

Hong Kong Employment Law Update

BAKER & MCKENZIE

September 2011

Breaking News

In a landmark decision earlier today (30 September 2011) the Court of First Instance held that a law prohibiting foreign domestic helpers from acquiring permanent residency was unconstitutional. This means that foreign domestic helpers who have lived and worked in Hong Kong for seven years may be eligible to apply to become permanent residents. This in turn would allow them to take up other types of work in addition to the work that they are currently permitted to do (such as nannies, maids, and elderly carers in domestic households). It is estimated that there are about 117,000 foreign domestic helpers in Hong Kong who already meet the seven year residency requirement. There has been wide debate about the impact of this decision, in particular how it would affect the Hong Kong job market and the potential strain it may put on social welfare services. The government has 28 days to appeal the decision and is widely expected to appeal. Sources indicate that the government may appeal the decision to the standing Committee of the National People's Congress in Beijing.

Case Law Update

Ex Gratia Payments – Reminder to Employers to Say What You Mean

In brief

In *Publicis Ltd –v- O'Farrell*, an employee who was dismissed in breach of her notice period but given an ex-gratia payment for the equivalent value of the notice period. She was nevertheless entitled to recover compensation from her employer for failure to pay notice in addition to the ex-gratia payment. The Employment Appeal Tribunal was not persuaded by the employer's assertion that the ex-gratia sum was supposed to represent her unpaid notice period. The view was taken that the wording 'ex-gratia' indicated that the payment was not legally required and as such, it was treated as a gift and could not be used to set off the damages claim for failure to pay notice.

Take-away points

1. If payments are being made to an employee in relation to a termination situation or otherwise, the language used to describe the payments must be clear and precise. Both parties should be in no doubt as to what each payment represents.
2. The use of the term 'ex-gratia' to describe both contractual and non- contractual payments is common. However this case is a reminder that the real meaning of the term is a 'gift' and if employers intend to use the term, this needs to be kept in mind. If employers pay additional sums to secure a waiver of claims from

Hong Kong

14th Floor, Hutchison House
10 Harcourt Road
Central, Hong Kong

23rd Floor, One Pacific Place
88 Queensway, Hong Kong

Tel: +852 2846 1888

Fax: +852 2845 0476

Beijing

Suite 3401, China World Office 2
China World Trade Centre
1 Jianguomenwai Dajie
Beijing 100004, PRC

Tel: +86 10 6535 3800

Fax: +86 10 6505 2309

Shanghai

Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC

Tel: +86 21 6105 8558

Fax: +86 21 5047 0020

the employee then it is advisable to use a settlement agreement. If this is not appropriate for a particular case then a clear description of what the payment relates to should be stipulated in writing.

3. Both the Tribunal and the Employment Appeal Tribunal made it clear that the term 'ex-gratia' was to be taken at face value as the meaning it would convey to the ordinary reader. It would not be re-classified in spite of the employer's motivation or intentions when making the payment. The significant message from this case is that ambiguity in letters or documents drafted by the employer will be construed in the employee's favour. This is known as the *contra preferentem* rule, which in simple terms means that if there is any ambiguity, the terms are construed against the party that imposed them.

Background

Ms O'Farrell was dismissed with four days' notice instead of the three months that she was contractually entitled to. The letter of dismissal confirmed that she would receive three payments as follows: -

1. An ex-gratia sum equivalent to three months of salary.
2. Statutory redundancy pay.
3. Holiday pay.

Ms O'Farrell lodged a number of claims against her employer including a breach of contract claim for the employer's failure to give her three months of notice or to make a payment in lieu. The employer contended that it was common industrial practice to refer to payments made to employees who were not required to work out their notice, as "ex-gratia" payments even though what they were being paid was actually an entitlement that was owed. Therefore they argued that the ex-gratia payment was clearly intended to be a payment in lieu of notice. However, the Employment Appeal Tribunal considered that it was "tolerably plain" (i) what the letter said and (ii) what the words used within the context would be taken to mean by any reasonable and objective reader. It was determined that the ex-gratia payment was made free of any legal obligation to pay it rather than a payment that was contractually obliged to be made.

