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Hong Kong Employment Law

6th Edition

About the Authors

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Felda handles all of the firm's employment cases, with clients ranging from international and local banks, SFC-licensed entities, accounting firms, law firms and C-suite executives. Her practice is focused on bonus claims and disputes as to the validity and enforceability of post-termination restrictions, including seeking and resisting injunctive relief surrounding key individuals or teams of employees moving to a competitor. She also handles cases addressing sexual harassment and sex discrimination, and continues to work in this area to promote diversity, equity and inclusion.

In her commercial disputes practice, she regularly advises and acts in both litigation and arbitration matters. Her practice covers all aspects of the dispute lifecycle, from giving strategic advice, seeking or resisting injunctive relief, trial or merits hearings, to enforcement and appeal matters. She is often praised by clients for her keen mind to find commercial solutions to address their objectives and priorities.

Felda has received various accolades including ALB Asia Hong Kong Rising Stars (2024), LexisNexis 40 Under 40 Asia List (2024), Lexis Nexis Under 40 Greater China List (2024) and Hong Kong Construction Law Rising Doyle's Guide (2024). Clients describe her as a "standout partner for her ability to quickly get to the bottom of issues" and praise her for her "excellent level of client care" – Legal 500 (2025).

About GALL

Gall is a leading independent Hong Kong law firm focusing primarily on dispute resolution, and specialises in handling highly complex commercial disputes and contentious employment law matters.

Gall's team of employment lawyers provide legal advice on ground-breaking, complex employment law disputes and are often referred work from other law firms where they are unable to act owing to conflicts of interest.

Gall has been ranked by Asian Legal Business (ALB) as one of the "Hong Kong Firms to Watch" in 2025 and was ranked as "Hong Kong SAR Firm of the Year" by Benchmark Litigation Asia-Pacific Awards 2024.

Foreword

Employment law is one of the few areas of law which impacts almost everyone, from large multinational corporations to small family businesses, to individual employees.

The Hong Kong employment law regime is comprehensive but understanding the various complex pieces of legislation, regulation and case law is no easy task for businesses or individuals. This practical guide serves as an encyclopaedia aimed to help both employers and employees understand their statutory rights, entitlements and obligations as well as the legal and practical issues of employment law.

The latest edition covers various legislative developments and new case law since the last edition published in 2017 and will serve as a helpful manual steering the readers through the full cycle of an employment relationship, from beginning to end, using a combination of case studies and practical advice.

The Hong Kong labour market is highly competitive and constantly evolving with an ever-growing demand for talent. It is paramount for businesses to work within the framework as breaches of employment legislation can have serious consequences including civil liability and/or criminal prosecution for companies and/or their directors and officers.

Felda Yeung, co-head of the Gall's employment practice at Gall hope that this remains the go-to book for businesses and individuals looking for straightforward answers, industry insight and actionable advice for everyday employment law questions in a structured manner. The industry insight and practical guidance in this book on the full range of employment law issues will make this book an indispensable tool for anyone navigating the complexities in this field.

Felda Yeung
Partner & Co-Head of Employment
July 2025

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CHAPTER 1: THE LEGAL SYSTEM IN HONG KONG

Key Practical Takeaways

- The Basic Law introduced the familiar concept of "one country, two systems".
- The application of precedents established outside of Hong Kong remains highly relevant as part of the dual approach.
- There are at least 26 pieces of primary legislation that impact on the employment relationship.
- Looking beyond the ordinances and being aware of numerous regulations and codes of practice is essential to fully understand the full picture when considering staffing issues.

[¶1-010] Overview

On 1 July 1997, the People's Republic of China (PRC) resumed the exercise of sovereignty over Hong Kong, which became the Special Administrative Region (HKSAR) of the PRC. The *Basic Law of the HKSAR* (the Basic Law) was adopted on 4 April 1990 by the Seventh National People's Congress of the PRC. This also came into effect on 1 July 1997.

The Basic Law is the constitutional document for the HKSAR. It enshrines within a legal document the concept of "one country, two systems" and prescribes the various systems to be practised in the HKSAR, including the legal system. The Basic Law expressly provides that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law continue to be maintained. The limited exception to this is any laws that contravene the Basic Law. In addition, laws in existence on 1 July 1997

are, of course, subject to subsequent future amendment by the legislature of the HKSAR.

