENTAL WELLNESS AND THE WORKPLACE – WHAT CAN AND SHOULD EMPLOYERS BE DOING?

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## Setting the scene

The World Health Organisation (“WHO”) defines health as “a state of complete physical, mental and social well-being and not merely the absence of infirmity”. However, in Hong Kong and globally, mental health and wellbeing remains significantly misunderstood and not properly equated, either in prevention or treatment, to physical illness. Mental health issues can arise from a wide variety of individual and combined factors, including workplace stress and an unhealthy working culture.

*The mental health charity MindHK reports that anxiety and depressive disorders are prevalent with 1 in 7 people in Hong Kong experiencing a common mental disorder at any given time, yet 75% of mental health sufferers do not seek any form of professional help.*

Workplace stress, conflict, low job security and lack of physical and mental space are all cited as work-related factors that contribute to poor mental health. Hong Kong is thought to be possibly the most overworked city in the world with the largest number of full-time employees who work more than 48 hours per week and was ranked 45th out of 50 countries in a survey of work-life balance. Mental health conditions have a significant impact on employee productivity and absences.

*A recent WHO-led study estimates that depression and anxiety disorders cost the global economy US\$ 1 trillion each year in lost productivity.*

Mental health concerns have been further exacerbated by the uncertainty thrown up by the COVID-19 pandemic. Aside from the fear of contracting the virus, anxiety and stress have been heightened by loss of business, risk of unemployment, shifting work patterns, work-from-home, isolation from family, friends, and colleagues, lack of physical exercise and travel, and the pressures of home-schooling children. A 2020 survey by the City Mental Health Alliance Hong Kong suggests that 1 in 4 employees in the Asia-Pacific region reported experiencing mental health problems within the past 12 months.

One possible silver lining from the pandemic is an increasing willingness of individuals to talk about mental wellbeing and of businesses to acknowledge and seek to

address these issues in the work environment. Against this background, this article discusses what employers must, can and should do with regard to mental health issues.

## The legal framework in Hong Kong

Despite the culture of long working hours and an undercurrent of concerns, Hong Kong lacks a comprehensive or holistic legal framework to address mental health issues in the workplace. At present, employers have few express obligations with regard to the mental health of their employees and the relevant legislation is quite disparate.

### **Occupational Safety and Health Ordinance**

Employers in Hong Kong are under a statutory duty pursuant to section 6 of the Occupational Safety and Health Ordinance (Cap. 509) (“OSHO”) to ensure the safety and health of all employees as far as reasonably practicable. Employees also have a corresponding statutory duty to co-operate with the employer in this regard. However, the OSHO does not provide for a specific obligation in relation to the mental health of employees which often leaves mental health on the fringes when workplace health and safety are considered.

### **Common law duty to take reasonable care**

Under common law, employers have a duty to take reasonable care and may be held liable for negligence if they fail to do so. Although we are yet to see a case in Hong Kong where an employee successfully claims compensation for psychiatric injury caused by work related conditions, developments in other jurisdictions are significant in this regard, especially now that mental wellbeing is more on the radar.



In *Barber v Somerset County Council*, [2004] UKHL 13, an employee was awarded damages after suffering a work-related stress breakdown. In holding the school liable for the breach of the duty of care, the House of Lords noted that “the senior management team should have made enquiries about his problems and seen what they could do to ease them” given that the reason for the employee’s absence as certified by the doctor was stress and depression. The House of Lords did not accept that termination or resignation were the only options. Rather, the senior management could have taken steps to make sympathetic enquires and reduction of the employee’s workload.

In *Olulana v Southwark LBC*, [2014] EWHC 2707 (QB), the Court opined that a reasonable employer is expected to act in light of what they knew or ought to have known about the employee’s conditions. This is significant although in this case the employee was unsuccessful in proving that work related stress was a causative factor for her neurobiological condition or that the employer was, or should have been, aware of the condition. In Australia, in order to be eligible for compensation for psychiatric injury, the work-related factors are required to be the most significant causative factor.

This means that that an employer will not be liable and an employee will not obtain damages in connection with a mental health condition, unless the employee can clearly show that work-related stress is a causative factor in psychiatric illness suffered by the employee and that the situation was brought to the attention of the employer or was foreseeable in the circumstances. The risk to employers of such claims is therefore low, which in itself does not provide a driver to address mental health conditions, even if there are multiple other reasons for doing so (as discussed below). Nevertheless, employers in Hong Kong should consider whether a pattern of taking sick leave, for example, suggests a mental health issue, as well as the reputational risk of associated with such claims and their handling.