Non-solicitation Clauses – What can Trigger a Breach?

In brief

The English High Court held that canvassing and soliciting requires an approach to a customer with a view to appropriating their business. It must involve some direct or targeted behaviour. Although this decision relates to a commercial transaction, it provides valuable insight into what behaviour the court considers to constitute a breach of the non-competition restrictive covenants.

Take-away points

1. It can be a challenge to prove breaches of non-soliciting, canvassing and enticing of former customers. The High Court confirmed that there must be "an active component and a positive intention" on the part of the employee in order to prove the breach. This means that the evidential burden is relatively high even if the employer manages to overcome the first enforceability hurdles of showing that the restrictive covenants protect a legitimate proprietary interest, are reasonable in length and scope and are no wider than necessary.

2. It may be advisable for employers to include non-dealing clauses in the employment contracts as the High Court noted that these are easier to police. This may be particularly helpful in light of the fact that the court held that certain contact with former customers (such as the act of telling a former client that you are leaving and where you will next be working) was not deemed to be a breach of a non-solicitation clause. It will be critical for any non-dealing clauses to be drafted with care as although breaches are likely to be easier to police, it is important to ensure that they are no wider than necessary and thus enforceable.

Background

Mr Maidstone sold his business to Baldwins for approximately £1 million (HK\$ 12 million). The agreement contained a restrictive covenant protecting the goodwill in the company in particular from any attempt at “*canvassing, soliciting or endeavouring to entice away*” former clients for a period of 3 years. Baldwins alleged that Mr Maidstone was in breach of this clause by contacting seven former clients and persuading them to move to his new employer’s company.

The judge found that the evidence demonstrated that there was a secret agreement between Mr Maidstone and his new employer to solicit his former clients from Baldwins. He further found that Mr Maidstone had actively solicited five clients in breach of the non-solicitation clause. The resulting loss to Baldwin’s was one year’s gross fee income for each of those clients which came to approximately £31,000 (HK\$ 375, 760).

Interestingly, an advert being placed in a newspaper which was local to Mr Maidstone’s clients was found not to be in breach of the non-solicitation clause, as it was not sufficiently “targeted” at former clients’ custom.

Before Signing a Settlement Agreement – Double Check the Math!

In brief

The District Court held in *Macpi Group (HK) Limited –v- Yap Bee Hong Chrisand*, that an employer could not recover an overpayment made to a former employee as it had been made under a settlement agreement with the Labour Department. The decision explores the law on compromise and recovery of payments made under settlement agreements.

Take-away point

1. Checking the basics is an obvious point, but litigation does create a highly pressured and stressful environment in which mistakes are more likely to be made. The bad news is that it will be costly to try and rectify those mistakes and ultimately the chances of success are low.

Background

A former employee, Ms Yap brought a claim against her previous employer, Macpi HK, in the Labour Department to recover outstanding commission in 2007. This was settled by entering into an agreement which was in writing and recorded by the Labour Department’s Labour Relations Division. Ms Yap continued to pursue another commission claim and Macpi HK took out proceedings in the District Court for a number of claims including an overpayment of US\$14,967.61 relating to when it settled the employee’s claim at the Labour Department.

The overpayment was based on a mistake made by Macpi HK's accounts department in relation to Ms Yap's commission entitlement. It was alleged that the payment was made under a mistake of fact and of law. In order to succeed, Macpi HK had to overcome the hurdle that the payment was made under a compromise agreement which settled a Labour Department claim in addition to any valid defences against a claim for restitution.

The law on compromise and restitution was explored in some depth and legal texts were cited to support the position that "a court should ...be slow to set aside compromises on the ground of mistake as to the validity of the compromise". Goff and Jones' Law of Restitution (17th edition) and Chitty on Contracts (13th edition) provided that "payments made in submission to a claim and under compromises are normally irrecoverable. If parties agree in good faith to compromise a disputed claim, the compromise is binding, even though the claim might in fact be without proper foundation."

