CHAPTER 2: AN OVERVIEW OF THE EMPLOYMENT ORDINANCE

Key Practical Takeaways

- The Employment Ordinance and Hong Kong law is likely to apply to all employees, including those from outside Hong Kong and sent to Hong Kong on a secondment-basis.
- Contracting-out of Hong Kong employment law protection is unlawful and ineffective.
- Breaches of the Employment Ordinance trigger criminal sanctions.
- Understanding the concept of "continuous service" is fundamental to understanding the rights and obligations that arise in respect of employees.
- Not clearly documenting the employment relationships may expose an employer to more onerous obligations than is necessary e.g. in terms of notice provision.

[¶2-010] Overview

The terms and conditions of an employment contract may be either expressly agreed between the parties to an employment contract, or incorporated by implication or by law. Chapter 3 "The Employment Contract" addresses the terms of an employment contract which are often expressly included by the parties, as well as those implied by the common law (that is, the case law regarding the employment relationship which has developed over the years).

However, the scope of those terms and conditions is restricted by legislation. In Hong Kong, the *Employment Ordinance* (Cap 57) (Ordinance) sets out a statutory framework to govern many aspects of the employment contract by incorporating a number of key terms and conditions into every contract of employment which falls within

its coverage. Accordingly, employers should be aware of the following provisions in the Ordinance to ensure that the express terms of their employment contracts are in compliance with the legislation.

[¶2-020] Who does the Employment Ordinance apply to?

The Ordinance applies to every employee engaged under a contract of employment, to an employer of such an employee, and to a contract of employment between such parties.

However, there are some exceptions. The Ordinance does not apply to:

- an employee who is a family member of the proprietor of the employer and who lives in the same dwelling as the proprietor;
- an apprentice whose contract of apprenticeship has been registered under the *Apprenticeship Ordinance* (Cap 47), other than certain provisions of the *Employment Ordinance*;
- an employee who serves under crew agreements or on board ships not registered in Hong Kong; and
- an employee who is covered by the *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78).

  The *Contracts for Employment Outside Hong Kong Ordinance* applies to all employment contracts under which a person located in Hong Kong agrees to provide manual services for another person who is not in Hong Kong, and the contract is to be performed (whether wholly or partially) outside of Hong Kong (and for non-manual employees whose monthly earnings do not exceed a cap set by the government (currently HK$20,000 per annum)).

Recent case law has provided that the Ordinance was intended to apply to every employee engaged in Hong Kong under a contract of employment, including employments governed by laws of another jurisdiction other than Hong Kong. This would mean that expatriates who are seconded or assigned to work in Hong Kong for more than just a transient stay are entitled to and should be afforded the same rights, benefits and protections that other Hong Kong employees are entitled to under the Ordinance (see further our discussion on *Cantor Fitzgerald*

Europe and Cantor Fitzgerald (Hong Kong) Capital Markets Limited v Jason Boyer and Others [2012] HKEC 30 at ¶7-040).

For employees to whom the Ordinance applies, they will be entitled to the basic protection under the Ordinance irrespective of hours of work. These basic protections include payment of wages, restrictions on wage deductions, the granting of statutory holidays (albeit not necessarily paid) and employment protection in respect of unlawful dismissal. For employees who are employed under a continuous contract (see ¶2-040), they are entitled to further benefits such as rest days, paid annual leave, sickness allowance, paid statutory holidays, maternity leave, paternity leave, severance payments and long service payments. The statutory provisions of the Ordinance set out a minimum level of benefits and entitlements for employees, and a framework for how those statutory rights and entitlements are to be exercised. The law places various restrictions on an employer varying those rights and entitlements, even with the agreement of the employee.

It is unlawful for parties to an employment contract to contract out of the provisions of the Ordinance. Any contractual terms which purport to extinguish any right, benefit or protection conferred on an employee under the Ordinance are void (sec 70). Accordingly, employers should ensure that any contractual terms expressly agreed with employees (either in a written contract or orally) are consistent with the minimum obligations introduced by the Ordinance.

It is important to note that a failure to comply with the Ordinance may result in criminal law sanctions (for which the usual penalty is a fine, except for payment of wages offences, which can give rise to a sentence of imprisonment). There are also extensive civil remedies available for aggrieved employees depending on the relevant breach.

[¶2-030] What kinds of contracts are governed by the Employment Ordinance?

The Ordinance generally governs the provisions of "contracts of employment", but not "contracts for services" (see Chapter 4 "Who Is An Employee?" for a discussion on the differences and for the definition of an "employee"). A "contract of employment" is defined in sec 2 of the Ordinance.

A "contract of employment" means "any agreement, whether in writing or oral, expressed or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee and also a contract of apprenticeship".

It is important to recognise that a contract of employment can exist even if it is not in writing, and even oral contracts of employment can be governed by the Ordinance (see Chapter 3 "The Employment Contract" for discussion on the elements of an employment contract).

[¶2-040] Continuous employment

What does "continuous service" mean?

The concept of "continuous service" is central to the Ordinance; it determines an employee's qualification to certain benefits conferred by the Ordinance, and the extent of those benefits. "Continuous service" is essentially a concept for recognising an employee's length of service with an employer. Once the employee has reached a threshold length of service (that is, he or she is under a "continuous contract"), the employee becomes entitled to certain rights and entitlements. Some entitlements accrue to an employee in accordance with the employee's length of continuous service.

It is important to remember that the concept of a "continuous contract" is statutory (that is, it is introduced by law, not by agreement between the parties). The parameters of a "continuous contract" apply only to ascertaining the length of an employee's continued service for the purposes of the Ordinance. Employers are of course free to apply the concept to an employee's eligibility to contractual benefits which are over and above those provided by the Ordinance.

The concept of continuous employment under the Ordinance further does not, in a "transfer of business ownership" situation, operate to transfer the transferor's (i.e. old owner) liability for employee benefits to the transferee (i.e. new owner) where a business changes hands.

Even though an employee's service under the old employment contract will be counted for the purposes of "continuous service", the new owner does not inherit the obligations of the former business owner under the old employment.

For example, in *Law Shu Fat & Ors v Ng Kwong Yui t/a Ng Yiu Kee Transportation Co* [2006] 947 HKCU1, the Court of Appeal considered the obligations on the owner of a small transportation business after the previous owner of the business had failed to pay the employees their statutory holidays and annual leave. After the death of the original sole proprietor of the business, the proprietor's son had continued to operate the business using the same employees. The employees filed a claim against the son of the sole proprietor for the unpaid statutory holidays and annual leave arising during the employment with his father. The Court of Appeal found that the employees were working for the son under new employment contracts and therefore, the son did not inherit the liability for the unpaid entitlements which had accrued when the employees were working for his father. The court found that the provisions of the First Schedule to the Ordinance, which provides the rules governing continuous employment, were only "counting provisions" for determining eligibility for, and entitlement to, various benefits under the Ordinance. The First Schedule did not have the effect, in a transfer of business situation, of transferring the transferor's liability for benefits to the transferee.

What amounts to a "continuous contract"?

To qualify as an employee under a "continuous contract", the employee must have been continuously employed for a minimum duration of four consecutive weeks for at least 18 hours a week. As already indicated above, the circumstances under which an employee will be considered to be employed under a "continuous contract" are set out in the First Schedule to the Ordinance.

The First Schedule provides that:

> "Where at any time an employee has been employed under a contract of employment during the period of four or more weeks next preceding such time, he shall be deemed to have been in continuous employment during that period".

Alternatively, there may be an agreement between the employer and the employee that the employee will be regarded as continuously employed (for example, during a period of unpaid leave of absence).

Continuity of service will be broken if the employee works for less than 18 hours in any one week. Therefore, if an employee is employed under a series of contracts with the same employer, but there is a break of at least one week between the contracts, then his or her continuity of service will be deemed broken.

For example, in the case of *Lui Lin Kam & Or v Nice Creation Development Ltd* [2006] 1132 HKCU1, the Court of Appeal considered the claim of two employees of a restaurant. The employees were terminated from their employment because the restaurant was undergoing redecoration and the scale of operation afterwards would be reduced.

The employees claimed a severance payment under the Ordinance, which requires 24 months of service under a continuous contract (see Chapter 23 "Redundancies and Lay Offs"). Both employees had been employed under a series of two contracts with the employer, each for under 24 months, but in total they had both served in excess of 24 months. The court found that a break of one week between the contracts was enough to break continuity of service.

However, the court may also look at all the circumstances of the case to determine whether there is in fact a "global contract" of employment comprised of the totality of the individual contracts, so that there is, in fact, no real break in continuity of service between them.

For example, in the case of *Lui* above, the court also examined the question of whether, in spite of the break between the contracts, it could be said that the employees were under continuous employment for a period of 24 months because there was a "global contract" covering the two separate contracts. The court noted that it was indeed possible to have a "global contract" covering a series of separate employment contracts, but there must be an "irreducible minimum of obligation" on each side to continue the employment even during the break periods. The court found that this was not the case on the facts, and the employer had adopted the practice of entering into employment contracts of 18 months only as a means of breaking the continuity of employment.

Accordingly, where an employer elects to enter into a series of shorter employment contracts, as long as there is a real break between the contracts (and not one which disguises the reality of an ongoing "global contract"), an employer is entitled to arrange its affairs to take advantage

by the employer" even though, technically speaking, the contract terminates automatically upon expiry of the fixed term (see Chapter 20 "Termination of the Employment Contract").

[¶2-060] Wages

The Ordinance contains a number of provisions dealing with an employer's obligation to pay an employee wages, the timing of payment of wages, the manner in which the wages are paid and restrictions against placing conditions on the payment of wages.

The Ordinance allows a wage period to be of any duration agreed between the parties, but in the absence of any proof to the contrary, the Ordinance imports a presumption that the wage period is one month, and wages become payable at the end of the wage period.

The Ordinance places strict limitations on the deductions which an employer is entitled to make from an employee's wages. An unlawful deduction which is not permitted by the Ordinance is a criminal offence, and offenders will be liable to a fine and imprisonment.

The *Minimum Wage Ordinance* (Cap 608) came into force in Hong Kong on 1 May 2011. The initial statutory minimum wage rate is HK$28 per hour. The Labour Department has issued Reference Guidelines for Employers and Employees. In summary, under the *Minimum Wage Ordinance*, an employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage.

(See Chapter 9 "Remuneration" and Chapter 10 "Benefits and Entitlements".)

[¶2-070] Bonus payments

It is common in Hong Kong for employers to provide for an end of year payment to employees. This is sometimes referred to as a "13-month payment", "double pay" or "end of year bonus" and it is often paid around the Chinese Lunar New Year period.

