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Employment Law Alert - May 2010

Welcome to our May 2010 edition of Employment Law Alert, in which we consider recent statutory amendments, proposed new statutes and recent cases.

Recent Statutory Amendments and Proposed Laws

Employment (Amendment) Bill 2009

The Legislative Council has recently passed the *Employment (Amendment) Bill 2009* which will create new criminal offences for failing to pay an award by the Labour Tribunal or Minor Employment Claims Adjudication Board

The *Employment (Amendment) Bill 2009* ("**EAB**") has created additional offences for employers who fail to pay awards of the Labour Tribunal or Minor Employment Claims Adjudication Board. Employers face of a fine of $350,000 and imprisonment of 3 years.

In addition the EAB creates personal liability for directors, managers and secretaries of a body corporate and partners in a firm. It is presumed that the offence occurred with the directors or partners consent if it is proven that at the time of the offence the director or partner was involved in the management of the body corporate or partnership *or* knew or ought to have known that the award of the Labour Tribunal in respect of which the offence was committed had been made against the body corporate. However this 'presumption' can be rebutted.

Practical implications

Whilst most employers have nothing to fear from the EAB which seeks to punish those unscrupulous employers who fail to pay employees' entitlements in accordance with the law, they should nonetheless be vigilant in ensuring that all employees are paid their entitlements in accordance with the Employment Ordinance (Cap. 57) ("**EO**").

It is also timely to remember that section 63C of the EO already creates an offence for employers who fail to pay entitlements under the EO in accordance with the EO, for example in accordance with section 24 of the EO which requires that employers pay employees their termination payment within 7 days of the termination of their employment.

Minimum Wage Bill

By way of update the debate continues over the hourly rate. The latest concerns expressed by some groups relate to disabled employees and ensuring that any new law adequately protects such employees from exploitation.

Recent Decisions

Chang King Leung v Better Hong Kong Movement Association Ltd CFI HCLA 16/2009

Employee claims employer's swearing amounted to conduct entitling the employee to claim constructive dismissal

An employee claimed that the employer's alleged abusive language amounted to conduct constituting a breach of the fundamental implied term in the employment contract of 'trust and confidence'. However, the Court found that the employer's language did not constitute a direction to the employee to leave, nor was it *objectively* so offensive as to fundamentally breach the implied term of "trust and confidence".

Facts

The employee commenced employment with the defendant company for 1 year on 3 September 2007. In his role the employee assisted a Dr. Yuan in his bid to be elected to the Legislative Council. However on 7 August 2008 the employee learned that Dr. Yuan had been disqualified from standing for the Legislative Council due to his continued Canadian citizenship. As such the employee allegedly told Dr. Yuan's assistant Ms. Mak that he wished to leave his employment on 21 August 2008 and between this date and 31 August 2008 take his accrued but unused annual leave. Ms. Mak then asked the employee what he intended on doing post his employment and the employee explained there was still time for the employee to find work with other candidates.

Later that same day Ms. Mak presented the employee with a cheque for his accrued but untaken leave and told him he could leave immediately. However, the employee did not wish to leave immediately and approached Dr. Yuan. The employee asked Dr. Yuan if he wished him to leave immediately. Dr. Yuen denied that that he wished the employee to leave immediately and stated that he wanted the employee to have the opportunity to work for other candidates prior to the election. However, the discussion then got heated. At some point Dr. Yuan told the employee he was "pissed off" (according to Dr. Yuen) or to "piss off" (according to the employee). The employee did continue working for a short while longer but then left and claimed he was constructively dismissed as a result of Dr. Yuan's "offensive comment".

Law

At common law an employee can claim constructive dismissal of his or her employment where the employer's conduct or breach "goes to the very root of the employment contract", or in other words the employer's breach of the employment contract is so fundamental it amounts to a rejection or repudiation of the employment contract allowing the employee to accept the fundamental breach and walk away as if their employment had been terminated by their employer.

Furthermore, every employment contract has implied into it an implied term of " trust and confidence" and abusive conduct and or requests for employees to cease employment have amounted to constructive dismissal through breaching this implied term.

