



A letter from the Pearl of the Orient

SCOTT ANDERSON and JIA XIE, Lewis Silkin LLP (Hong Kong)

Hong Kong's labour market has traditionally been lightly regulated, but what is the current direction of travel?

With its historical ties to the West and reputation as a gateway to mainland China, it is unsurprising that Hong Kong is home to many Western companies. Despite the domestic civil unrest in 2014 and the economic slowdown in China, the so-called 'Pearl of the Orient' remains a stable and thriving location for business.

Although Hong Kong is a special administrative region of China, the employment law regimes in the two jurisdictions in many ways remain poles apart. This is consistent with the concept of 'one country, two systems', whereby Hong Kong has been granted a degree of autonomy over certain areas since Britain handed back sovereignty to China in 1997. Unlike China, Hong Kong has a common law system which is ostensibly very familiar to UK lawyers, under which its courts refer to precedents of other common law jurisdictions when making decisions.

The labour market in Hong Kong is less regulated than in China and many jurisdictions around the world. In some countries, the trend towards deregulation has been apparent and this might be beginning to happen in China. In February, a senior Chinese official criticised Chinese employment law for being too employee-friendly and hampering economic development. But could it be that the direction of travel is the opposite in Hong Kong (as has been the case in (previously) deregulated Singapore)?

In this context, we assess two claims about Hong Kong employment law that we often hear from our UK and European-based clients: 'Employees have no statutory rights in Hong Kong' and 'It's easy to terminate employment'.

'Employees have no statutory rights in Hong Kong'

While it would be inaccurate to say that employees have no statutory rights, the minimum benefits provided by statute are limited when compared to the UK and Europe. Freedom of contract largely remains the guiding principle.

That said, the employment landscape in Hong Kong is far from being static and a diverse reform agenda has been a prominent feature of recent years. There have, for example, been reforms to introduce third-party contract rights, a statutory minimum

wage, paid statutory paternity leave and competition legislation that will have certain employment implications.

Public consultations on proposed reforms are common. The most high-profile ones have been on the introduction of standard working hours and the Equal Opportunities Commission conducting a consultation into the adequacy of discrimination law. As part of its review, the EOC has so far reported widespread support for legislative protection against discrimination on grounds of age and sexual orientation.

The principal statute regulating the employment relationship is the Employment Ordinance. Many benefits and protections under the EO are only available to employees who are employed under a continuous contract. A continuous employee must have been employed by the same employer for a minimum of four consecutive weeks, working at least 18 hours in each week. In practice, this excludes a large number of part-time employees from many of the benefits and protections provided by the EO.

Some key rights provided by the EO and other statutes are:

- a minimum hourly wage, which is HK\$32.50 (£2.90) and currently subject to a consultative review;
- for continuous employees, at least one rest day every seven days (there are no specific laws on working hours);
- for continuous employees with at least one year's service, paid annual leave of up to 14 days depending on their length of service. It is also common for employers to provide enhanced contractual leave above the statutory minimum;
- 12 statutory holidays although only continuous employees with at least three months' service are entitled to be paid for these. Many employers also allow an extra five days of paid holiday, known as general holidays;
- a 'sickness allowance' for continuous employees. This accrues at the rate of two paid sickness days for each completed month of service in the first year of employment and four paid sickness days for each completed month of service in subsequent years, up to a maximum 120 days. Save for pregnancy-related check-ups or treatment, sickness allowance is payable only for sickness-related absences of four or more consecutive days;

'it is relatively easy for employers to defend dismissal claims successfully and the potential remedies are limited'

- 10 weeks' paid maternity leave and three days' paid paternity leave for female and male continuous employees respectively, if certain eligibility criteria are met;
- a default statutory pension fund scheme – the Mandatory Provident Fund – into which (with some exceptions) employers are required to enrol employees who have been employed for 60 days. Both employer and employee must contribute a minimum of 5% of the employee's pay into the fund; the employee's pay being subject to a statutory cap (currently HK\$1,500 a month (£134));
- certain protections against dismissal and discrimination.

'It's easy to terminate employment'

When it comes to dismissing employees, Hong Kong has a reputation as an employer-friendly jurisdiction – one that is largely warranted. Terminating employment is relatively straightforward when compared to Europe and indeed other jurisdictions in Asia, notably Japan, China, South Korea, Indonesia and Malaysia.

An employer is not immediately required to give a reason for termination and the contract can be terminated at any time by the employer giving the notice specified or making a payment in lieu of notice. This is in contrast to China, where the employer may not be able to terminate the contract even if seeking to dismiss for a reason that has been contractually provided for. Nonetheless, Hong Kong does not permit termination 'at will' and employees have several significant protections. These include:

- protection from dismissal without notice except in certain limited circumstances, including gross misconduct. The threshold to justify a summary dismissal is very high;
- the EO allows a continuous employee with at least two years' service to make a claim for 'unreasonable dismissal' if the employer dismisses him/her to evade liability imposed on the employer by the EO. But it is relatively straightforward to defend such a claim. The employer only has to produce a valid reason for the dismissal and there is no requirement to show that the termination was reasonable or fair. Valid reasons include: the conduct of the employee; the capability or qualifications of the employee for performing the work of the kind he/she was employed to do; or redundancy;
- certain categories of employee are specifically protected from dismissal, including employees who are pregnant or in receipt of the sickness allowance;
- statutory severance is payable to a continuous employee with at least two years' service who is dismissed by reason

of redundancy or laid off. The amount is calculated using a formula based on the employee's monthly wages and period of continuous employment. Long-service payments are payable to continuous employees if certain criteria are met, including a minimum of five years' service;

- statutory minimum notice applies, depending on the term of the contract, ranging from seven days to one month. Unusually, an employee is also permitted by statute to terminate the contract by making a payment in lieu of notice;
- discrimination or harassment on the grounds of sex, pregnancy, marital status, disability, family status and race are prohibited. There have been a handful of discrimination claims coming through the courts arising from termination of employment, but the numbers are very low compared to in the UK and Europe. There is currently no protection against discrimination on grounds of age, religion or sexual orientation.

In a further constraint on employers' ability to dismiss freely, the Hong Kong Court of Appeal held in *Tadiudin Sunny* that an anti-avoidance term was implied in an employee's contract so that the employer was prevented from terminating to avoid paying a discretionary bonus. The decision confirms that there may be limitations implied at common law on the otherwise very broad grounds for terminating employees under Hong Kong law.

The number of dismissal claims brought by employees is low. This is partly because it is relatively easy for employers to defend claims successfully (except where termination is for a prohibited ground such as pregnancy) and partly because potential remedies are limited. Unless the employee obtains reinstatement or re-engagement, which generally requires the employer's consent so is extremely rare, the remedy for unreasonable dismissal is limited to an employee's unpaid contractual and statutory entitlements.

Conclusion

While employees in Hong Kong have fewer statutory rights than those in many other jurisdictions, there have been reforms to introduce more rights. It will be interesting to see whether this trend continues into the future.

KEY:

Tadiudin Sunny *Tadiudin Sunny v Bank of America National Association* (CACV 12/2015)