Employers are free to negotiate the amount of this payment with employees, or not to provide it at all. Where a bonus payment is provided, unless it is strictly a discretionary bonus, the Ordinance contains

provisions which govern the amount and timing of the payment in the absence of agreement between the employer and employee. In particular, the Ordinance provides that where the employer has provided for a contractual bonus, then the amount should be equal to one full month's wages, unless otherwise agreed.

The Ordinance does not govern bonus schemes which are purely discretionary in nature. However, employers need to be aware that case law has developed in Hong Kong, so that even where a bonus is expressed in a contract of employment to be payable purely at the discretion of the employer, such bonus arrangements may be deemed to be contractual in nature, particularly where calculation of the bonus is based on achievement against agreed formula or targets. Further, even if the bonus is purely discretionary in nature, the courts have held that there is an implied contractual term that the discretion must be exercised rationally, not perversely and in good faith.

(See ¶9-100 – ¶9-160 in relation to end of year payments.)

[¶2-080] Sickness allowance

In Hong Kong, the Ordinance sets out a rather unusual regime for sick leave entitlements for employees under a "continuous contract" (see ¶2-040 above).

Under the Ordinance, there is an entitlement to accrue "sickness allowance" during continuous employment at the rate of two paid sickness days each month in the first year of employment and four paid sickness days each month thereafter. The maximum accumulation at any one time is 120 paid sickness days. The accrued sickness days are paid at the rate of four-fifths of the employee's average daily wages calculated in accordance with the Ordinance.

However, payment is only due for the sickness days when the employee is off sick for four consecutive days or more. Once the employee is off for at least four consecutive days, all the sickness days are deemed subject to the sickness allowance (including the first three days) up to the maximum.

This is only a minimum statutory entitlement and employers are free to provide for a greater allowance, and they often do. Employers are

therefore free to include an allowance for payment for absences even when the employee takes less than four days, and/or pay full wages rather than four-fifths of the wages on those sick leave days.

The Ordinance contains a prohibition against an employer terminating an employee's employment on any sickness day taken by the employee in respect of which sickness allowance is payable (see ¶10-040).

[¶2-090] Annual leave

In Hong Kong, any employee who is employed under a continuous contract of employment (see ¶2-040 above) for a period of 12 months is entitled to paid statutory annual leave in accordance with the minimum standards set out in the Ordinance. Payment is on the basis of the employee's average daily wages calculated in accordance with the Ordinance. Therefore, annual leave accrues at the end of the year. The Ordinance sets out a sliding scale of minimum annual leave entitlements for employees based on the employee's length of service; from seven days (for employees with more than one year but less than three years of employment) up to 14 days (for employees with at least nine years of continuous employment). This entitlement is in addition to statutory holidays.

The Ordinance also sets out a number of restrictions in relation to how this entitlement may be taken. In general, employers cannot pay employees a payment in lieu of their annual leave entitlement, except for any sum owing upon the termination of the employment contract and in certain circumstances where the employee is entitled to more than 10 days' statutory annual leave or where an employer continues to employ an employee after the expiration of a period during which statutory annual leave should have been granted to him/her and the employer has not granted that leave. In these circumstances, then the employee can elect to be paid in lieu but this cannot be imposed by the employer without the employee's agreement. There are also restrictions in relation to the forfeiture of accrued but untaken statutory annual leave.

The Ordinance allows employers to calculate the annual leave entitlement of employees either by reference to a period of 12 months following

the commencement of an individual's employment or by reference to a common 12-month period for all employees (see ¶10-050).

[¶2-100] Statutory holidays

Statutory holidays are granted in accordance with the Ordinance to all employees .There are currently 12 statutory holidays recognised in Hong Kong.

For employees with at least three months' continuous employment (see ¶2-040 above), the statutory holidays must be paid. Payment is on the basis of the employee's average daily wages calculated in accordance with the Ordinance.

In addition, Sundays and a list of specified days are designated as "general holidays", which are observed by all banks, educational establishments, public offices and government departments. Although there is no requirement that these further general holidays be granted by other businesses, many businesses do so without making deductions from wages.

(See ¶10-020, ¶10-070 and ¶10-080 on a discussion in relation to general and statutory holidays.)

[¶2-110] Rest days

Under the Ordinance, employees are entitled to a statutory "rest day" each week. Any employee who is employed under a continuous contract of employment (see ¶2-040 above) is, under the Ordinance, entitled to not less than one rest day (a continuous period of not less than 24 hours without work) in every period of seven days. Rest days are in addition to statutory annual leave and statutory holidays. The Ordinance is silent as to whether the rest days are paid or unpaid although, in practice, if the contract of employment does not clearly state the position (and there is no custom and practice to the contrary) they are generally accepted to be paid and covered by the employee's monthly wages. The issue of whether rest days are paid or unpaid has become particularly significant as a result of the *Minimum Wage Ordinance* which came into force on 1 May 2011 (see ¶10-030 for more details).

The Ordinance sets out an employer's obligations in relation to providing those rest days (see ¶10-030).

[¶2-120] Mandatory Provident Fund

In Hong Kong, employers and employees are required to participate in a legislative mandatory provident fund scheme which is administered by the relevant government authority.

Under the *Mandatory Provident Fund Schemes Ordinance* (Cap 485), employers are required to enrol their staff in a Mandatory Provident Fund if the employee is employed for at least 60 days (with the exception of "casual workers" who must be enrolled even if they are employed on a day-to-day basis or for a period of less than 60 days). Both the employer and employee are required to contribute to the fund at the rate of 5% of the employee's income although a statutory cap on the contribution applies. (See Chapter 22 "Retirement" for a discussion on employers' MPF obligations.)

[¶2-130] Maternity leave

Under the Ordinance, female employees who are employed under a continuous contract of employment (see ¶2-040 above) are entitled to maternity leave.

The Ordinance sets out the minimum statutory entitlement. In summary, employees who qualify for this benefit are entitled to a continuous period of 10 weeks' maternity leave (with an additional period if the employee gives birth later than expected and an additional period of up to four weeks for illness or disability arising out of the pregnancy or childbirth). Where the employee's period of continuous service is more than 40 weeks before the start of the maternity leave, she is entitled to maternity pay during the 10 week maternity leave period; otherwise it is leave without pay. Maternity leave pay is calculated at four-fifths of the average daily wages of the employee calculated in accordance with the Ordinance.

Once a pregnant employee has served notice of pregnancy on her employer, the employer is not entitled to terminate her contract of employment from the date on which her pregnancy is confirmed by a

medical certificate to the date on which she is due to return to work following her statutory maternity leave.

(See ¶10-060 in relation to employers' obligations in respect of maternity leave.)

[¶2-140] Paternity leave

As of 27 February 2015, male employees who are employed under a continuous contract of employment (see ¶2-040 above) are entitled to paternity leave under the Ordinance.

Similar to maternity leave, the minimum statutory entitlement is set out in the Ordinance. In summary, employees who qualify for this benefit are entitled to three days' paternity leave, which is to be taken consecutively or separately for each confinement of their spouse or partner. Where the employee's period of continuous service is more than 40 weeks before the start of the paternity leave, he is entitled to paternity leave pay during the three-day paternity leave period; otherwise it is leave without pay. Paternity leave pay is calculated at four-fifths of the average daily wages of the employee calculated in accordance with the Ordinance.

(See ¶[10-070] in relation to employers' obligations in respect of paternity leave.)

[¶2-150] Notice of termination

In Hong Kong, the Ordinance allows either party to an employment contract to terminate the contract at any time by providing adequate notice to the other party.

The Ordinance specifically prohibits an employer from terminating the employment of an employee in certain circumstances (see Chapter 20 "Termination of the Employment Contract").

Subject to those limitations, the Ordinance sets out minimum notice periods for terminating different types of employment contracts:

- where the contract is a "continuous contract" and is deemed by the Ordinance to be renewable from month to month, the notice required to terminate the contract depends on the terms of the contract:

  - where the parties have expressly agreed to a notice period, then the notice period will be as agreed between the parties, subject to a minimum notice period of *seven days*; or
  - where the contract is silent as to the amount of notice, the notice period is deemed to be *one month*; and
- in all other cases, where a contract specifically provides for termination by notice, the length of notice is to be the agreed period. Where the contract is a "continuous contract", the agreed period cannot be less than seven days.

The Ordinance also addresses the notice period required where an employment contract specifically provides for a probationary period. During the first month of the probationary period, either party may terminate the employment contract without any notice (even if the contract provides for a period of notice). For the remainder of the probationary period, the notice period is as agreed between the parties, but subject to a minimum of seven days.

(See Chapter 20 "Termination of the Employment Contract".)

[¶2-160] Payment in lieu of notice

The Ordinance provides an alternative means to terminate an employment contract other than by giving the other party notice. The Ordinance provides that both the employer and employee may terminate an employment contract by making a payment to the other party in lieu of the notice period (see Chapter 20 "Termination of the Employment Contract" for a discussion on the right to make payment in lieu of notice).

What is included in payment in lieu of notice?

The Ordinance sets out the method to be used for calculating a payment in lieu of notice and a distinction is made between notice periods expressed in days or weeks and notice periods expressed in months. Where the notice period is expressed in days or weeks the payment will be based on the employee's average daily wages calculated during the 12 months prior to the termination date (or a shorter period where the employee has been employed for less than 12 months). Where the notice period is expressed in months the payment will be based on the employee's

average monthly wages calculated during the 12 months prior to the termination date (or the shorter period). Consideration must be given to the definition of "wages" in the Ordinance, which is relatively broad, but does expressly exclude certain categories of payments (see ¶20-040 for a detailed discussion on the components of payment in lieu of notice under the Ordinance).

[¶2-170] Time of termination payments

The Ordinance sets out strict timetables for payment of certain benefits to employees, including the payments due upon termination. For example, the Ordinance provides that any sum due to the employee upon termination of an employment contract (including wages due, payment in lieu of notice, accrued but untaken annual leave) must be paid as soon as practicable and in any event not later than *seven days* after the date of termination (sec 25) (see Chapter 20 "Termination of the Employment Contract" for a discussion on termination payments).

Accordingly, it is not lawful for an employer to withhold statutory termination payments from an employee upon the satisfaction of certain conditions, for example, to secure a deed of release from an employee or to secure the return of company property.

[¶2-180] Prohibited termination

The Ordinance sets out a number of situations where an employer is prohibited from terminating the employment relationship whether by notice or payment in lieu. These include the following:

- after the employee has given notice of her intention to take maternity leave until her return from statutory maternity leave;
- during any sickness days in respect of which statutory sickness allowance is payable;
- where it is in contravention of the *Factories and Industrial Undertakings Ordinance* (Cap 59);
- where it is in contravention of the *Employees' Compensation Ordinance* (Cap 282);

- where an employee has exercised rights in respect of trade union membership and union activities;
- where an employee has participated in proceedings for the enforcement of the Ordinance or in relation to a workplace accident or a breach of health and safety obligations (that is, the employee has given evidence or information in relation to proceedings in connection with the enforcement of the Ordinance or health and safety matters); and
- when an employee is taking accrued statutory annual leave (on the basis that an employer cannot include a period of statutory annual leave in any period of notice to which an employee is entitled).

