

Redundancy in Hong Kong – An employer’s guide to the law, process and practical considerations

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For a lot of companies, the last 18 months in Hong Kong has been undoubtably challenging. As a result of the uncertainties with the protests, lack of international travel and the COVID-19 pandemic, employers have been looking at making redundancies in order to survive.

It vital that redundancies are carried out both in accordance with the law and with certain practical considerations in mind. Where a redundancy is not handled properly, it can open the employer up to both criminal and civil liabilities.

In this article, we will consider how best to handle the redundancy process, support staff, minimize costs and disruption to the business and set out the key general legal principles along with our best practice suggestions.

Consultations

Despite there being no requirement under Hong Kong law to engage in employee consultations, it is recommended that employers consult employees affected by the redundancy selection process on either a collective or individual basis.

A fair selection process will involve discussions between employer and employee regarding a full range of possible arrangements which may be suitable to the employee selected for the process, including redeployment, a reduction in hours, retraining or redundancy. An open dialogue can produce positive outcomes for everyone - for example, an employee that agrees to be redeployed to an alternative role will avoid losing their job and develop new skills which are necessary for the employer’s business. For the employer, it gets to retain a loyal employee who understands the business.

A successful consultation and redundancy program will ensure that there is minimal disruption to the workplace and staff morale. The consultation process should also be well-documented, from the employers' assessment of who should be selected for consultation to the conversations and agreements which take place with employees. This should provide employers with better protection should any decisions be later challenged.

Offers of re-employment or re-engagement

Employers are not normally required to pay an employee a statutory severance payment where the employer has offered to renew the employment or re-engage the employee on the same or similar salary and benefits, and the employee has unreasonably refused that offer.

When making an offer of re-employment or re-engagement, it is essential that employers get their timing right should they wish to take advantage of the exception to the rule on making statutory severance payments. After an employer has given notice of termination, the offer must be made seven days before the employment is due to terminate or, if the employer is making payment in lieu of notice, seven days before the employer has undertaken to make a payment in lieu of notice.

It should also be noted that the new engagement or renewal must be effective either on or before the date of termination, or the following day if the termination date falls on a contractual rest day or a holiday.

Redundancy pay

For employees that are not offered alternative employment and are selected for redundancy, employers should take care in calculating a suitable payment package.

Statutory severance pay is the statutory minimum payment that must be made to an employee. The sum is subject to the length of service on termination by reason of redundancy (the employee must have been employed for at least two years). Statutory severance pay is calculated as two-thirds of the employee's monthly wage or two-thirds of HK\$22,500, whichever is less, for each year of service. The maximum statutory entitlement is HK\$390,000.

An employee may also have specific entitlements on redundancy as set out in their employment contract, which may be more generous than the entitlements provided for by the law. Employers should always check the employee's contractual documents to ensure that the proper payments are made.

In addition, employers will often consider making an enhanced redundancy payment. A more generous redundancy package will provide much needed support and hopefully lessen the blow of termination to those affected. In exchange, an employer may ask for a release and waiver of any potential claims the employee may have as a result of the loss of employment.

Once an employer has decided on an appropriate redundancy package, they should ensure that this is applied to all affected employees in the same or similar circumstances. From the beginning of the selection process to making payments on termination, employers should treat all employees equally when their employment is terminated.

Notifying third parties

After a decision is made on redundancy, employers must provide notice of termination (or payment in lieu of notice) in accordance with the employee's contractual entitlement and then comply with all reporting obligations to third parties. Such obligations include:

1. Notifying the Inland Revenue Department of the cessation of employment for taxation purposes within one month of termination. If the employer fails to comply with this requirement, the employer will be liable upon conviction to a fine of HK\$10,000. This notification must also include details of income for the tax year, including termination payments made to the employee. We will address the issue of terminal payments separately in our upcoming article.
2. Notifying the Immigration Department if the employer has sponsored a visa for the employee. Notification of the termination of sponsorship should be made as soon as possible to the Extension Section of the Immigration Department (by post or fax). The employee in question will not be able to take up new employment (and a new sponsor) without the permission of the Immigration Department.
3. Employers should also notify the Mandatory Provident Fund Scheme trustee of the termination date on or before the tenth day of the following month. This allows the trustee to update the employee's records and obtain investment instructions from the employee. If the employer fails to comply with this requirement, the employer will be liable upon conviction to a fine of HK\$20,000. The trustee may also report any subsequent default on contributions to the MPFA.

Conclusion

It is important for employers to be aware of their rights and obligations in the event of a redundancy situation. Handling redundancies is a difficult task – there is a balance to be struck between treating employees fairly and making decisions for the financial wellbeing of the employer’s business, all whilst complying with contractual terms and the law. Where an employer is unclear of their rights and obligations in the redundancy context, they should seek independent legal advice.

Stay tuned for our next article in this series – we will explore the factors employees should have in mind when faced with an offer of redundancy or alternative employment, as well as highlight practical matters and considerations for employees on redundancy.

Please do not hesitate to contact Andrea Randall (andrea.randall@rpc.com.hk / +852 2216 7208), a Partner and Head of the Employment Practice in Hong Kong for any employment law related queries you may have.

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