In relation to the claim for recovery of the overpayment, Judge HC Wong held as follows:

- The compromise to and payment of Ms Yap's claim against Macpi HK for commission was voluntarily entered into and was irrecoverable even though Macpi HK subsequently discovered it had made a mistake in calculation at the time of the settlement.
- Crucially, Macpi HK also failed to apply to set aside the settlement agreement at the Labour Tribunal, instead choosing to issue proceedings in the District Court and also failing to ask for the settlement agreement to be set aside in the Statement of Claim.

References – Guidance on Dealing with Misconduct Allegations Arising After Employee's Departure

In brief

A reference which included details of behaviour that had not been raised formally with the employee prior to his departure, was found **not** to be unfair by the English Court of Appeal. This was due to the fact that the reference made it clear that the issues had not been investigated before the employee left and were therefore untested. It was considered that the reference was true and accurate and not unfair.

The Court of Appeal found that it could not criticize the former employer for (i) giving a reference and (ii) including a cautionary remark that was based on allegations which had been made by three individuals based on four independent accounts. It should be noted that in this case the reference was both written and also formed a subsequent telephone conversation where the former employer was very careful and fair.

Take- away points

1. This case is fairly unusual on its facts because it involved a public sector employee working with youth offenders. Therefore although the principles are helpful, significant caution must be exercised prior to considering the inclusion of unsubstantiated allegations in a reference even if it is made clear to the third party that they were not investigated due to the departure of the employee.
2. This area of employment must be carefully navigated to steer clear of liability to either the former employee or to the third party receiving the reference. There is no one formula that can be applied

to all scenarios. Ultimately following the principles expressed in the key cases on references are critical, namely to (i) exercise reasonable care and skill; (ii) to ensure that any reference is true, accurate and fair and (iii) does not give a misleading impression.

3. Employers may wish to check whether they have a policy on giving references and whether it is being adhered to internally (for example, the seniority of the person authorised to give references, internal check points being followed prior to issuing or the provision of factual references only being complied with).
4. If it is proposed to include any negative comments or issues which were not raised and/or are unproven, employers must ensure that there is robust evidence to substantiate these. In this case, there was significant evidence from three different sources which was based on four different accounts. Further, the individual who gave the reference was a group manager and the care exercised by her both in the written reference and in the telephone call that she had was highlighted by the Court of Appeal as having demonstrated due care and fairness.

Background

Mark Jackson worked as a social worker on the youth offending team with Liverpool City Council for a period of approximately 12 years. He received a favourable reference upon departure initially and took up a post with Sefton Borough Council in their Adult Services Department. The difficulties arose when he applied for a post with the Sefton Youth Offending Service one year later. Liverpool City Council were approached for a further reference and matters had come to light which were not known when Mr Jackson had initially taken up the post in Sefton Adult Services Department. The reference, which was issued by Catherine Griffiths who was the group manager of the Youth Offending Service, raised a concern about Mr Jackson's record keeping. Specifically it stated:

"There were some issues identified by his team manager in respect of recording and recordkeeping. This was addressed by supervision and would have led on to a formal improvement plan to assist Mark to make improvements in this area. Mark left the service before this process was instigated."

However it should be noted that Ms Griffiths sought to balance the reference by highlighting Mr Jackson's strengths as follows:

"Mark was able to form good relationships with members of his team and was willing to assist colleagues. He is familiar with the youth-offending recording system and has extensive knowledge of court orders and the requirements of these orders."

Comments made on the telephone

Ms Griffiths did not answer the written questions posed in the reference request on whether the employer would re-employ Mr Jackson or whether any reasons were known not to employ the applicant. She received a telephone call from the Head of Sefton's Youth Offending Team and she explained the specific concerns but made it clear that as there had been no formal investigation, she could not answer the questions *"in either a positive or negative manner"*.

The concerns

The issues that prompted the concerns in the reference came from his previous manager. She had a number of matters brought to her attention by other members of the team who had taken over supervision

case files relating to young people who had previously been supervised by Mr Jackson. The concern was that work and contact with certain individuals had not been carried out, although the records suggested that it had been. Ms Griffiths asked for written evidence and received three emails from different social workers concerning four offenders.