There may be criminal sanctions applied against employers who contravene the provisions by terminating an employment contract in prohibited circumstances.

Further, it is unlawful for an employer to terminate an employee for any discriminatory reasons for which anti-discrimination legislation is in place (that is, on the basis of an employee's sex, marital status, pregnancy, family status, disability or race).

[¶2-190] Summary dismissal

The Ordinance allows an employer to dismiss an employee summarily, without notice, on certain limited grounds. The Ordinance specifically sets out a number of circumstances which will trigger this right, and it affirms the common law rights of an employer to terminate an employment contract without notice. However, termination without notice which does not fall within these grounds will be considered wrongful termination, giving rise to potential remedies and compensation payments under the Ordinance and under the employment contract.

(See ¶20-060 for a discussion on summary dismissal in Hong Kong.)

[¶2-200] Termination without notice by an employee

An employment contract may also, in some circumstances, be terminated by an employee without notice. The Ordinance affirms the common

law position that, where the employer has engaged in conduct which is incompatible with the continuation of the relationship, an employee may regard himself or herself as being discharged of his or her obligations under the employment contract.

(See ¶20-070 and ¶20-090 for a discussion on constructive dismissal and employees' statutory right to terminate without notice.)

[¶2-210] Entitlement to severance payment

In Hong Kong, an employee may be entitled by statute to a severance payment upon termination where his or her employment has been terminated by reason of redundancy or lay-off.

The Ordinance generally provides for a severance payment for employees continuously employed (see ¶2-040 above) for more than two years and who are dismissed by reason of redundancy or lay-off.

The Ordinance sets out the definition of redundancy and lay-off which will qualify an employee with the required period of continuous service for a severance payment. A redundancy is defined as a situation where:

- the employer has ceased or intends to cease to carry on business for the purposes of which the employee was employed or in the place where the employee was employed; or
- the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish.

A severance payment is calculated on the basis of two-thirds of the employee's last full month's wages or two-thirds of HK$22,500 (i.e. HK$15,000), whichever **is less**, for each year of continuous employment, with a pro rata amount for any part year. The current maximum amount of any severance payment is HK$390,000.

The right to a severance payment may be lost if the employer (or associated company or new owner of the business following a change of ownership of the business) offers to re-employ or re-engage the employee and the employee accepts that offer or the offer is on the same terms and conditions (or on terms no less favourable) and the employee unreasonably refuses that offer.

	Child who has completed Form III	*Child who has not completed Form III*	*Young Persons*
			• For any young person aged 16 or over, no load which is "unreasonably heavy", having regard to the employee's age and physical development

CHAPTER 9: REMUNERATION

Key Practical Takeaways

Summary of an employer's obligations in relation to wages

- Prior to the employment, an employer should inform the employee of the conditions with regard to:
  - the employee's wages;
  - the wage period; and
  - any end of year payment.
- During the employment, an employer should inform the employee whenever:
  - any change occurs in the conditions relating to wages or end of year payments; and
  - particulars of wages paid (including overtime and any allowances).
- An employee must be paid wages in respect of any wage period of not less than the minimum wage (currently HK$32.50 per hour worked).
- Wages should be paid not later than seven days after the last day of the wage period.
- Wages should be paid in a manner and place permitted under the *Employment Ordinance* only.
- Deductions from wages should not be made unless permitted under the *Employment Ordinance*.
- Due wages must be paid within seven days of the completion of the employment contract.
- Records should be kept regarding the employees particulars, wages paid to the employees and the employees wage period. If the wages payable in respect of a wage period are less than HK$13,300 then a record should also be kept of the total number of hours worked by the employee in that wage period.

Summary of an employer's obligations in relation to end of year payment

If:

- the employee is employed under a continuous contract; AND
- the employment contract provides for a "contractual" end of year payment,

then:

- the employee is entitled to an end of year payment to be paid in accordance with the *Employment Ordinance*:
  - Payment period
    - (a) as agreed in the employment contract; OR
    - (b) if the employment contract is silent — the lunar new year.
  - Amount
    - (a) as agreed in the employment contract; OR
    - (b) if the employment contract is silent — a sum equivalent to one full month's wages
  - Timing
    - (a) as agreed in the employment contract; OR
    - (b) if the employment contract is silent, by the last day of the payment period.
  - Payment on termination
    - (a) if the employee is terminated after the termination of the payment period but before the end of year payment becomes due, the employee is entitled to the amount of the end of year payment;
    - (b) if the employee is terminated before the termination of the payment period, the employee is entitled to a *pro rata* end of year payment UNLESS:

i. the employee has resigned; or

ii. the employee has been terminated summarily for serious misconduct.

[¶9-010] Overview

In Hong Kong, in the past, employers and employees have been generally free to agree upon the terms of pay and benefits packages, subject to some limited minimum statutory conditions. However, the *Minimum Wage Ordinance* (Cap 608) which came into force on 1 May 2011 in Hong Kong has significantly changed the legal position. At the time of its enactment, a great deal of debate and public commentary was generated as the concept of imposed wage requirements was viewed by many as being contrary to the business ethos of Hong Kong. The *Minimum Wage Ordinance* applies to all employees (subject to certain limited exceptions for students undertaking internship in full-time locally-accredited programmes (see Chapter 8 "Employing Children and Young Persons") for more details on the employment of children and young persons, and domestic workers who dwell free of charge in the same dwelling as their employers) and has set a statutory minimum hourly wage in Hong Kong. The current statutory minimum wage rate from 1 May 2017 is HK$34.50 per hour worked.

In developing an appropriate compensation and benefits package for any particular employee, it is important to consider the minimum statutory requirements in Hong Kong as well as the best way to entice, reward and motivate the desired employees. Minimum requirements for annual leave, sick leave, statutory and general holidays are set out in the *Employment Ordinance* (Cap 57) (Ordinance) (see Chapter 10 "Benefits and Entitlements" in relation to these benefits).

Subject to a limited number of exemptions, it is also compulsory for employers to enrol employees who are employed for more than 60 days in the Mandatory Provident Fund (MPF) (see Chapter 22 "Retirement" in relation to MPF schemes).

Employers may consider including different types of incentive based components in a compensation and benefits package to motivate achievement of particular targets by employees. These may include

commission payments, bonus payments, employee share award schemes, share option schemes or phantom unit schemes and profit share schemes. Supplementary benefits often form part of executive remuneration packages in Hong Kong as an incentive to entice and reward high-performing employees. These often include accommodation or housing allowances, club membership, company recreational facilities and company cars.

Medical insurance coverage is not a mandatory employee benefit in Hong Kong. However many employers include medical insurance coverage as a benefit for their employees.

This chapter covers minimum statutory entitlements in relation to the payment of wages and end of year payments. It is common for employees in Hong Kong to receive an end of year payment in addition to their basic remuneration. This is sometimes known as a "13th month" payment or "end of year bonus" payment and is often paid by employers at the end of the Chinese Lunar New Year. Where an employer has provided for these payments as a contractual entitlement (that is, they are guaranteed under the contract of employment and are not of a discretionary nature), the Ordinance regulates the conditions of payment. This is also the position with all non-discretionary bonuses.

[¶9-020] Wages

Prior to 1 May 2011, there was no national ruling on wages providing for any minimum wages in Hong Kong although cleaning and security workers were covered by voluntary provisions which had been adopted by some employers, including the government.

Minimum Wage Ordinance (MWO)

The *Minimum Wage Ordinance* (Cap 608) came into force on 1 May 2011. The Labour Department has released Reference Guidelines for Employers and Employees (Guidelines) in relation to the MWO together with specific industry guidelines for catering, retail, hotel and tourism, property management, security and cleaning services, logistics and real estate agencies (Industry Guidelines). The Guidelines are not law but it is important that employers are aware of their provisions as they demonstrate how the Labour Department will interpret and

enforce employers' obligations under the MWO until there is judicial interpretation to assist.

In summary, the MWO states that employees are entitled to "wages" of not less than the statutory minimum wage (SMW) rate for every "hour worked" in a wage period.

The current SMW rate as of 1 May 2017 is HK$34.50 per hour worked. The SMW rate was raised from HK$32.50 per hour worked (previously in place from 1 May 2015 to 30 April 2017) and prior to that, HK$30 per hour worked (previously in place from 1 May 2013 to 30 April 2015).

Calculation

The starting point is to calculate what the minimum wage for the wage period is.

The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.

Example

If the total number of hours worked by an employee in a wage period is 208.25 hours, his minimum wage for that period is:

208.25 hours (total number of hours worked) x HK$34.5 (SMW rate) = HK$7,184.6

Hours worked

Sec 4 of the MWO makes it clear that "hours worked" (including any part of an hour) includes any time which the employee is, in accordance with the contract of employment or with the agreement or at the discretion of the employer:

- in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
- travelling in connection with his employment excluding travelling (in either direction) between his place of residence and

his place of employment other than a place of employment that is outside Hong Kong and is not his usual place of employment.

There remain a number of areas of uncertainty with respect to the calculation of "hours worked". The Guidelines suggest that if an employee arrives to work early to avoid busy traffic, or stays late for personal reasons, then this would not be "hours worked" as he or she is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training. However, there is nothing to suggest that the employer does not agree to the employee arriving to work early to staying late. It is also not clear if the position would change if the employee carries out some work during this time or in what circumstances this would be "hours worked". Further clarification on this is required.

Wages

The second stage is to ascertain whether the wages payable to the employee for the wage period meet the minimum wage.

The definition of "wages" in the MWO is based on the definition of "wages" in the *Employment Ordinance* (Cap 57). Therefore it will include a wide range of payments including salary, allowances paid in cash, tips, overtime, contractual commission and some regular contractual bonuses (although annual bonuses whether contractual or discretionary will be excluded).

The MWO provides that payments for time that is not "hours worked" (see above) are not "wages" for the purposes of the MWO. This exclusion was originally understood to refer to leave payments, for example, annual leave, sick leave, paternity leave and maternity leave. However, the Guidelines go further to provide that "rest day pay" and "meal break pay" will also not be included as "wages".

Therefore, if an employee is paid wages by the calendar day (as opposed to working day) then the payment made for the rest days (usually Saturday and/or Sunday) will be excluded from "wages".

