



**Issue 2011.3**

**Newsflash** ..... 1

**Employers and Employees may have different notice periods** ..... 1

**Top 10 questions to ask when you HIRE or FIRE an employee in Hong Kong** ..... 3

**Alarming Trend Regarding Employment of Expatriates in Indonesia** ..... 3

**Minimum Wage Update** ..... 4

**MPF Update** ..... 4

**Newsflash**

On 6 December 2011, the Chief Executive ordered that the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2011 be introduced into the Legislative Council. The Bill aims to introduce a new statutory regime to regulate intermediaries' sales and marketing activities in preparation for the Employee Choice Arrangement (ECA) which is expected to become effective in 12 months time. Readers will recall that the implementation of the ECA was delayed by the MPFA as there was call for enhanced protection of scheme members' interests.



*Seasons' Greetings*  
The Partners and Staff of Deacons Human Resources & Pensions Practice Group wish you a happy festive and a prosperous new year.

**Employers and Employees may have different notice periods**

Nothing in Employment Ordinance prohibits different notice periods required for employers and employees.

**Kwong Wai Ling Candy vs. Hotel Panorama o/b Hotel Panorama Company Ltd (HCME1/2011)**

The Plaintiff's employment contract with the Defendant commenced on 16 August 2010. The first 6 months of employment was treated as the probation period. During the Plaintiff's 5th month of service, the Defendant served termination notice on the Plaintiff terminating her employment the following date by making payment in lieu of notice of 7 days.

The Plaintiff claimed against the Defendant for payment in lieu of notice of 1 month.

**a. The Employment Contract**

It was provided in the Plaintiff's Employment Contract that:-

*"21. Termination of Employment. The Employee's employment may be terminated by the Employer for any of the following reasons:*

.....

*(b) without cause, upon giving the notice referred to in the Employment Ordinance of Hong Kong;*

22. Notice. Should the Employee choose to resign their position, Employee must provide Employer with a minimum notice period of one (1) month, unless otherwise agreed by both parties.”

#### **b. The Employment Ordinance**

Section 6(3) of the Employment Ordinance provides that:-

*“Where in any contract of employment, whether in writing or oral, it has been expressly agreed the employment is on probation and the contract does not make provision for the length of notice required for its termination, such contract may be terminated:-*

.....

*(b) by either party at any time after the first month of such employment by giving to the other party notice of not less than 7 days.”*

Section 6(3A) of the Employment Ordinance provides that:-

*“Where in any contract of employment, whether in writing or oral, it has been expressly agreed that the employment is on probation and the contract makes provision for the length of notice required for its termination such contract may be terminated –*

.....

*(b) by either party at any time after the first month of such employment by giving to the other party notice of the agreed period, but no less than 7 days.”*

Section 70 of the Employment Ordinance provides that:-

*“Any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void.”*

#### **c. Small Claims Tribunal**

The Plaintiff’s claim was first heard in the Small Claims Tribunal. The adjudicator of the Small Claims Tribunal noted that under clause 22 of the Employment Contract, in case of resignation, the Plaintiff was required to serve at least 1 month’s notice on the Defendant. Clause 22 however did not specify the notice period required on the part of the Defendant.

The adjudicator considered that since clause 22 of the Employment Contract already set out the notice

requirement of 1 month, section 6(3)(b) of the Employment Ordinance did not apply, and instead, section 6(3A)(b) should apply. The agreed notice period under clause 22 of the Employment Contract should be 1 month.

The adjudicator considered that although clause 22 of the Employment Contract did not specify that termination notice period required on the part of the employer, when reading clause 21 (b) and clause 22 together, the legal and reasonable interpretation should be that the notice period required on both the employer and the employee shall also be 1 month.

The adjudicator further considered that if an employee was required to serve 1 month’s termination notice, whilst the employer was only required to serve 7 days’ notice, such “unbalance” notice period should be void under section 70 of the Employment Ordinance.

The adjudicator ruled that the termination notice required on the part of the Defendant was 1 month and therefore, it should make payment in lieu of notice of 1 month to the Plaintiff.

#### **d. High Court**

The Defendant appealed against the decision of the Small Claims Tribunal to the High Court.

The Judge of the High Court considered that clause 21 of the Employment Contract only stipulated the notice period required on the part of the employer, and clause 22 only stipulated the notice period required on the part of the employee. If it was the intention of the parties that both the employer and the employee should both serve 1 month’s termination notice on the other party, it was not necessary to have 2 different provisions. Therefore, the Judge considered that the adjudicator of the Small Claims Tribunal had wrongly applied clause 22.

The Judge also considered that the adjudicator had wrongly applied section 6(3A)(b) of the Employment Ordinance as it only applied to the circumstances when there was an agreed termination notice period on the part of the employer. In the present case, as there was no agreed termination notice period on the part of the employer, instead of section 6(3A)(b), section 6(3)(b) should apply, and the Defendant was only required to give a termination notice period of not less than 7 days.

The Judge further confirmed that although the termination notice periods required on the part of the employer and the employee were different, it was not in contravention of the Employment Ordinance.

The Judge allowed the Defendant employer's appeal and concluded that it is only required to give not less than 7 days termination notice on the Plaintiff employee, and therefore, it should make payment in lieu of 7 days' notice to the Plaintiff.