Decision

The Court accepted that the phrase used by Dr. Yuan was "pissed off" rather than "piss off". The key issue then was whether objectively speaking the phrase "pissed off" went "to the very root of the employment contract" through breaching the implied term of trust and confidence.

The Court held that the phrase "pissed off" simply reflected Dr. Yuan's feelings and was not a direction to the employee to leave. Furthermore, the Court held that the phrase was not so offensive objectively speaking as to go "to the very root of the employment contract". Therefore, the employee's claim was dismissed.

Practical Implications

This case demonstrates that an employment contract does not contain all the terms and conditions of an employee's employment. Employers should be aware of the terms the law implies into employment contracts both as a result of the general law and statute.

In this particular case, whilst also evidently an issue of common sense employers should always be mindful to avoid the use of inappropriate language in the workplace, even where such language is relatively inoffensive and perhaps justified. Employers should also be mindful that the workplace does not necessarily just include the office, but can extend to events outside the office such as the firm Christmas party. Furthermore, when having sensitive discussions with employees which could lead to a dispute, employers should always have a witness present.

Zurich Life Insurance Co Ltd v Pang Man Yiu DCCJ 2465/2007

An insurance agent claims he was an employee rather than an 'agent' or independent contractor for the purposes of the EO and therefore the insurer was allegedly unable to deduct or claim back money paid to the individual pursuant to section 32(1) and 70 of the EO

Determining whether an individual is an employee or an independent contractor can raise critical questions in terms of a party's liability – such as in relation to Employees' Compensation, compliance with safety legislation and of course the EO, as well as possible mandatory pension benefits. This case once again demonstrates some of the factors Courts consider in determining this important question and the need, practically speaking, to set out such arrangements clearly and concisely in independent contractor / labour hire agreements. In this way, a company and / or individual can reduce liability and shift risk.

Facts

The Plaintiff insurance company wished to claim back various amounts paid to the Defendant agent after he had finished working for the insurer pursuant to a contractual power under the agent's "Letter of Appointment" to do so. As part of his defence the agent argued that he was actually an employee and as such the employer could not contract out of the prohibition under the EO to not deduct "wages" (which the agent claimed the amounts claimed by the insurer indeed were).

The Law

In determining the nature of the relationship the Court's role is to examine all the features of the relationship between the parties concerned with a view to deciding whether, as a matter of overall impression, the relationship is one of contract for service or contract of service.

Relevant factors that the Court may have regard to include (but are not limited to):-

- The degree of control exercised by the party engaging the individual;
- Whether the person performing the services provided his / her own equipment;
- Whether the person performing the services hired his / her own staff;
- What degree of financial risk the person performing the duties exposed himself / herself to; and
- The degree of responsibility for investment and management and whether he / she had a chance of profiting from sound management of the services.

Decision

In this particular case, upon examination of the Defendant's "Letter of Appointment" and other contractual documentation and consideration of the above factors, the nature of the relationship was not one of employment.

Practical implications

Businesses should be particularly careful when engaging persons as 'independent contractors' or 'agents' as Courts will not be reluctant to go behind the title of the arrangement to examine the true nature of the relationship overall. Therefore, businesses should carefully set out their independent contractor arrangements in a well drafted agreement reflecting this arrangement. Furthermore, this arrangement should reflect the reality of the situation.

Businesses should also recognise that other legislation such as the Race Discrimination Ordinance (cap. 602) covers contractors as well as employees, so such arrangements can not always shift risk in any event.

Lastly it is always preferable (if possible) for businesses to engage independent contractors who are incorporated, as this places a further layer between the business and the individual (assuming that the individual is a sole shareholder/director of a company).

If you require any further information on any of the above articles please let us know.

We trust that you have found our latest edition of Employment Law Alert informative relevant to your business. Please do let us know if you have any questions. In additional to our Alert, we will be holding a free lunchtime seminar on other recent Hong Kong employment law cases at **12:45 p.m. - 2:00 p.m.** on **26 May 2010** at our offices. Lunch will be provided. Please confirm your attendance with Lincoln Kinley by email at lkinley@rsrbhk.com

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Disclaimer: The information contained in this article is intended to be a general guide only and is not intended to provide legal advice.