Example

An employee is paid HK$7,000 per month. The employment contract provides that all days of the month are paid, including rest days on Sundays. The rest day pay for March will be:

HK$7,000 / 31 days × 4 days = HK$903.2

If an employee is paid for his/her meal breaks and such breaks are agreed between the employer and employee as time that is not "hours worked", the payment made for the meal break will be excluded from "wages". However, the Guidelines suggest that even if no work is performed, so long as the employer and the employee agree that the relevant time is considered 'hours worked', the meal break pay will be "wages".

Example

An employee is paid HK$6,500 per month and the contract provides for working hours of Monday to Friday, 9:00am to 5:00pm excluding one hour meal break which is paid. The meal break pay for March will be:

HK$6,500 / 31 days / 8 hours × 1 hour × 22 days = HK$576.6

Despite wide spread demands from labour unions and employers, the Guidelines have left the key issue of whether meal breaks and rest days are to be paid unresolved. In practice, most employment contracts do not state clearly whether wages are payable by the calendar day or working day or whether meal breaks are paid or unpaid or included or excluded from hours worked. In the absence of guidance on this issue, employers should exercise caution in unilaterally amending employment contracts which are currently silent on this issue to provide that rest days and/or meal breaks are unpaid.

A contractual entitlement to payment may have arisen through custom and practice. For example, when an employee takes unpaid leave for one day, how is that one day's pay calculated? When an employee's employment ceases, how is pay for accrued but untaken annual leave calculated? If an employee is entitled to overtime, how is one hour's pay calculated, i.e. is it by dividing by the total number of hours in the working day including the lunch hour or excluding the lunch hour? As

a further example, if an employer treats all days of the month as fully paid (i.e. paid for 365 days a year) as is customary in Hong Kong and as adopted by the Labour Department, the rest day will be paid.

Even if there is no implied term through custom and practice, an amendment to provide that rest days and meal breaks are unpaid could damage staff morale and labour relations. However, if employers provide in their contracts that rest days and/or meal breaks are paid, this could cause a lower paid employee's wages to fall below the SMW level.

Employers will also need to keep in mind the calculations under the *Employment (Amendment) Ordinance*. By stating that rest days are unpaid, employers will be dividing by the number of working days (260 days if Monday to Friday) when calculating employees' average daily wages for the purposes of the relevant statutory entitlements. Therefore, for higher paid employees for whom the MWO is not an issue, employers may be better stating that rest days are paid.

Wage period

The wage period for the purposes of the MWO will be the period in respect of which wages are payable to an employee for work done or to be done under the contract of employment. Unless provided otherwise, the period must be taken to be one month. One possible approach which has been considered to assist with employees who are paid on an incentive/commission basis and who may receive very little salary (if any) during some months and a very large amount in other months depending on incentive/commission earned, is to change the wage period to a longer period, for example, three months. Payments made on a monthly basis could be allowances paid in anticipation of wages earned at the end of the wage period. However, the Labour Department's concern with this approach is that the monthly payments may lead to a variation to the contractual wage period through custom and practice resulting in a one month wage period as before (see "Commission and overtime" for discussion on commission).

Commission and overtime

It is our view that the general principle for MWO purposes is that overtime and commission payment should constitute "wages" in the

wage period in which they are due to be paid under the employment contract. The wage period may, therefore, be different from the period in which the amounts were earned and could be different from the period in which they are in fact paid (e.g. if the wages are paid in advance or in arrears).

There is an express limited exception for commission payments (but not for overtime). Sec 6(5) of the MWO provides that where commission is paid at any time after the first seven days of a wage period (but before the end of the 7th day immediately after that period), it must be counted as part of the wages payable in rest of that period irrespective of when the work is done or the commission is otherwise payable under the contract of employment. However, it is important to note that the employee must agree to this before the payment is made. While, in practice, an employee is unlikely to refuse to agree to an advance payment of commission, a well informed employee may be reluctant to waive a future commission entitlement if he or she calculates that he or she would be entitled to "additional remuneration" in the current wage period to meet the SMW level.

It is not clear from the MWO and the Guidelines whether an employer can obtain the employee's agreement for the purposes of sec 6(5) in advance by way of a term in the employment contract. The Guidelines do not clarify this point.

Consequences of a failure to pay the minimum wage

If the wages payable to an employee in respect of a wage period are less than the minimum wage, the contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period.

There is a line of argument that the rest day pay and meal break pay could constitute this additional remuneration. This is on the basis that the sec 10(1) of the MWO assumes that no other remuneration (other than "wages") is payable under the contract and, therefore, these amounts could constitute "additional remuneration" as required by sec 10(1).

In discussions with the Labour Department, they have not agreed with this approach and maintain that "additional remuneration" must have the same character as "wages" (i.e. not be payments for time that is not "hours worked"). This argument may have to be considered by the courts in due course.

Further, a failure to pay the minimum wage amounts to a breach of the wages provisions in the *Employment Ordinance*. According to the *Employment Ordinance*, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when they become due is liable to prosecution and, upon conviction, to a fine of HK$350,000 and to imprisonment for three years.

Record-keeping obligations

The wage and employment records kept by an employer under the *Employment Ordinance* (see ¶13-030 "Record keeping") should include the total number of hours (including any part of an hour) worked by an employee in a wage period if:

- the SMW applies to the employee; and
- the wages payable in respect of that wage period are less than HK$14,100 per month. The threshold was raised from HK$13,300 per month (previously in place from 1 May 2015 to 30 April 2017) and prior to that, HK$12,300 per month (previously in place from 1 May 2013 to 30 April 2015).

The Guidelines make it clear that an employer is required to determine in each individual wage period whether an employee's wages will be less than the equivalent of HK$14,100 per month. An employer is not entitled to calculate an average across several wage periods. "Wages" for the purposes of the record keeping obligations will be calculated in the same way as set out above. Therefore, an employee who is normally paid wages of more than HK$14,100 per month, could fall below this threshold in a given month on the basis of public holidays in a month or if the employee takes, for example, any annual leave, sick leave or maternity leave in that month.

As a result, an employer may be intermittently required to keep records of "hours worked" for employees who are normally paid well over HK$14,100 a month. From our experience, employers are dealing with this by: deciding to keep records of hours worked by each employee, keeping a record of hours worked for employees earning below a certain level (above HK$14,100); or monitoring leave arrangements so that record keeping arrangements can be put in place in relation to an employee who takes a long period of leave. The obligation to keep records is a strict liability obligation. Therefore, having a "reasonable excuse" will not be defence. The penalty for non-compliance is HK$10,000 per offence. The Labour Department has indicated that one-off failures to record "hours worked" may be overlooked if an employer is otherwise compliant with the MWO. However, employers should keep in mind employees who, on termination, could use the failure to comply with the record keeping obligations as a negotiating tool to demand a higher termination payment.

Application of MWO

The MWO applies to all employees except for certain specified categories.

The following categories of employees are excluded from the protection of the MWO:

- persons to whom the *Employment Ordinance* does not apply;
- domestic workers;
- students undertaking internships necessitated by their curricula (Interns);
- work experience students under the age of 26 (Work Experience Students); and
- people with disabilities.

The provisions with respect to the exclusion for Interns and Work Experience Students are complex. We have set out below a flowchart which can be followed to ascertain whether an individual falls within the exception or not (see ¶9-190 "Flowchart: Application of the Minimum Wage Ordinance on student interns and work experience students").

With respect to the provisions for people with disabilities (PWDs), it is recognised that PWDs may encounter employment difficulties as their productivity may be impaired by their disabilities. The MWO therefore provides for special arrangements for those PWDs in order to mitigate any potential risk that the MWO may have on their employment opportunities. Under the MWO, PWDs whose productivity is impaired by their disability may undergo an assessment. The purpose of the assessment is to ascertain whether the statutory minimum hourly rate will apply or whether a rate which is proportional to the degree of their productivity should be used instead. There are specific requirements in relation to different categories of PWDs. For those PWDs who have undergone a trial period of employment, the applicable minimum hourly wage rate is set at 50% of the prescribed minimum hourly rate. In relation to employees with a disability and whose degree of productivity has been assessed, the applicable hourly rate is derived by multiplying the prescribed minimum hourly wage rate by the employee's assessed degree of productivity as stated in the certificate of assessment. For those PWDs who have elected to have an assessment made in respect of their degree of productivity in performing the work required under their contract of employment and continue to be employed to do the same work for the same employer, until the end of the day on which the assessment of their degree of productivity is completed, the hourly rates applicable to them are the percentage of the prescribed minimum hourly wage rate as specified in the option forms signed by them.

Timing and payment of wages

The Ordinance sets out a number of strict provisions in relation to the manner, timing and payment of wages. Compliance with an employer's wage obligations is important because there are potentially severe consequences for failure to pay wages on time. This can possibly extend to criminal convictions and personal liability for directors and officers of the company (discussed below).

Definition of wages

The definition of "wages" is set out in sec 2 of the Ordinance. This definition is important because it provides the basis for calculating a

number of minimum benefits and entitlements under the Ordinance, apart from an employee's basic wages.

Under sec 2, "wages" is defined as:

> "Remuneration, earnings, allowances, including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment."

The Ordinance specifically excludes 11 categories of payment from this definition:

- the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- any contribution paid by the employer on its own account to any retirement scheme;
- any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- any travelling allowance which is of a non-recurrent nature;
- any travelling allowance payable to the employee to defray actual expenses incurred by him or her by the nature of his or her employment;
- the value of any travelling concession;
- any sum payable to the employee to defray special expenses incurred by the nature of employment;
- any end of year payment, or any proportion thereof, which is payable under the Ordinance;
- any gratuity payable on completion or termination of a contract of employment; or

- any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer.

Tips and service charges

The term "tips and service charges" is specifically defined in relation to wages, and it means:

> "sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are:
>
> (a) paid or derived from payments made by persons other than the employer; and
>
> (b) recognised by the employer as part of the employee's wages."

The question of whether tips and service charges amount to "wages" will depend on the circumstances of each case. In the case of *Lam Pik Shan v Hong Kong Wing On Travel Service Ltd* [2007] HKCU 1286, the Court of First Instance considered whether tips paid to a tour guide from the customer would fall within the definition of "wages" in the Ordinance. In resisting the claim, the employer contended that the employee's basis salary was as set out in the employment contract and that tips were not part of the wages. The court considered whether the employer recognised the tips as part of the employee's wages and concluded, on the facts, that the employer knew that the guide accepted the contract of employment not because of the basic salary but the amount of tips collectable. Further, the employer actively participated in the tips by collecting the head tax in advance of the tour and tips were clearly mentioned in the employee's handbook. As such, the reasonable inference to be drawn was that tips and service charges were part of the employee's wages.

In *Madam Leung Ho and others v Hong Kong Macau Hydrofoil Company Limited*, District Court, Workers Compensation, Case No 190/82, the District Court considered whether the tips earned by a sailor from carrying passengers' luggage fell within the definition of "earnings" under the former *Worker's Compensation Ordinance*. The court decided the point by reference to whether, among other things, the practice of tipping was "notorious, habitual and closely connected with the business", and held that the tips were considered as part of "wages".