## Top 10 questions to ask when you HIRE or FIRE an employee in Hong Kong

### Hiring

1. Does the employee have a right to work in Hong Kong or does the employee need a **work visa** ?
2. Is the employment offer subject to any **condition precedent** (e.g. satisfactory reference check, obtaining the necessary qualification) ?
3. Is the **recruitment screening and decision making process** fair and free from challenge of discrimination ?
4. Is the employee **free from restrictive covenants** to take up the job ?
5. Is the **personal data** of the candidate/employee collected or dealt with in accordance with Hong Kong law ?
6. Does the employee need to be a member of the **mandatory provident fund (MPF)** in Hong Kong or is the employee exempt ?
7. Does the remuneration of the employee meet the **statutory minimum wage** requirement? Are rest days/ lunch breaks paid or not ?
8. Is the employee entitled to all the **statutory required benefits** granted under Hong Kong law (e.g. employees' compensation insurance, statutory annual leave, statutory holiday, rest day etc) ?
9. Are **mandatory safety training or medical checkup** required for the position of the employee ?
10. Have all the legal requirements with respect to **occupational safety and health** been complied with ?

### Firing

1. Does the employer have a **valid reason** for the termination ?
2. Does the employer have **sufficient evidence** to terminate the employment of an employee on the alleged ground ?
3. Is the employee pregnant, on maternity leave, on paid sick leave, or receiving employee's compensation in which case it is **unlawful to terminate** the employee ?

4. Is the termination free from challenge that one of the grounds of termination was sex, disability, family status or race **discrimination** ?
5. What **termination payments** (e.g. outstanding wages, payment in lieu of notice, annual leave pay, severance payment or long service payments) will the employee be entitled to ?
6. Will / can the **restrictive covenants** be enforced ?
7. Any special treatment required with respect to any **unvested share options** or other benefits after termination of employment (eg. MPF) ?
8. Will the employer pay an ex-gratia payment in return for the employee entering into **settlement agreement** in full and final settlement of all claims which the employee has or may have ?
9. Has the requisite notification been made to the **Inland Revenue Department** informing the authority regarding the relevant termination payments and the final payment withheld where required ?
10. Has the **Immigration Department** been informed regarding the termination of employment in the circumstances that the employee is under work visa?

Watch out for our coming issues of newsletter for more tips in other jurisdictions !!

## Alarming Trend Regarding Employment of Expatriates in Indonesia

by **Richard D. Emmerson, Advisors of SSEK**  
([richardemmerson@ssek.com](mailto:richardemmerson@ssek.com))

Foreign investors and other employers in Indonesia need to take steps to anticipate and avoid the alarming trend for expatriates to claim the significant procedural rights and generous termination benefits under Indonesian law. In order to understand the significant financial implications of this developing practice, it is critical for employers to understand that termination-at-will is not recognized in Indonesia and that Indonesian statutory termination benefits far exceed the global standard.

### The Risks

Under Indonesian law, all employee terminations are subject to the approval of a special Labour Court. The law contemplates a 140 day period which covers bipartite

negotiations, mandatory non-binding mediation and Labour Court proceedings. In addition to the generous statutory minimum termination benefits, the employee is entitled to full salary throughout the process until the Labour Court approves the termination, including any appeal period. The concept of providing a fixed number of months notice of termination or pay in lieu of notice simply does not work in Indonesia. In order to avoid the significant time and expense of conducting such formal termination process, and to end the employee's entitlement to continuing salary, the best HR practice is to negotiate a Mutual Termination Agreement with the employee which is not subject to Labour Court approval. The Court approval requirement obviously provides employees with enhanced bargaining power.

Indonesian law provides a clear statutory minimum entitlement for virtually every possible type of employment termination. Employers are able to calculate their employees' accruing termination benefits quite accurately on an actuarial basis and to make appropriate reserves. Employers are also able to take into account those statutory minimum entitlements when designing compensation packages for their local employees. Employers are therefore able to manage and offset the cost of such generous termination benefits which are essentially aimed at providing protections for the relatively low-paid Indonesian work force.

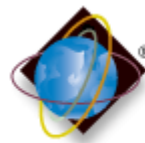
The problem is that multinationals are often not aware of the court approval requirement or the generous statutory termination benefits when they negotiate the compensation packages of expatriates being transferred to Indonesia or hired to work in Indonesia. Historically, expatriates normally accepted termination based on the notice provision of their employment contracts prepared by overseas counsel or HR managers without knowledge of the Indonesian system. It seemed to be well accepted that claiming the generous Indonesian rights and benefits would be unfair and unconscionable at their salary level. Today, many expatriates will reject the agreed notice or pay in lieu of notice, and assert that they are entitled to all

rights and benefits under Indonesian law. That assertion can be debated but consider the following scenario should Indonesian benefits apply: An expatriate with three years and one month service earning USD12,000/month is downsized. The employee would be entitled to 8 months "severance" pay, 2 months "service" pay and a "health and housing allowance" equal to 15% of the severance and service pay: US\$138,000.

### The Solution

No multinational expects to pay the equivalent of 11.5 months severance pay for an expatriate with just over three years service. This scenario can be effectively avoided with an Employment Agreement in the home jurisdiction, a carefully prepared Secondment Agreement between the home jurisdiction employer, the local subsidiary in Indonesia and the employee, and a specially drafted Employment Agreement in Indonesia.

SSEK is the Indonesian member firm of the Employment Law Alliance of which Deacons is the Hong Kong member firm.



**EMPLOYMENT LAW ALLIANCE®**  
*Helping Employers Worldwide®*

## Minimum Wage Update

The Minimum Wage Commission will start its review in Q1 2012 with a view to submit by November 2012 a report to the Chief Executive to recommend whether there is a need to change the current statutory minimum wage rate (HK\$28) after the initial first 2 years of its operation.

## MPF Update

Minimum level of relevant income for MPF Contributions raised to HK\$6,500 with effect from **1 November 2011**.  
Maximum level of relevant income for MPF Contributions to raise to HK\$25,000 with effect from **1 June 2012**.