## ***Employees’ Compensation Ordinance***

There is also little or no recourse for employees under the statutory framework for work related injury, which is governed by the Employees’ Compensation Ordinance (Cap. 282) (“**ECO**”). In order to claim compensation under the no-fault mechanism of the ECO, an employee is required to have suffered “injury by accident” arising out of employment and in the course of employment. The “accident” must be an identifiable event or events. A continuous process does not qualify as an accident. Crucially, the list of illnesses which are deemed to be accidents does not include mental illnesses. Under the ECO, the burden of proof lies with the claimant. Accordingly, unless the claimant successfully proves that the mental illness is a consequence of an accident, it will not be possible to obtain compensation under the ECO.

## ***Sick leave and sickness allowance***

Statutory sick leave allowance and prohibition of termination when an employee is on sick leave provide some limited and temporary protection to employees facing mental health issues. Under the Employment Ordinance (Cap. 57) (“**EO**”), individuals under a continuous contract of employment are entitled to sickness allowance provided they have accumulated sick leave days (i.e., 2 days per month for the first 12 months and 4 days per month thereafter up to a maximum of 120 days), and they take sick leave for four or more consecutive days supported by a medical certificate in the required form. During the time an employee is on statutory sick leave, it will amount to a criminal offence if any employer terminates the employment contract (except for summary dismissal) on a paid sickness day. This protection extends to circumstances when an employee is on sick leave due to psychiatric illness (such as depression and anxiety). In addition, employers may also have additional contractual benefits and entitlements over and above the statutory protection. The number of sick days taken due to stress and anxiety and the corresponding loss of productivity ultimately is a huge cost for companies and a key reason for trying to address mental health concerns within the workforce.



## **Anti-discrimination laws**

It is also worth noting anti-discrimination laws which seek to prohibit less favourable treatment to persons (including employees) with protected characteristics. The definition of disability under the Disability Discrimination Ordinance (Cap. 487) (“DDO”) wide enough to include mental illnesses. The DDO renders the following unlawful: discrimination; harassment; vilification; and victimisation on the ground of disability. It is also unlawful for an employer to dismiss an employee on the ground of mental illness. Under the DDO, so long as an employee can perform the inherent requirements of a job, the employer is prohibited from terminating the employment on the ground of the disability. An employer may also be held vicariously liable for the acts of its employees unless the employer can demonstrate that reasonably practicable measures were taken to prevent such acts. Discrimination laws are another reason for employers to be aware of and to educate their employees in relation to mental illness.

## **Recent legal amendments**

The recent amendments in relation to maternity leave and breastfeeding discrimination are seen as being a positive development in the context of employee wellness and inclusion.

*The EO was amended with effect from 11 December 2020 (the “Amendment Date”) to increase statutory maternity leave from 10 weeks to 14 weeks for female employees.*

The period in which a male employee is able to take paternity leave has also increased from a 10-week period to a 14-week period. Given that time off work and flexibility are frequently cited as important factors in a balanced working environment, these changes seem to be a step in the right direction.

Similarly, the amendment to the Sex Discrimination Ordinance (Cap. 480) prohibits discrimination and harassment against women who are breastfeeding. While this falls short of expressly requiring employers to provide a specific facility or separate space to relevant employees, it shows recognition of a sensitive issue which can cause anxiety and influence new mothers as to their return to work.

Overall, there are very few legal obligations on employers with regard to mental wellness and correspondingly few avenues for employees to seek redress for mental

conditions caused or exacerbated by working conditions. However, awareness of the importance of mental wellbeing is growing and there is an increasing willingness to speak about this, driven at least in part by the public revelations of well-known sports personalities regarding their challenges.

## **Practical steps and initiatives for employers to promote mental wellness**

A Cigna 360 Well-Being Survey published in June 2021 found that 83% of people reported being stressed, with 13% experiencing unmanageable stress. Employee productivity is now often viewed as directly proportional to employee mental health and wellbeing. Data also suggests that lack of productivity can be broken down by factors such as individuals feeling emotionally exhausted, having trouble concentrating, taking longer to finish tasks and struggling to juggle responsibilities. Aside from productivity, mental wellbeing affects retention rates for existing staff and the ability to attract new talent.

## **Leadership roles and the power of empathy**

Studies have also shown that empathetic leadership is effective in boosting employee morale and productivity. So, it seems appropriate that management should take the lead in considering the challenges and promoting change. If bosses add these issues to the agenda at a board room level it is far more likely to result in policies, procedures and initiatives being introduced into companies. Similarly, if leadership are open about discussing mental health, including by telling their own stories, it is more likely that other employees will feel able to overcome the apparent stigma of talking and feel more confident in seeking help and support when they feel they need it.

## **New initiatives**

There is no one-size-fits-all solution to mental wellbeing and employers will need to assess what is most appropriate for their business, but companies are starting to bring in new employee assistance programmes and initiatives. Specific examples include:

In-house psychologist / coach: Companies are increasingly engaging on-site professionals with whom their employees can discuss mental health issues. It is important to emphasize that information shared in sessions is confidential and to arrange discreet locations and appointment times for sessions to maintain privacy. Feedback suggests that the take-up rate for such resources is extremely high.