In the case of *Li Shuk Man and 35 others v Ho Wai Ling Rebecca trading as Windsor Sauna* HCA 5446/1996, the High Court, having found that the employees of a sauna establishment had been wrongfully dismissed, considered whether the tips paid by patrons should be part of the employees' wages in the calculation of the employee's claims. On the facts of the case, the employees' tips amounted to significantly more than their basic remuneration and there was a system whereby the tips for each massage session would be recorded in the employer's records and would be paid to the employees after an appropriate deduction was made. The court considered the requirement under the Ordinance that in order to be considered to be wages, the tips had to be "recognised by the employer" as part of the employee's wages. The court held that the correct approach was to examine the evidence to see whether:

- the evidence adduced by the employer in denying recognition of the plaintiff's tips as part of their wages was credible; and
- if not, whether the evidence suggested that the employer in fact recognised the tips as part of their wages.

In assessing the evidence, the court adopted the approach of asking whether the tips were "notorious, habitual and closely connected with the business". Considering that the tips were collected, kept and distributed openly in the employer's establishment, the court held that they were, and therefore, should be considered as part of wages.

Commission payments

As set out above, the Ordinance expressly excludes from the calculation of wages any commission which is of a "gratuitous nature" or which is payable only at the discretion of the employer. The question of whether certain commission payments should be included as "wages" for the purposes of statutory entitlements has been considered by the court on a number of occasions.

The legal position pre-2007 was as stated in the case of *Lisbeth Enterprises Limited v Mandy Luk* [2006] HKCU 333. In this case, the Court of Final Appeal addressed the issue of whether commission payments should be included as wages for the purposes of calculating holiday pay and annual leave pay. The court held that commission was not to be included

as "wages" as the Ordinance did not provide for a "workable mode of calculation" in the relevant sections and "wages" could not otherwise include what the employee "might" have earned if the employee had fluid contractual requirements for the entitlement to commission. The court held that from the definition, it was clear that gratuitous or discretionary commission did not form part of wages and therefore did not have to be taken into account when calculating such payments. The position in relation to contractual commission was uncertain. On the facts of the case, the employee's remuneration comprised a low basic salary and contractual commission which was dependent on the achievement of sales targets, and was significantly greater in proportion than her basic salary. At that time, the Ordinance provided that the amount of annual leave pay and statutory holiday pay was an amount equivalent to wages which the employee "would have earned" if she had worked during that leave period, whereas the commission related to what the employee "might have earned" if specific targets were met.

The decision in *Lisbeth* was the subject of considerable criticism as it did not reflect the government's policy intention that "wages" should include contractual commission for the purposes of calculating all statutory entitlements. This was intended to ensure that an employee's take-home pay would not be affected if the employee enjoyed a statutory entitlement. The Labour Department, in response to the case of *Lisbeth*, proposed a legislative amendment to confirm that all components of wages (including contractual commission) would be included in the calculation of statutory entitlements (including payment in lieu of notice). The *Employment (Amendment) Ordinance* (which came into effect on 13 July 2007 — except for sec 16, which came into effect on 13 January 2008) revised the mode of calculating several payments under the Ordinance, including:

- payment in lieu of notice;
- damages for wrongful termination during pregnancy;
- sickness allowance;
- damages for wrongful termination during sickness;
- holiday pay; and
- annual leave pay.

These payments are now to be calculated using the average of the wages earned by an employee during the last 12 months (or where the employee has been employed for a shorter period, that shorter period). The legislative change also reverses the effect of the case of *Lisbeth* and means that commission of a contractual nature is to be included as "wages" for the purposes of calculating statutory entitlements under the Ordinance. However, the legislative change only applies to employment contracts entered into on or after 13 July 2007. For employment contracts entered into before 13 July 2007, the legislative change is only applicable in limited situations including:

- if maternity leave pay, sickness allowance, holiday pay or annual leave pay is payable by an employer to an employee in respect of a wage period, and the last day of the wage period falls on or after 13 July 2007;
- if the due date of the end of year payment payable by an employer to an employee falls on or after 13 July 2007; or
- if the relevant statutory entitlements are payable upon termination of contract and the date of termination falls on or after 13 July 2007.

Non-contractual commissions which are payable at the discretion of the employer are not regarded as wages at all. Of course, in practice, the majority of commission payments are payable on a contractual basis and therefore will be regarded as wages.

Housing allowance

The value of any accommodation, education, food, fuel, light, medical care or water provided by the employer is expressly excluded from the calculation of wages. Therefore, free or subsidised accommodation and other benefits will not be regarded as amounting to wages. However, where an employer pays such benefits in cash (as opposed to "in kind"), they will be included as wages.

Overtime pay

The Ordinance (sec 2(2)) specifically provides that overtime pay shall not be included in calculating the wages of an employee for the purposes of any:

- end of year payment;
- maternity leave pay;
- severance payment;
- long service payment;
- sickness allowance;
- holiday pay; or
- annual leave pay.

However, this exclusion does not apply to overtime, which is:

- of a constant character; or
- the monthly average of the overtime pay over a period of 12 months (or a shorter period if the employee has not worked for 12 months) immediately preceding the "relevant date" in each of those cases exceeds 20% of the employee's average monthly wages during the same period.

For the purpose of determining whether non-recurrent overtime payment exceeds 20% or more of the employee's average monthly earnings, the employee's earnings over the previous 12 months are averaged. The period of 12 months to be taken into account depends on the statutory benefit being paid. In particular, the "relevant date" is defined as follows:

- for the payment of any end of year payment, it is the expiry date of the payment period;
- for the payment of maternity leave pay, it is the commencement date of the maternity leave;
- for severance payment and any long service payment, it is the date of termination (which differs according to whether the employment is terminated by notice or payment in lieu of notice);

- for payment of sickness allowance, it is the first sickness day;
- for the payment of holiday pay, it is the first day of the holiday; and
- for the payment of annual leave pay, it is the first day of the annual leave.

The Ordinance does not define what constitutes overtime payment of a "constant character". In *New Bright Industrial Company Limited v Wong Sau Chi & Ors* [1995] 2 HKC 357, the High Court considered the claims of a number of employees whose positions had been made redundant. The employees rejected the employer's method of calculating their termination entitlements as the employer had calculated compensation based only on the daily basic wage. The High Court considered the finding of the lower Labour Tribunal that the employer should have included as a basis for compensation, amongst other things, overtime pay and overtime allowance for the employees. The court found that regardless of how the parties attempt to label it, it is the substance and nature of the allowance which was to be looked at in determining "wages". The court found that "overtime work" means time during which the employee worked over and above regular hours. Based on the facts of the case, there was no established pattern of regular overtime hours to justify any inference that any particular number of hours outside the specified eight hours per day had, by the conduct of the parties, been adopted as "regular hours". The employees worked overtime irregularly and for an irregular duration. Accordingly, the overtime payments were not regarded as wages for the purpose of calculating the termination payments.

Annual bonus

The Ordinance specifically excludes any end of year payment payable under Part IIA of the Ordinance from the definition of wages. An "end of year payment" is defined to include any annual payment or annual bonus of a contractual nature. As such, a contractual bonus which is not paid annually, for example, a one-off sign-on bonus paid to an employee upon commencing employment may fall within the definition of "wages". This could have a significant impact when calculating an employee's pay for a particular statutory entitlement during the first few

months of employment as the employee's average daily wages could be considerably inflated as a result of the sign-on bonus.

Sum payable to defray special expenses

In the case of *Kwan Siu Wa Becky v Cathay Pacific Airways Ltd* (unrep., LBTC 2827, 2828, 2829/2008, [2009] HKEC 924); (unrep., LBTC 2827/2008, [2009] HKEC 925); (unrep., HCLA 3, 4, 5, 7, 8, 9/2009, [2009] HKEC 1816) the plaintiffs were cabin attendants. The flight attendants sued Cathay Pacific for insufficient payment in lieu of statutory holiday and annual leave pay. During their employment with Cathay Pacific, they were contractually entitled to receive, among other things, an outport allowance. Some of the outport allowance components, such as meals and travelling expenses, were paid to them to cover expenses incurred by them when they stayed overseas between flights.

The issue was whether the outport allowance was "a sum payable by the employee to defray special expenses incurred by them by the nature of this employment" excluded from the definition of wages. The cabin attendants contended that the term "special expenses" in the *Employment Ordinance* denoted something which was of a non-recurrent nature and should be a one-off expenditure pertinent to the nature of the employment. Such contention was rejected by the court since there was nothing in the *Employment Ordinance* which provided that "special expenses" must be non-recurrent in nature. The extra meals and travel expenses which they were likely to incur when they stayed overseas were regarded as special expenses incurred by them due to the nature of their employment. On that basis, the court held that the outport allowance fell within the statutory exception and did not form part of the cabin attendants' wages. The court further held that, even if the payments were pre-determined and non-accountable fixed monthly payments, they could constitute reimbursement of expenses and fall within the statutory exception.

[¶9-030] Remuneration other than wages

The Ordinance provides that an employer may provide an employee other benefits such as food, accommodation and other allowances or privileges in addition to wages as remuneration for the employee's

Annex Workstation Risk Assessment Checklist

	Yes	No	N.A.*	Remarks
Chair				
14. Is the base of the chair stable?	☐	☐	☐	
15. Do the casters allow easy movement of the chair?	☐	☐	☐	
16. Is the seat height adjustable to suit the body size of the user?	☐	☐	☐	
17. Is the backrest adjustable in both height and tilt to provide adequate support to the lower back?	☐	☐	☐	
18. Is the seat pan padded and free from sharp edges?	☐	☐	☐	
19. Do the armrests, if any, allow the user to get close enough to key comfortably?	☐	☐	☐	
Document Holder				
20. Is the document holder, if provided, properly positioned to avoid awkward neck posture and movement?	☐	☐	☐	
Footrest				
21. Is the footrest, if required, stable and provided with a non-slip surface?	☐	☐	☐	
Illumination				
22. Is the lighting level suitable for the work?	☐	☐	☐	
Noise				
23. Is the noise produced by the workstation acceptable?	☐	☐	☐	

Part B : Follow-up Actions

(If a "No" answer is given to any of the above questions, follow-up actions are required.)

