



Rights & Obligations in the Workplace

Before you accept a job, know your rights and responsibilities under the laws of Hong Kong.

There are a number of provisions designed to protect you from your employer and vice versa. These provisions oblige you to do or refrain from doing certain things that your employer might not like.

Such provisions are not ordinarily referred to. However, they come in handy only if something goes wrong, and either you or your employer questions the other's version of the relationship. At such a point, it helps to be able to produce evidence on paper showing exactly where you both stand.

The time to get this paper is after you have been offered the job, but before you actually accept or go to work. The common practice is to enter into an employment agreement detailing both the legal and quasi-legal aspects of the relationship. This review examines the basic issues of employment in Hong Kong. A complete copy of the Employment Ordinance is available at university libraries or the Labour Tribunal.

CONTRACTUAL FORMALITIES

Hong Kong law imposes few absolute requirements, except that contracts for longer than one month must be in writing and signed by both parties. If you fail to observe this requirement, you risk having the legal status of your employment regarded as only one month. This might allow an employer to terminate you on just one month's notice even if you have been there for a long time and thought you were in a long-term, secure situation.

Law aside, it is always preferable to have employment terms in writing because written terms are harder to dispute than oral ones. Once your terms have been put into writing, you need to update them whenever the employment relationship changes. Because terms of employment often change, few people bother changing their records.

One tip would be to simply write a short memo yourself and ask the personnel department to put it in your file. Many employment cases taken to court might have been decided differently had someone kept a record of applicable employment terms.

EMPLOYMENT RIGHTS AND OBLIGATIONS

The terms of an employment contract detail the respective rights and obligations of both the employers and employees. Although the law provides a wide scope for both parties to agree on the manner under which the employment is to be undertaken, an increasing number of employment terms must comply with minimum legal requirements.



In this regard, the Employment Ordinance lays down a definitive set of minimum employment rights and entitlements that apply to termination, annual leave, rest days, holidays, sickness allowance, salary protection, end of year payments, severance and long service payments. In a similar way, the Employees' Compensation Ordinance lays down a comprehensive set of laws that provide compensation for work-related injuries.

While the law allows contractual terms which exceed the minimum legal requirements to be offered, contractual terms which do not meet these requirements will be void and unenforceable. Since many employers and employees assume that they are contractually bound by whatever they have agreed to, it often comes as a surprise for either party to learn that what was thought to be a contractual obligation or right is, in fact, unenforceable. The law protects employees from either voluntarily or even unwittingly surrendering their employment rights by guaranteeing certain employment terms regardless of what was written in the employment contract.

The rights recognised by the law of employment do not relate to employees alone. Employers are also recognised as having various employment rights. As a consequence, employees will, in many instances, be burdened with corresponding obligations. By way of illustration, let us suppose that a student accepts an offer of employment with a bank. Under the terms of the agreement, the student is to begin work one month after graduating.

The letter of employment further provides that the contract may be terminated by either party if that party gives a three-month notice of termination or makes a payment to the other party. In the event that the graduate decides not to commence work with the bank, he or she will be legally obligated to give the bank a three-month notice of termination or make payment.

In fact, few would-be employees fulfil their obligation to give notice or make a payment to their employer when they decide not to commence employment after having accepted an appointment. Because the bank has a contractual right to be given proper notice or a payment in lieu of such notice, the bank is legally entitled to recover compensation under the Employment Ordinance if an employee decides not to commence employment.

LEGAL VERSUS NON-LEGAL ISSUES AFFECTING EMPLOYMENT

An employment contract is a legally enforceable agreement. It is on this basis that the parties may refer to the law in order to enforce a particular right or define a specific obligation. Because the 'law' in this sense means Hong Kong law, particular care should be taken by employees who are required to work outside Hong Kong.

As a general principle, the laws of Hong Kong are capable of being applied to employment undertaken outside the territory, so long as there remains a sufficient 'connection' between the employment and Hong Kong. Few problems would arise, for example, where a Hong Kong-based employee worked partly outside the territory for a Hong Kong-based employer.

However, it should not be assumed that the laws of Hong Kong will apply where a Hong Kong resident was employed by a non-Hong Kong based employer to work partly inside and partly outside of Hong Kong. In such circumstances, the law (whether Hong Kong or another country) governing the contract will be determined by reference to the legal system which the employment contract has its most real and closest



connection. Because employment entails such a wide variety of rights and obligations, it is not uncommon for employment contracts, and even items of employment legislation, to be silent on certain matters arising out of an employment.

Special care should be taken by employers and employees alike to avoid the temptation to exploit such apparent ‘loopholes’ to their advantage. While it may appear to make good business sense to take full advantage of such oversights, the courts will more often than not take into account the conduct of the parties rather than adhere strictly to the law.

For example, the fact that an employment contract is silent on whether an employee is required to work overtime could not be used as a reason for his or her refusing to work overtime if asked to do so. In such a situation, it would be necessary to look at the terms (both explicit and implied) of the employment contract, the intention of the parties at the time the contract was concluded, and all of the surrounding circumstances as all these may apply to the issue of working overtime.

If the employer could establish that overtime was customarily worked by all employees, then the employee would have no right to refuse. By contrast, if the employee could establish that he or she had been orally assured that no overtime is required, then the employer’s request would not have much chance of being upheld by the courts.

CONTRACTUAL ENFORCEMENT AND RESOLUTION

The law offers the prospect of a remedy whenever a party is in breach of the employment relationship. As a general rule, the more serious the default, the more readily a court is likely to provide redress. Many a party has commenced court proceedings in the mistaken belief that they have the law on their side, only to be later declared that the party was at fault.

Employees who are tempted to seek a judicial settlement of a dispute should be mindful that they may be held to be at fault. In such circumstances, they will not only fail to secure the remedy sought, but may well end up paying the employer’s legal costs as well.

The time and effort in seeking a judicial remedy should also not be underestimated. Although making a claim before the Labour Tribunal does not entail a lot of expense, the time involved in filing the relevant forms and documents may involve an effort not justified by the amount being claimed.

Currently, a claimant making a claim at the Tribunal has to wait many months before a hearing. Where an employer elects to appeal the decision of the Labour Tribunal at the High Court, an employee runs the risk of being liable for the employer’s costs which may run into many thousands of dollars.

While it may be useful to understand the letter of the law as it may apply to a work contract and to the relationship between you and your employer, it is equally important to understand what is generally accepted as usual and fair in the working world. Although it may sound trite, it is in your interests not only to know your employee rights, but also your corresponding obligations. Not only will this contribute to a smooth working environment, but should there be a need to challenge your employer in a court of law, you will also stand a better chance of a resolution in your favour.