The claim

Mr Jackson was not offered the post by Sefton and remained unemployed for one year. He brought a claim for damages in relation to the reference issued by Liverpool City Council.

The decision

The Judge in the County Court found in Mr Jackson's favour. However the Court of Appeal allowed the appeal lodged by Liverpool City Council against this decision. Although sympathy was expressed for Mr Jackson due to the difficult position he found himself in, the judgment was that Liverpool City Council could not be criticised for providing a reference and could not "*reasonably be criticised for including within it a cautionary remark based on allegations that had been made by three social workers themselves based on what four young people had independently said in at least one case supported by a parent.*"

The Court of Appeal confirmed that the allegations were not being taken as true and it had been confirmed that they had not been investigated. In the circumstances, the written reference was true and accurate and the subsequent telephone conversation was carefully conducted and fair.

General Employment News

China's Social Insurance Law – What does it Mean for Hong Kong Residents Working on the Mainland?

The Provisional Measures for Foreigners Working in China to Participate in the Social Insurance System (the "Measures") were finally passed on 6 September 2011, and are due to come into force on 15 October 2011. However, a recent Hong Kong newspaper reported that there could be a delay to the implementation date as a result of complaints made by local governments of insufficient time being given to enable compliance with the implementation date.

All foreign employees who legally work in China must be enrolled in the social insurance system from 15 October 2011 (unless a formal extension is confirmed). Contributions are required not only for foreigners with a local employment contract in China, but also for those who are employed by an offshore company and assigned/seconded to work in China.

Impact on employees from Hong Kong, Taiwan and Macau

The Measures are silent on employees from Hong Kong, Taiwan and Macau. Sources within the Ministry of Human Resources and Social Security speaking anonymously have indicated that employees from Hong Kong, Taiwan and Macau will still be subject to 2005 regulations under which these employees must participate in China's social insurance scheme, but only if they are directly employed by a China-based entity. Currently, enforcement of the 2005 regulations is inconsistent and varies by city.

For a full copy of our China team's recent client alert on this topic please click on this [link](#).

Judicial Recommendations on Equal Opportunities Claims

The Judiciary recently published a Review of the Adjudication of Equal Opportunities Claims by the District Court. This was prompted by the following factors:

1. In response to the judgment (Decision on Costs) in *Sit Ka Yin Priscilla v Equal Opportunities Commission*. In this case, Judge Lok confirmed that as anti-discrimination statutes are social legislation protecting civil rights, such claims should be speedily adjudicated and costs of litigation should be reduced;
2. The Equal Opportunities Commission's Recommendations to the Government on the Establishment of an Equal Opportunities Tribunal in Hong Kong (March 2009). The Equal Opportunities Commission highlighted that the procedural rules were too complex, the court had insufficient case management powers and the adjudication system does not specialize in discrimination and harassment; and
3. The Judiciary's ongoing initiative to review rules and procedures of the court on a regular basis.

Summary of outcome of review and recommendations

The Judiciary considered that the Civil Justice Reform implemented in April 2009, has addressed a number of the concerns expressed by the Equal Opportunities Commission. It is opposed to the establishment of a specialised tribunal within the Judiciary to hear equal opportunities cases. However the review resulted in a number of issues being identified and the following recommendations were made:

1. Technical pleadings should be replaced by informal claim forms and response forms in equal opportunities proceedings under normal circumstances. A judge may still direct pleadings under exceptional circumstances for case management purposes.
2. There should be a Practice Direction providing for a first direction hearing to be fixed within a certain time (eight weeks for example) after the filing of an equal opportunities claim.
3. It is not proposed to introduce further reforms other than those already initiated under the Civil Justice Reform.
4. The current rule that each party shall bear its own costs of action and the court may make adverse costs orders should be maintained.
5. The court should continue to encourage and promote mediation as an alternative dispute settlement and refer suitable cases to mediation.
6. Legal representation should continue to be allowed.
7. To tackle the increasing number of litigants in person, a multi-faceted approach should continue to be adopted –
 - The legal profession would continue to promote pro-bono services;
 - The Administration may consider extending legal aid and assistance to Equal Opportunities litigants as appropriate. In particular, consideration may be given to the feasibility of waiving the means test requirement for a person involved in proceedings in which a breach of anti-discrimination statutes is an issue; and