_____

_____

_____

Person making the assessment: _____ Date of assessment: _____

Note: *Not Applicable

CHAPTER 16: DISCRIMINATION

Key Practical Takeways

- Discrimination law is evolving slowly in Hong Kong. We still do not have specific legislation covering discrimination on the grounds of age or sexual orientation.
- It is important to look beyond the law at the Codes of Practice and other guidelines issued by the Equal Opportunities Commission (EOC) and other government departments. While these documents are not legally binding, they reflect best practice and will be relevant in any dealings with the EOC, the courts, and the Labour Tribunal.
- Employers are potentially liable for the discriminatory acts of their staff. This is why taking reasonable steps to ensure a workplace free from unlawful discrimination is important to mitigate these liabilities.
- Hong Kong's disability discrimination protection is very extensive compared to other jurisdictions. The statutory position is that all staff will probably be able to successfully argue they fall within the ambit of the Disability Discrimination Ordinance. Whether or not unlawful disability discrimination has taken place will rarely include arguments about whether the claimant is actually disabled under the legislation.
- The Discrimination Law Review conducted by the EOC was completed in March 2016. While the pace of legislative change is invariably slow in Hong Kong, it does indicate an intention to encourage a broader debate about workplace discrimination.

[¶16-010] Overview

The *Sex Discrimination Ordinance* (Cap 480) (SDO), *Disability Discrimination Ordinance* (Cap 487) (DDO), *Family Status Discrimination Ordinance* (Cap 527) (FSDO) and *Race Discrimination Ordinance* (Cap 602) (RDO) (together referred to as the Discrimination Ordinances) prohibit certain forms of discrimination in the workplace and elsewhere.

The Discrimination Ordinances together prohibit direct and indirect discrimination on the following grounds (amongst others) in employment and employment-related activities:

- sex,
- marital status,
- pregnancy,
- disability,
- family status,
- race,
- colour,
- descent, and
- national or ethnic origin

The Discrimination Ordinances also provide protection from sexual harassment, disability harassment, racial harassment, discrimination by way of victimisation and additionally from vilification and serious vilification on the grounds of disability and race.

The *Employment Ordinance* (Cap 57) and Hong Kong *Bill of Rights* also prohibit workplace discrimination, but the former mainly deals with trade union membership whilst the latter only applies to the public sector. The *Employment Ordinance* also makes it unlawful to terminate an employee who is pregnant or on statutory maternity leave or on statutory sick leave.

Generally, the volume of cases in Hong Kong is still very much smaller than in many other jurisdictions. In 2014/2015, statistics of the Equal Opportunities Commission (EOC) indicate that the number of complaints it handled was 716. Out of these complaints, 549 are related to the employment field.

The EOC has issued four Codes of Practice on Employment pursuant to the Discrimination Ordinances. The Codes of Practice are intended to provide guidance to employers on how to comply with their obligations under the Discrimination Ordinances. The Discrimination Ordinances (except the FSDO) provide that a failure to observe any provision of a

Code of Practice will not, of itself, create liability in any proceedings. However, in any proceedings under each of the Discrimination Ordinances, any Code of Practice issued will be admissible in evidence and the court can consider the terms of the Code of Practice if it thinks it will be relevant to any question arising in the proceedings.

[¶16-020] Scope of anti-discrimination laws in Hong Kong

The international context

The *International Covenant on Civil and Political Rights 1966* (Covenant), which came into operation in 1976, promotes equality and seeks to eradicate discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. It also requires signatories to adopt such legislative or other means necessary to give effect to the rights recognised in the Covenant.

The domestic context

Article 39 of the Basic Law adopts the provisions of the Covenant and other international conventions. It states:

> "The provisions of the *International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.
>
> Such restrictions shall not contravene the provisions of the preceding paragraph of this Article".

The Discrimination Ordinances have been enacted to address some of the types of discrimination outlined in the Covenant.

The employment-related provisions of the SDO came into effect on 20 December 1996. The SDO is based on the English *Sex Discrimination Act*

1975 but the provisions of sexual harassment are modelled on the *New South Wales Anti-Discrimination Act 1977*.

The SDO established the EOC, which is the statutory body responsible for the implementation of the Discrimination Ordinances and the elimination of certain forms of discrimination in Hong Kong. The EOC is empowered to work towards the elimination of discrimination and harassment, and issue codes of practice.

The employment-related provisions of the DDO also came into effect on 20 December 1996. The FSDO came into effect on 21 November 1997 and the RDO came into effect on 10 July 2009.

[¶16-030] What are the prohibited grounds of discrimination?

Sex Discrimination Ordinance (Cap 480) (SDO)

The SDO renders unlawful acts which discriminate against persons on the grounds of sex, marital status and pregnancy. "Marital status" means "the state or condition of being (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; or (e) widowed". These forms of discrimination may be direct or indirect. Sexual harassment and victimisation are also unlawful.

Following the passing of the *Sex Discrimination (Amendment) Ordinance* 2014, effective from 12 December 2014, the SDO was amended to render any sexual harassment by customers against providers or prospective providers of goods, facilities or services unlawful.

Apart from employees working in Hong Kong, the application of this protection was also specifically extended to cover sexual harassment between service providers and customers which takes place on a Hong Kong registered ship or aircraft while outside Hong Kong. This means that flight attendants and crew members on ships are also protected while they are performing their duties on aircrafts or ships outside Hong Kong.

Disability Discrimination Ordinance (Cap 487) (DDO)

The DDO renders unlawful acts which discriminate against a person on the ground of disability.

"Disability", in relation to a person, means:

- total or partial loss of the person's bodily or mental functions;
- total or partial loss of a part of the person's body;
- the presence of organisms causing disease or illness in the body;
- the presence of organisms capable of causing disease or illness in the body;
- the malfunction, malformation or disfigurement of a part of the person's body;
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour.

Disability includes a disability that: presently exists; previously existed but no longer exists; may exist in the future; or is imputed to a person.

Disability discrimination may be direct or indirect. Harassment, victimisation and vilification on the ground of a person's disability are also unlawful.

In addition, the DDO provides that disability discrimination includes:

- discrimination based on the fact that a person is accompanied by, or possesses, a palliative or therapeutic device or auxiliary aid (such as a Braille writing device, hearing aid, oxygen unit or wheel chair) or any matter related to this fact (sec 9 and Schedule 2 of the DDO);
- discrimination based on the fact that a person is accompanied by an interpreter, reader, assistant or carer who provides interpretive, reading or other services to that other person

because of the disability, or any matter related to this fact (sec 10 of the DDO); and

- discrimination on the ground of the disability of the person's associate.

An "associate", in relation to a person, includes: a spouse of the person; another person living with the person on a genuine domestic basis; a relative of the person; a carer of the person; and another person who is in a business, sporting or recreational relationship with the person.

In the case of *L v Equal Opportunities Commission* (unrep., DCEO 1, 6/1999, [2002] HKEC 1390), the District Court noted that the definition in the DDO is broad and that just about any illness would do. They stated that the loss of function or the effect of the disorder on thought processes or emotions need not be substantial or long-term. The way is open for claims based on minor and temporary disability which a seriously disabled person, such as a paraplegic, would no doubt find ludicrous; but that is the way the legislation is drawn.

Family Status Discrimination Ordinance (Cap 527) (FSDO)

The FSDO renders unlawful acts which discriminate against persons on the ground of family status. "Family status" means the status of having responsibility for the care of an immediate family member. An immediate family member is a person who is related to the person by blood, marriage, adoption or affinity. Family status discrimination may be direct or indirect. Victimisation on the ground of a person's family status is also unlawful.

Race Discrimination Ordinance (Cap 602) (RDO)

The RDO renders it unlawful to discriminate against a person on the ground of race. The definition of race in the RDO includes race, colour, descent or national or ethnic origin. The RDO also prohibits discrimination on the ground of the race of a person's near relative which is defined as (a) the person's spouse; (b) a parent of the person or of the spouse; (c) a child of the person or the spouse of such a child; (d) a brother or sister (whether full blood or half blood) of the person or of the spouse or the spouse of such a brother or sister; (e) a grandparent

of the person or of the spouse; or (f) a grandchild of the person or the spouse of such a grandchild.

Sec 8 of the RDO excludes certain grounds from the definition of race which include:

- that the person is or is not an indigenous inhabitant of the New Territories;
- that the person is or is not a person who was in 1898 a resident of an established village in Hong Kong or a person descended through the male line from such person;
- that the person is or is not a Hong Kong permanent resident;
- that the person has or has not the right of abode or the right to land in Hong Kong;
- that the person is or is not subject to any restriction or condition of stay imposed under the *Immigration Ordinance* (Cap 115);
- that the person has or has not been given permission to land or remain in Hong Kong under the *Immigration Ordinance*;
- the length of residence in Hong Kong of a person; or
- the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalisation of or in that country or place.

Race discrimination may be direct or indirect. Harassment, victimisation, vilification and serious vilification on the ground of a person's race are also unlawful.

[¶16-040] What is direct discrimination?

Definition

Direct discrimination occurs when a person, in circumstances relevant for the purposes of any of the provisions of one of the Discrimination Ordinances, treats another person less favourably on the grounds of that other person's sex, marital status, pregnancy, disability (or the person's associate's disability), family status or race (or the person's near

relative's race) than he/she would treat someone without the specified characteristic (in the case of disability, pregnancy or family status) or someone with the opposite or different characteristics (in the case of sex, marital status or race).

Direct discrimination can occur at any point during the employment cycle, including decisions about whether to employ, conditions of employment, training opportunities, promotion decisions and separation agreements.

Not all direct discrimination is unlawful. For example, there is currently no legislation that makes discrimination on the basis of age or sexual orientation (although please see ¶16-190 below on the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation) unlawful. However, it is important that employers do not take an unduly simplistic approach.

While discrimination on the basis of age, for example, is not currently unlawful, applying criteria which is age-related could amount to indirect sexual discrimination if women with more fragmented careers (due to child care responsibility) are adversely affected.

In addition, the EOC commenced the Discrimination Law Review (Review) in March 2013, which involved reviewing the four existing anti-discrimination ordinances and submitting recommendations for amendments to the Hong Kong Government. The EOC completed the Review and issued the reports setting out its submissions to the Government, on 29 March 2016.

In the reports, the EOC stated that its recent research studies revealed that discrimination against older and younger employees, as well as lesbian, gay, bisexual, transgender and intersex individuals, is widespread and significant. This prompted further recommendations regarding the expansion of protected characteristics to include characteristics such as age, sexual orientation, gender identity and intersex status. The EOC recommended that the Government should start conducting a large scale public prevalence survey of age discrimination to collect public views regarding the issue. Also, the Government should consider conducting a public consultation on introducing anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status. The focus of which should be on the scope and possible content, instead of whether legislation should be introduced.

In anticipation of future legislative reform arising from the Review, and in line with the practices and culture of their businesses which operate in jurisdictions with more extensive anti-discrimination legislation, many global organisations in practice implements an equal opportunities policy which include more protected characteristics such as age, sexual orientation, gender identity, intersex status, religion etc.