Relaxation spaces: Some businesses are providing spaces at work for employees to rest, relax or meditate. This may include comfortable chairs or day-beds for taking naps, quiet rooms for meditation, turning the lights down during a lunchbreak or rest period and similar initiatives to allow employees to take a break, breathe and de-stress.

Training courses: Mental health first aid courses are now being rolled out by companies to help individuals learn how to deal with issues they face, as well as to teach designated teams and managers how to identify issues within the workforce. Such initiatives are particularly welcome given that the cost of private external resources is often high for individuals.

Medical insurance: Another trend is for employers to look at whether the healthcare and medical insurance they provide to employees covers mental health issues as part of the package. This is another avenue which potentially allows individuals to seek and afford help when they need it.

### ***Work from home and flexible working***

COVID-19 dictated work from home arrangements around the world, but many indicators suggest the increasing importance of flexibility for employees.

*The EY 2021 Work Reimagined Employee Survey revealed that 9 out of 10 employees seek some flexibility in when they work and where they work.*

Even in Hong Kong, where more compact living conditions mean that many people like going to a physical office space, there is a trend towards more flexible working arrangements.

Whether working from home is imposed by circumstances or introduced as a new working model, employers need to remain alert to the potential impact on mental wellbeing.

Isolation: During the pandemic many individuals have struggled with isolation and lack of human connectivity. For this reason, it makes sense to structure arrangements which accommodate flexibility of working times and location, but which include some office time or in person collaboration to build connections and boost collective creativity. During lockdown periods some companies have used online recreational activities or “socials”, buddy programmes and training and upskilling courses to maintain a sense of community and connectivity.

Inability to disconnect: Conversely, the lines between professional and personal spaces become blurred during work from home which increases the likelihood of burnout. Some employees have complained of not being able to switch off, especially when working across international time zones. It is important to consider whether specific working hours should be applied. Some companies have even implemented systems which prevent employees from receiving and/or sending emails after certain times of day.

Technology: Providing employees with laptops, software and other equipment which allows them to work flexibly is viewed extremely favourably. The availability of IT support is also important. Similarly, it makes sense to assist staff with guidelines and assistance to set up a home workspace so that this is as efficient, functional and safe as possible.

Zoom fatigue: Online platforms for meetings have proved hugely efficient and effective during the pandemic, but this does result in a high level of screen time. To alleviate this, some businesses have implemented “no meetings days” or similar initiatives to guard against excessive screen time.

Engagement and team spirit: The value of an office environment and interactions such as “water-cooler conversations” and coffee breaks are often underestimated in terms of connectivity and building employee morale. Aside from online team meetings, buddy chats and socials, some organisations have introduced AI chatbots and other online platforms which can help to provide psychological support and assess mental wellbeing. Other small gestures such as sending a plant or other small gifts can help to engage and encourage staff working remotely for long periods.

### ***Encouraging employees to take annual leave***

Severe and sustained travel restrictions coupled with unpredictability and constantly changing travel rules overseas have resulted in many employees not taking regular annual leave and thus having significant accrued but untaken entitlements.

*One of the underlying purposes of annual leave and a primary reason for having minimum thresholds of statutory annual leave is to promote and maintain employees’ physical and mental wellbeing, as well as to allow time with family and on external pursuits.*



Employees should be encouraged to take their leave regularly and to take time out from work. It is worth emphasizing and educating employees of the health and wellbeing benefits of this. Some companies are also considering policies to allow employees to travel outside Hong Kong and work from quarantine on return to alleviate the sense of “cabin fever” from not having left Hong Kong during the pandemic.

### ***Attracting new hires***

The amount of annual leave offered by an employer can also be a key consideration (which may even rival remuneration in importance) for potential hires when weighing up offers from rival companies.

Similarly, employees are increasingly researching company values and flexibility of working arrangements when looking at career moves. Employee stories on websites and online ratings are proving to be great influencers. Much of this is focused on achieving work-life balance and preserving mental wellbeing.

### ***And finally***

Mental wellness in the workplace is more of a challenge and more important than ever in these disrupted and turbulent times. Employers need to be prepared to talk

transparently about the issues and introduce policies and practices to avoid employee burnout and to identify and support employees facing difficulties. While the law currently does not provide significant or clear obligations for employers in this area, companies that do actively address mental health will find that this brings clear benefits in terms of engagement, productivity, staff retention, attracting talent and brand reputation.

### **About Gall:**

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Our partners all come from international firms and have practiced in Hong Kong or overseas for many years. They have a wealth of experience in a wide variety of litigation, mediation and arbitration. We use a partner led, team-based approach to complex litigation, drawing upon the legal and linguistic skills of solicitors with different areas of expertise. We ensure that we maintain an “around-the-clock” service to our clients.

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