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## Editorial

The employment law landscape has been relatively flat over the last 6 months, with few material changes to employment legislation or landmark cases, aside from the appeal decision in *Tadjudin Sunny v Bank of America* (to see our full case report, click [here](#)). This newsletter brings you some recent legislative developments and case law highlights.

*Susan and Rowan*

## Recent legislative developments

### 44 hour week proposed by unionists in Standard Working Hours Committee

Recent reports suggest the Standard Working Hours Committee ("SWHC"), established to explore the best legislative approach to regulating the working hours of Hong Kong employees, may be close to reaching agreement on proposed working hours. Recent reports state that labour unionists have agreed to compromise at a 44 standard working hour week, having long demanded legislation mandating 40 - 44 hours and for employers to pay staff 1.5 times their regular wages for every extra hour.

The SWHC, originally expected to submit a report to government by November 2016, has been given a two month extension to submit its final recommendations to government. Chief executive Leung Chun-ying is under pressure to standardise working hours within this term, which ends in March 2017.

The consultation to date has identified two potential approaches to regulating working hours:

- the "big frame" approach which would involve legislation to regulate working hours, for example, written employment contracts for employees specifying working hours; and
- the "small frame" approach which focuses on other measures to further protect grassroots employees with lower income, lower skills and less bargaining power, for example, setting a working hours standard and overtime compensation rate.

SWHC's second round consultation explored issues around the "big frame" and "small frame" approaches, including discussing whether or not there

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should be a transitional period for employers if legislation is enacted, and what impact changes are likely to have on smaller businesses.

SWHC's consultation publication can be found [here](#).

## Minimum wage could be increased by HK\$2 next year

It is likely that Hong Kong's minimum wage will rise by around HK\$2, or 6.15 per cent, to HK\$34.50 per hour next year, following the final meeting of the Minimum Wage Commission on 7 October 2016. There has been no official confirmation from the Minimum Wage Commission but sources claim that members have reached a consensus on the increase, which now must be approved by the Executive Council. If approved, the new minimum wage will come into effect from May next year for some 154,500 employees across Hong Kong. Labour unions have already voiced their concerns with the low rise, which is the smallest percentage increase since the baseline was introduced five years ago.

## Case Review

### District Court dismisses employee's claim of disability, sex and family status discrimination against employer

*Law Miu Kuen Sally v Sunbase International (Holdings) Ltd [2016] HKCU 503*

#### **In brief:**

The dismissal of a disabled employee who had recently returned from maternity leave did not amount to unfair dismissal, the District Court ("Court") has found. The Court applied a two part test as to (i) whether the employee had suffered less favourable treatment; and (ii) whether the less favourable treatment had been caused by one of the prohibited discriminatory grounds.

#### **Background:**

The claimant suffered from a disability due to a road traffic accident in 2007, and frequently took sick leave for medical and physiotherapy treatment. In August 2009, the defendant employer issued a new set of guidelines (the "**Leave Guidelines**") stating that paid sick leave would only be granted if the sick leave was for not less than four days. Previously, paid sick leave was granted without any qualifying period.

In September 2009 the defendant made the decision to terminate the claimant's employment due to the claimant's poor performance, negative behaviour towards colleagues and misuse of work computers for personal matters. However the termination was delayed when the claimant informed the defendant that she was pregnant in October 2009.

When the claimant returned to work in August 2010, her employment was terminated by the defendant.

The claimant argued that the Leave Guidelines amounted to unlawful discrimination (discriminating against her sex, disability and family status) and that she was dismissed due to her disability and her recent pregnancy.

**Decision:**

The Court held that:

- the introduction of the Leave Guidelines did not amount to unlawful discrimination as the Leave Guidelines were applicable to all employees and there was no evidence to suggest that the claimant would be unable to comply with the Leave Guidelines nor that the claimant had suffered unfavourable treatment; and
- there was no evidence that she was dismissed due to her physical condition or her need to take care of her new baby. The claimant was dismissed due to poor performance, mistreatment of co-workers and breach of the defendant's IT policy.

**Take away points:**

1. Paper trail: to ensure you can demonstrate you have a legitimate reason for dismissal, it is always helpful to properly document any performance issues, including appraisals, warning letters and notes from meetings with the employee. Note, however, that these may be subject to a Data Access Request by the employee, so care must be taken in preparing such documents.
2. Take care when amending policies: the case demonstrates that an employer can react and amend a sick leave policy if it feels it is being exploited by employees **but** an employer must: (i) check that sick leave provisions are not enshrined in the employment contract; (ii) consider whether any employees have prohibited attributes that could be directly or indirectly discriminated against if the policy is changed; and (iii) ensure that the sick leave policy applies to all employees.

## Court of First Instance finds commission deductible from holiday pay

*Mak Wai Man v Richfield Realty Ltd (23/06/2016, HCLA 28/2015)*

**In brief:**

The Court of First Instance (“**CFI**”) found that the holiday pay, annual leave pay and sickness allowance (collectively “**Statutory Entitlements**”) payable to employees should be reduced not only by base salary paid to an employee but also by any payment of commission.

The Labour Tribunal (“**LT**”) had taken the view that the Statutory Entitlements payable to employees should not be reduced by any part of the commission, because of the fundamental distinctions between the basic salary and the commission, and the fact that the calculation

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of payment for the paid sickness day/holiday/annual leave day based on the daily average wage (“**DAW**”) was irrelevant as to whether that “paid sickness day/holiday/annual leave day” had already been paid for. The CFI overturned the decision of the LT and, with reference to the legislative intent, held that the commission was earned over a period of time including sickness days/holidays/annual leave days, thus giving the employer the right to deduct the commission.

**Decision:**

The CFI found that “wages” inclusive of commission of a contractual nature was to be used as the basis for all calculations, in order to ensure that an employee’s take-home pay would not be affected if they enjoyed a Statutory Entitlement such as taking a statutory holiday or a period of annual leave. On this basis, the CFI held that the distinctions between the basic salary and the commission could not justify a different treatment, thus the payment of the commission was to be deducted from the Statutory Entitlements in the same manner as the basic salary.

**Take away points:**

Employers should provide clear guidelines to employees regarding the methods of calculation and relevant laws applicable to their entitlements, in order to minimise exposure to potential areas of complaint and dispute by current and former employees. Employers should seek legal advice if introducing new forms of incentives for employees. Seeking clarification of relevant regulations will minimise the risk of similar claims in the future.

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