Proving direct discrimination

As stated by the Court of Final Appeal in *Secretary for Justice & Others v Chan Wah & Others* [2000] 3 HKLRD 641, in determining whether a particular arrangement involves sex discrimination, the court should adopt the "but for" test applied in *R v Birmingham City Council; ex parte Equal Opportunities Commission* [1989] 1 AC 1155. This test was applied in *James v Eastleigh Borough Council* [1990] 2 AC 751. In that case, the court considered the *Sex Discrimination Act 1975* in England which the SDO is based upon. Lord Goff said:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned... is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex".

The courts have consistently applied the "but for test" to claims involving other prohibited grounds.

Applying the "but for test" requires identification of a real or hypothetical comparator without the specified characteristics (for example, not disabled or not pregnant) or with the opposite or different characteristics who is in the same, or not materially different, circumstances.

It was not necessary for a person to have an intention or motive to discriminate before he/she can be held liable under the Discrimination Ordinances. It is sufficient to bring a claim if the person did not have an intention to discriminate, but in fact discriminated another person on the ground of a protected characteristic.

The Discrimination Ordinances specify that if an act is done for two or more reasons and one of the reasons is the prohibited ground (whether or not it is the dominant or substantial reason for doing the act) then the act shall be considered as having been done for the prohibited ground.

The District Court in *Lam Wing Lai v YT Cheng (Chingtai) Ltd* [2006] 1 HKLRD 639 approved the application of a number of principles and guidance with respect to the burden of proof in discrimination claims:

- the burden of proof is on the applicant who complains of discrimination to prove his or her case. If the applicant does not prove the case on the balance of probabilities then he or she will fail;
- it is unusual to find direct evidence of discrimination as few employers will be prepared to admit such discrimination even to themselves. In some cases, discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in";
- the outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the courts. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw, for example, from a failure to reply to a questionnaire;
- if the court is able to find less favourable treatment as well as a difference in sex, race, etc, this will often point to the possibility of discrimination. In such circumstances, the courts would look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the courts to infer that the discrimination was on a prohibited ground; and
- it is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence, the courts should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the plaintiff to prove his or her case.

Direct sex discrimination

Helen Tsang v Cathay Pacific [2001] 4 HKC was a case on direct sex discrimination. The plaintiff, who was employed by Cathay as a flight attendant, sued Cathay for sex discrimination on the ground that she was forced to retire at the age of 45 whilst the male flight attendants were allowed to retire at the age of 55. The plaintiff's employment commenced in 1979 at which time the retirement ages under the Cathay Pacific scheme for male and female flight attendants were different. In 1993, Cathay changed its retirement scheme so that the retirement age for male and female flight attendants was both revised to 45. Flight attendants who were employed before 1993 were allowed to choose either to stay with their scheme or change to the new scheme. The plaintiff chose to continue with her plan and sought extension of her employment until she was 45 when her employment was terminated by Cathay.

The plaintiff claimed damages and a declaration under the SDO arguing that Cathay's original retirement scheme with different retirement ages for male and female cabin attendants was discriminatory and that she was discriminated against because of her sex.

The Court of Appeal decided that the SDO applied to the plaintiff's contract notwithstanding that it was made before the SDO took effect in 1996. In determining whether sex discrimination did occur, the court compared the plaintiff with the male flight attendants who were employed by Cathay over the same period of time. The court found that the male flight attendants were able to choose to stay with the old plan and retire at the age of 55 whilst the plaintiff, being a female flight attendant, could not. Therefore, the plaintiff was discriminated against because of her sex, and sex discrimination did occur.

Direct pregnancy discrimination

Establishing direct pregnancy discrimination requires a comparison between the plaintiff and someone who is not pregnant but who is in the same or not materially different circumstances. For example, in *Chang Ying Kwan v Wyeth* [2001] 2 HKC 129 the District Court found that the employer had discriminated against an employee when it attempted to force her to resign after she notified the employer of her pregnancy, and then victimised her after she had complained to the EOC. Evidence

was produced which showed that the employer treated other pregnant employees well.

However, the court held that no inferences could be drawn from this as the appropriate comparator was an employee who was not pregnant in the same, or not materially different, circumstances and it was held by the court that the employer would have treated the comparator better than the plaintiff (for example, by putting in place steps to allow for a proper evaluation before making a decision to terminate an employee's employment).

In the case of *Lam Wing Lai v TY Cheng (Chingtai) Ltd* [2006] 1 HKLRD 639 the plaintiff brought a claim for pregnancy and family status discrimination as well as discrimination by way of victimisation. The plaintiff had taken frequent sick leave during pregnancy and was dismissed a week after returning from her maternity leave. The employer claimed that the reason for her dismissal was that a customer had complained about her. The court inferred discrimination on the basis that the employer failed to offer a reasonable explanation for her dismissal and the court considered evidence that the plaintiff had received a salary increase and passed her probation period to show that the employer had not considered the plaintiff's performance to be an issue previously.

In *Yuen Wai Han v South Elderly Affairs Limited* [2003] HKDC86 129, the District Court held that the plaintiff was discriminated against by the defendant because of her pregnancy. The defendant rescinded the plaintiff's contract of employment after the plaintiff had accepted the offer when it found out she was pregnant. The District Court found that the plaintiff's pregnancy was at least one of the reasons for the defendant to rescind her employment contract. The plaintiff was awarded HK$155,000 in damages which included loss of income, damages for injury to feelings and punitive damages. On appeal, the Court of Appeal considered that it was not proper for the District Court to factor in the Defendant's malicious conduct in making unfounded allegations against the Plaintiff to the police when calculating both damages for injury to feelings and punitive damages. In light of this, the amount of punitive damages was reduced to HK$10,000, thereby reducing the total damages to HK$145,000.

In *Lau Hoi Man Kathy v Emaster Consultants Ltd* DCEO11/2012, unreported, the plaintiff was initially employed under a one-year contract. Close to

the end of such contract, the plaintiff entered into a second contract which extended her period of employment under the first contract continuously for another nine months. Shortly after signing the second contract, the plaintiff notified the defendant of her pregnancy. The defendant cancelled the second contract the next day and offered a third contract to the plaintiff. The third contract was the same as the second contract, but the commencement date of the non-month period was postponed by one day, creating a one-day break between the first contract and the third contract. The defendant then refused to give paid maternity leave to the plaintiff on the basis of such one day break. The court considered that but for the plainitff's pregnancy, there would not have been a one-day break between the contracts and the plaintiff would have been entitled to paid maternity leave. Therefore, it ruled in favour of the plaintiff and determined that the cancellation of the second contract and the one day break were "less favourable treatment" under the SDO.

In addition, the *Employment Ordinance* (Cap 57) (Ordinance) provides that it is unlawful for an employer to terminate the employment of a female employee who is not on a probationary period (up to 12 weeks) during the period between which she provides notification of her pregnancy and returns from maternity leave (sec 15(1) of the Ordinance) except in circumstances where the employer is entitled to terminate the employment without notice under sec 9 of the Ordinance. An employer who dismisses an employee outside of the permitted circumstances commits an offence and is liable to pay compensation to the employee.

This is covered in more detail in ¶20-060 "Summary dismissal under the *Employment Ordinance* (sec 9)".

The Ordinance also provides that upon production of a medical certificate with an opinion as to a pregnant employee's unfitness to handle heavy materials, or to work in places where gas injurious to pregnancy is generated, the employee may request her employer to refrain from giving her work which is heavy, hazardous or harmful during her pregnancy period (sec 15AA of the Ordinance).

Direct disability discrimination

M v Secretary for Justice [2009] 2 HKLRD 298 involved a claim brought by a former civil servant for disability discrimination and harassment. The

plaintiff had resigned after being told that his employment would be terminated and that it was in his interests to leave. The plaintiff suffered from Generalised Anxiety Disorder which he claimed caused problems with his job performance. It was accepted by the Court of Appeal that the plaintiff had a disability at the material time but that the Government (the defendant) did not have knowledge of his condition. However, the Court held that in certain circumstances, it may be entitled to adopt a more objective approach in considering the question of knowledge, but there must good reason for doing so. Assuming that an employee has symptoms which are so obvious that indicate some kind of disability, but the employer turns a blind eye and treats the employee in an unfavourable manner, then such recklessness could be sufficient to hold the employer liable for direct discrimination, subject to the satisfaction of the other requirements.

In *Siu Kai Yuen v Maria College* [2005] 2 HKLRD, Mr Siu had worked for the school for over 14 years as a teacher. He was dismissed while on sick leave for about two and a half months. The school asserted that his dismissal was on the ground of his absence rather than his disability. The court compared Mr Siu's situation with two hypothetical comparators in similar circumstances i.e. teachers without disabilities having to take leave for similar lengths of time: a teacher on maternity leave and a teacher on jury duty. The school confirmed that they would nonetheless retain the teacher who had taken maternity leave and the teacher who has been on leave for jury duty. Comparing Mr Siu's situation with the two hypothetical comparators, the court ruled that, but for Mr Siu's disability, he would not have been dismissed.

In *K and Others v Secretary for Justice* [2000] HKDC 9 (27 September 2000), the District Court considered discrimination on the basis of the disability of an associate. In that case, two plaintiffs were refused jobs and the third plaintiff was dismissed because the plaintiff's parents had a genetic disability, schizophrenia. All were applying for jobs in the Fire Services Department and Customs and Excise Department. It was held that the departments unlawfully discriminated against the applicants on the basis of disability of an associate. The details of this case are discussed in more detail below.

Example

An employer refused to hire persons who needed to use a wheelchair because the employer thought such persons were more prone to work injuries. Because of this stereotypical assumption, F, a candidate with mobility disability, was refused an opportunity to have an interview. F has therefore been discriminated against on the ground of her disability by being deprived of a chance to have an interview. (Source: DDO Code of Practice on Employment)

Direct family status discrimination

In *Lam Wing Lai v TY Cheng (Chingtai) Ltd*, the court upheld the plaintiff's claim that she had been dismissed because she had responsibility for the care of her child. The court relied upon evidence which included a statement made by her employer prior to her dismissal that she should stay home to take care of her son.

Direct race discrimination

In *Dean Alexander Aslett v Lane Crawford (Hong Kong) Ltd* [2013] HKCU 2714, the plaintiff of European origin alleged that his remuneration package was less favourable than that of his Chinese counterparts and he was given a heavier workload. The District Court considered that with respect to a claim under the RDO, it is not sufficient to prove that the plaintiff has been treated unfavourably but also that he has been so treated due to his race. In this case, the plaintiff in fact stated as part of his own case that the alleged unfavourable treatment was due to his criticism of his manager's work performance (as he was tasked to review his manager's work practice). Further, the court took the view that there was no basis to infer that the difference in the plaintiff's remuneration was a result of his race.

