Introduction to Hong Kong Employment Law: Session 3 of 3

Employment disputes - bonus, stigma and other recent developments

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Potential claims arising on termination

- Labour Tribunal:
  - Claim for a sum of money arising from:
    - breach of the employment contract; or
    - breach of the Employment Ordinance.
  - Limitation periods vary depending on claim, but breach of employment contract claims can be brought any time within 6 years.
  - Typical claims include: underpayment or non-payment of wages, annual leave pay, holiday pay, sick pay or bonus.

- A quick mention of Part VIA of Employment Ordinance:
  - It appears to provide protection against termination other than for a “valid” reason (i.e. conduct, capability, redundancy, illegality, other reason of substance)
  - **BUT** there are no remedies available for employees – so these provisions are (currently) toothless!

- Note: No HK equivalent to UK unfair dismissal protection
Potential claims arising on termination (cont’d)

- Discrimination claims
  - On grounds of sex, race, pregnancy, disability, marital status or family status
  - Complaint to Equal Opportunities Commission
    - Within 12 months of alleged conduct
    - Investigation/Conciliation
  - Claim in District Court
    - Within 24 months of alleged conduct
    - No requirement to go to EOC first (but many do)
New evolving area of law: implied anti-avoidance term

*Tadjudin v Bank of America (CFI, 2014; CA, 2016)*

- First case in Hong Kong to imply an “anti-avoidance” term into an employment contract
- Builds on line of English case law on implied anti-avoidance terms
- Highly fact sensitive decision

Facts

- Employee dismissed; no bonus or pro-rata bonus paid
- Dismissal was due to employee’s conduct and failure of the implemented Performance Improvement Plan (PIP)
- Employee had a difficult working relationship with her supervisor
- Bank’s pay for performance scheme
  - Low basic salary, high bonus (annual bonus in 2001-2006 was 147% to 315% of her salary)
  - “The base salary is the ‘sauce’, the performance bonus is the ‘meat’”
- Implied term of contract that Bank would not dismiss in order to avoid payment of bonus
- Bank’s reason for dismissal (poor performance) did not stand up to scrutiny; Court inferred that ‘real’ reason for dismissal was to avoid paying bonus
Breach of implied anti-avoidance term (cont’d)

*Tadjudin v Bank of America (CA, 2016)*

- Court of Appeal decision:
  - Upheld decision that this particular contract contained an implied anti-avoidance term – employer cannot terminate to avoid paying the employee’s bonus
  - Ruled that the Bank had terminated employee with an intention to deprive her of 2007 bonus
  - Not necessary to imply an anti-avoidance term into all employment contracts generally
  - Anti-avoidance term can be implied without relying on implied term of mutual trust and confidence
  - Employee sought US$3.8 million and was awarded US$500,000 in damages
Breach of implied anti-avoidance term (cont’d)

_Tadjudin v Bank of America (CFI, 2014; CA, 2016)_

- Practical implications
  - When dismissing employees have to be aware of potential argument that dismissal was done to avoid paying bonus
  - Timing of dismissal: close to end of bonus year = greater risk
  - Intention of a single employee may be attributed to the employer
  - The best way to defend against claims is to show a genuine reason for termination which is unconnected to any bonus obligations
Stigma Damages

*Williams v Jefferies (CFI, 2013)*

- Back door protection against “unfair dismissal”?
- Circumstances of dismissal “stigmatised” employee and damaged his reputation in the market; made it more difficult for him to find new employment.
- Awarded US$ 2 million (c. two years’ remuneration) in damages.

Facts:
- Employee produced a daily client newsletter
- An edition inadvertently distributed before requisite approval. Contents and a link considered offensive.
- Employee summarily dismissed, citing “unacceptable and entirely inappropriate misconduct”
Stigma Damages (cont’d)

*Williams v Jefferies (CFI, 2013)*

- **Held**
  - Court held employee had been wrongfully dismissed *and* that employer had breached the implied term of trust and confidence by the way in which he was terminated (left “*high and dry*”)
  - Substantial stigma damages awarded – HK$7.6 million
  - Level of damages determined by impact of employer’s actions on employee’s reputation and ability to find new employment

- **Practical implications**
  - Take care with external and internal communications
  - Limit any communications regarding reasons for leaving
Forthcoming developments

Employment (Amendment) Bill

- Seeks to allow the Labour Tribunal to order reinstatement or re-engagement where the employee is unreasonably and unlawfully dismissed without the need for the employer's consent.
- Also proposed that, if the employer fails to comply, it shall pay the employee a sum set at three times average monthly wages, subject to a cap of HK$50,000.
- Current status:
  - Not passed during the Legislative Council term which ended in July 2016.
  - HK Government plans to re-introduce a revised bill
  - May set the cap at the higher level of HK$72,500.