To find out more about how our Employment Law Group can add value to your business, please contact:

Jennifer Van Dale

Direct: +852 2846 2483
jennifer.van.dale@bakermckenzie.com

Susan Kendall

Direct: +852 2846 2411
susan.kendall@bakermckenzie.com

Leading Law Firm for Employment Law in Hong Kong – *ALB Employment and Labour Law Survey 2011*

Tier 1 Law Firm for Employment in Hong Kong – *Asia Pacific Legal 500, 2010/2011, 2009/2010*

Leading Law Firm for Employment in Hong Kong – *Chambers Asia 2011, 2010, 2008*

Leading Law Firm for Labour and Employee Benefits in China – *PLC Which Lawyer? 2011, 2010, 2009, 2008, 2007 Yearbook*

Ranked No. 1 Employment Law Firm – *PLC Which Lawyer? Global Employment Top Ten Firms Leading in China*

International Employment Firm of the Year in China – *China Law & Practice Award 2011, 2008*

China Client Choice Award – *International Law Office 2008, 2007, 2006, 2005*

- The Judiciary would consider producing suitable publicity materials to assist court users on equal opportunities proceedings.

The Judiciary invites feedback on its review and recommendations above in order to determine the way forward. They request that interested parties send their comments on or before 31 October 2011. If you wish to review the report it can be accessed via this [link](#).

Reminder for the Diary – Amendment of Minimum Level of Relevant Income for MPF Contributions to \$6,500 on 1 November 2011

Employers and employees are required to make contributions based on the minimum level of relevant income, as set by the legislature. The Legislative Council passed an amendment to the minimum level of relevant income which will be increased to HK\$6,500 with effect from 1 November 2011. The current level is HK\$5,000.

For the contribution periods (wage periods in general) starting on or after 1 November 2011, employees with a monthly relevant income less than HK\$6,500 are not required to make the employee's part of contribution, but their employers have to make the employer's part of contribution.

Systems should be updated in order to ensure that the contribution amount is calculated as per the new level for the contribution periods commencing from 1 November 2011 and that automatic deductions for employee contributions are not made on relevant income under HK\$6,500.

Revised Guidelines

The above amendment has led to the Mandatory Provident Fund Schemes Authority issuing the following revised guidelines:

- Guidelines on enrolment and contribution arrangements for relevant employees other than casual employees (IV.8)
- Guidelines on contribution arrangement of a self-employed person (IV.17)
- Guidelines on contribution arrangements of a self-employed person who sustains a loss (IV.18)
- Guidelines on minimum and maximum levels of relevant income of a self-employed person (IV.19).

Copies of the revised guidelines can be accessed on <http://www.mpfa.org.hk>.

Crystal ball: Potential Good News for New Fathers

The government is exploring the viability of allowing paternity leave for Hong Kong's male employees. The Secretary for Labour and Welfare, Matthew Cheung Kin-chung is keen for a study to take place that can later be considered by the Legislative Council and Labour Advisory Board in early 2012. The key issues are likely to be whether the leave will be paid or not and how to structure the qualifying criteria given that some fathers may be unmarried or employees' spouses may not be Hong Kong residents.

This Update has been prepared for clients and professional associates of Baker & McKenzie. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases. No responsibility for any loss occasioned to any person acting on refraining from action as a result of material in this Update is accepted by clients, authors or Baker & McKenzie. If advice concerning individual problems or other expert assistance is required, the service of a competent professional adviser should be sought.

Data Privacy

Please contact Vivien Chan by telephone +852 2846 1635 or e-mail: vivien.chan@bakermckenzie.com should you wish your details to be added, amended or deleted from our mailing list.

©2011 Baker & McKenzie. All rights reserved. Baker & McKenzie, a Hong Kong Partnership, is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.