The plaintiff also claimed vilification but he pleaded that it was on the basis of a sexual allegation against him which was later retracted by the defendant. The District Court considered that the basis of such vilification was unrelated to the plaintiff's race.

Given the alleged unfavourable treatment has nothing to do with the plaintiff's racial origin, the District Court held that the plaintiff's claims under the RDO were liable to be struck out.

Example

A person of Pakistani origin who speaks fluent Cantonese and has adopted a Chinese name applies by telephone for a job of a sales person and is invited for an interview. However, because his appearance indicates that he is of Pakistani origin, when he turns up to the interview he is falsely told that someone else has already been hired and the interview is declined. This is less favourable treatment on the ground of race if another job seeker not of Pakistani origin would not have been declined. (Source: RDO Code of Practice on Employment)

[¶16-050] What is indirect discrimination?

Indirect discrimination is defined in the same way in the SDO, DDO, FSDO and RDO. It occurs when a requirement or condition is applied to a person with a protected characteristic or attribute and it is applied equally to persons without that particular characteristic or attribute but has a disproportionate effect on a particular group of persons because of a characteristic or attribute. In addition, this requirement or condition cannot be shown to be justifiable and its application operates to the person's detriment.

Example

It could be unlawful indirect sex discrimination if a company imposes a height requirement for a particular post since it is likely that more men than women are able to comply with this requirement. Further, under the RDO, it could be unlawful for a company for no good reason to stipulate that no employees may wear headgear, or for a company to require applicants for a cleaner job to pass a test in written Chinese when all the job requires is the ability to understand simple oral instructions in Cantonese. In the former example, it would exclude Sikh men who wear a turban in accordance with their ethnic practice from employment with the company. In the latter, the requirement is unjustified and potential applicants of non-Chinese origin will also find it difficult to qualify for the job.

Therefore, in order to demonstrate indirect discrimination, the plaintiff must identify a comparator group to demonstrate that the proportion of the members of the group to which he/she belongs who can comply with the requirement or condition is considerably smaller than the proportion of those from another group who can comply. In the English Court of Appeal decision of *University of Manchester v Jones* [1993] ICR 474, the following was approved as the process the court must follow to determine the pool of comparators:

- identify the challenged criterion for selection;
- identify the relevant population, comprising all those who satisfy all of the other criteria for selection;
- divide the relevant population into groups — one representing those who satisfy the challenged criterion and those who do not;
- predict statistically what proportion of each group should constitute men or women (or different racial groups, the disabled and non-disabled etc);
- determine the actual balances between the two groups; and
- compare the actual with the predicted balances.

The criterion is proved discriminatory if women (or a racial minority, persons with disabilities etc) are found to be under-represented in the first group and over-represented in the second.

In one of the leading Australian cases (*Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56; (1989) 168 CLR 165 (5 December 1989)), an employer was found to have indirectly discriminated against women in a redundancy termination program. The employer decided to select for redundancy employees whose service with the employer was short, in preference to long serving employees — using the 'last in, first out' principle. While not overtly discriminatory, the employer was found to have acted unlawfully because the number of women who had been hired in the last years before the redundancy program was significantly higher than the number of men. Therefore, by applying the "LIFO" principle, the employer had, in fact, treated the women less favourably.

While the RDO is the only Discrimination Ordinance which clarifies that a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to that objective, this test has been applied in other cases under the SDO, DDO and FSDO (see *Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775).

Example

An employer places a blanket ban on beards for health and safety reasons in a food packaging factory. This is a requirement or condition that indirectly discriminates ethnic groups such as Sikhs (who by their custom have to keep a beard), when compared to other racial groups, if information shows that the blanket ban is not justifiable, for example, because face masks could be used satisfactorily to meet health and safety standards. However, the blanket ban is justifiable if information shows that face masks could not satisfactorily meet health and safety standards. (Example taken from RDO Code of Practice on Employment)

For a plaintiff to be successful in a claim for indirect discrimination, it is not necessary for him or her to prove that the employer had an intention to discriminate. However this may be relevant to determining whether the plaintiff is entitled to any compensation.

[¶16-060] Harassment

The SDO, DDO and RDO prohibit harassment.

Sexual harassment

The SDO prohibits two types of sexual harassment. The first consists of any unwelcome sexual behaviour; or other unwelcome conduct of a sexual nature in relation to the harassed person in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated. It includes unwelcome sexual advances, unwelcome requests for sexual favours, and other unwelcome conduct of a sexual nature. A series of incidents may constitute sexual harassment. However, depending on the circumstances,

it is not necessary for there to be a series of incidents; one incident can be sufficient.

The second type is "hostile environment" harassment and occurs when a person alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for an individual.

The SDO Code of Practice on Employment includes a number of examples of behaviours which can be regarded as sexual harassment:

- unwelcome sexual advances e.g. leering and lewd gestures; touching, grabbing or deliberately brushing up against another person;
- unwelcome requests for sexual favours e.g. suggestions that sexual co-operation or the toleration of sexual advances may further a person's career;
- unwelcome verbal, non-verbal or physical conduct of a sexual nature — e.g. sexually derogatory or stereotypical remarks; persistent questioning about a person's sex life; and
- conduct of a sexual nature that creates a hostile or intimidating work environment, e.g. sexual or obscene jokes around the workplace; displaying sexist or other sexually offensive pictures or posters.

In *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKDC 1, the District Court held that a male student had sexually harassed a female student by taking a video footage of the plaintiff in her on-campus bedroom.

In *Ray Chen v Taramus Rus & Anor* DCEO 2/99, unreported, a male plaintiff alleged he had been sexually harassed at work by a female colleague. The harassment was alleged to include unwelcome personal emails, unsolicited invitations to social outings and unwanted physical contact. The District Court found that the plaintiff was not harassed, but rather, was a willing participant in a consensual personal relationship. To be unlawful, the sexual conduct complained of must be "unwelcome". If advances are solicited, procured, or invited by a plaintiff, then it cannot be said that such advances are unwelcome.

Wong Kwok Mui Enoch v Lee Yuen Tim DCEO 9/99, unreported, was another case where the District Court found there was no "unwelcome" behaviour that may otherwise constitute sexual harassment. In that case, the defendant had telephoned, touched and discussed private issues with the plaintiff. In determining whether or not the behaviour was unwelcome, the court considered the character of the plaintiff. It was held that the plaintiff was a confident person who had demonstrated an understanding and application of her rights in various areas in the past. In circumstances where the defendant denied any impropriety and the court found that the plaintiff could have informed the defendant that his actions were unwelcome but did not, the defendant's actions could not be said to have been unwelcome.

In *L v Burton* DCEO 15/2009, unreported, the plaintiff was interviewed for and offered a position with a marketing firm, for which the defendant was the general manger. Prior to the commencement of and during the plaintiff's employment, the defendant made multiple sexual advances towards her and touched her inappropriately on a number of occasions. The plaintiff rejected the defendant's advances every time. After a number of rejections, the defendant's attitude towards the plaintiff deteriorated and finally he dismissed her, at which time he also forcefully grabbed and bruised the plaintiff's wrist. The District Court found that there was a clear case of sexual harassment based on the plaintiff's undisputed evidence. The plaintiff was awarded damages for injury to feelings and loss of earnings. The Court considered that compensatory award was insufficient to punish the defendant in this case and further awarded HK$20,000 in exemplary damages to the plaintiff. In this case, the court also awarded legal costs to the plaintiff as she had conducted the proceedings in a reasonable manner while the defendant refused to settle or apologise for his wrongful conduct. Further, the court took the view that the defendant should have known that his conduct was wrong at the outset.

In *A v Chan Wai Tong* DECO 7/2009, unreported, the plaintiff and the defendant worked together in the Food and Environmental Hygiene Department (FEHD). The plaintiff complained to the FEHD that the defendant sexually harassed her by making sexual remarks, physical contacts and other unwelcome conducts of a sexual nature against her. The FEHD conducted an internal investigation but the plaintiff's case

was found to be unsubstantiated. The plaintiff persisted and brought her claim to the court. The defendant denied the allegation of sexual harassment and claimed that the plaintiff made a complaint against him because she wanted to revenge for his gossiping with other colleagues about her relationship with one of her supervisors. The court found the defendant committed unlawful sexual harassment and rejected his defence that the plaintiff brought a claim to retaliate against him. In relation to the results of the FEHD's internal investigation, the court stated that the results of the investigation did not impact its ruling in this case as the investigation adopted the more stringent criminal standard of proof of "beyond all reasonable doubt" than the "balance of probability" standard used by the court. In this case, the court awarded exemplary damages to punish the defendant as he completely fabricated his defence. The plaintiff was also awarded costs as the defendant refused to attempt conciliation and made a completely fabricated defence.

Disability harassment

Disability harassment is unwelcome conduct towards an employee in relation to his/her disability in circumstances where a reasonable person would have anticipated that the person being harassed would feel offended, humiliated or intimidated. Name calling and mimicking gestures are common examples of disability harassment.

Whilst not an employment case, in *Ma Bik Yung v Ko Chuen* (referred to below) it was held that a taxi driver had unlawfully harassed a wheelchair bound passenger under the DDO by making comments such as "do you think you are superior in a wheelchair" and "get out of the car if you cannot manage the wheelchair".

Racial harassment

Similar to the SDO, the RDO defines two types of harassment. The first is unwelcome conduct harassment where a person engages in unwelcome conduct (which may include an oral or a written statement) towards another person on the ground of that other person's race or that person's near relative's race, in circumstances where a reasonable person would have anticipated that the other person would be offended, humiliated

or intimidated. As before, there is no need for there to be an intention or motive to offend, humiliate or intimidate for there to be harassment.

The second form of harassment is hostile environment harassment where a person engages, on the ground of another person's race or that person's near relative's race, in conduct alone or together with other persons that creates a hostile environment for that person.

The RDO Code of Practice on Employment provides a list of types of behaviour which can be regarded as harassment on the ground of race. These include:

- racially derogatory remarks or insults, for example, name calling;
- displaying of graffiti or slogans or other objects offensive to certain racial groups;
- racist jokes, banter, ridicule or taunts, for example, laughing at the accent or habits of people belonging to certain racial groups;
- using a disparaging or offensive tone when communicating with people on the ground that they belong to certain racial groups;
- ostracising people because of their racial group;
- imposing excessive workloads or unrealistic performance targets on people on the ground of race; and
- unnecessarily picking on individuals from particular racial groups.

[¶16-070] Victimisation

The Discrimination Ordinances protect individuals from discrimination by way of victimisation. Discrimination by way of victimisation happens if a person treats another person less favourably than other people by reason of that person (or a third person) having done or intending to, or being suspected of having done or intending to:

- bring proceedings under one of the Discrimination Ordinances;