The Basic Law expressly provides that the courts of the HKSAR may refer to the precedents of other common law jurisdictions when making decisions. In addition, the Court of Final Appeal and the judiciary of the HKSAR are also given the power to invite judges from other common law jurisdictions to participate in the judicial process.

What this means in practical terms is that litigation before the courts and tribunals of the HKSAR is often conducted on the basis of precedents from other common law jurisdictions. In addition, the extensive precedents built up in Hong Kong prior to 1 July 1997 remain good law. In particular, given the very marked similarity between much of the legislation in the HKSAR and legislation from England and Wales, there is very heavy reliance upon the authority from the English courts in the field of employment law.

Any individual seeking an understanding of the employment law principles in the HKSAR has to grapple with a wide variety of legislation and also a significant volume of case law decided by courts both within and outside the HKSAR.

[¶1-020] Employment-related legislation

While the *Employment Ordinance* (Cap 57) is the primary legislation governing the employment relationship, it is also important for employers and employees alike to be aware of the other legislation governing the relationship. The following is not an exhaustive list, and includes:

- the *Companies Ordinance* (Cap 622);
- the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32);
- the *Competition Ordinance* (Cap 619);
- the *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78);
- the *Contracts (Rights of Third Parties) Ordinance* (Cap. 623);
- the *Disability Discrimination Ordinance* (Cap 487);

- the *Employees' Compensation Ordinance* (Cap 282);
- the *Employment of Children Regulations* (Cap 57B) (made under the *Employment Ordinance*);
- the *Factories and Industrial Undertakings Ordinance* (Cap 59);
- the *Family Status Discrimination Ordinance* (Cap 527);
- the *General Holidays Ordinance* (Cap 149);
- the *Immigration Ordinance* (Cap 115);
- the *Inland Revenue Ordinance* (Cap 112);
- the *Interpretation and General Clauses Ordinance* (Cap 1);
- the *Labour Tribunal Ordinance* (Cap 25);
- the *Mandatory Provident Fund Schemes Ordinance* (Cap 485);
- the *Minimum Wage Ordinance* (Cap 608);
- the *Minor Employment Claims Adjudication Board Ordinance* (Cap 453);
- the *Occupational Retirement Schemes Ordinance* (Cap 426);
- the *Occupational Safety and Health Ordinance* (Cap 509);
- the *Personal Data (Privacy) Ordinance* (Cap 486);
- the *Protection of Wages on Insolvency Ordinance* (Cap 380);
- the *Race Discrimination Ordinance* (Cap 602);
- the *Rehabilitation of Offenders Ordinance* (Cap 297);
- the *Sex Discrimination Ordinance* (Cap 480); and
- the *Trade Unions Ordinance* (Cap 332).

In addition to the primary legislation and a variety of regulations, employers and employees also need to be aware of the guidelines, guidance and codes of practice issued by a variety of bodies. For example, although the Code of Practice on Human Resource Management (issued by the Office of the Privacy Commissioner for Personal Data) is not strictly legally binding, it can be taken into account in any legal disputes as evidence of good practice. The various codes of practice issued by the Equal Opportunities Commission are also vital for any employer

seeking to comply with Hong Kong's anti-discrimination laws; once again, such codes are not strictly legally binding, but they will be the starting point for any court exploring allegations of discrimination. The Statutory Minimum Wage: Reference Guidelines for Employers and Employees issued by the Labour Department are also not law but are nonetheless important because, pending judicial interpretation, they demonstrate how the Labour Department will interpret and enforce employers' obligations under the *Minimum Wage Ordinance*.

As we go through the entire employment relationship, we will cover the key legal principles applied in Hong Kong, albeit from a practical rather than strictly legal perspective.

CHAPTER 2: AN OVERVIEW OF THE EMPLOYMENT ORDINANCE

Key Practical Takeaways

- The Employment Ordinance and Hong Kong law are 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) (*Employment Ordinance* or Ordinance) sets out a statutory framework to govern many aspects of the employment relationship 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 business in which he or she is employed 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)).

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 Other*s [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), protection against anti-union discrimination 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 or her 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 additional 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. To enhance labour protection, this requirement (commonly referred to as the "4-18" requirement) is set to be revised by using the aggregate working hours of four weeks as a counting unit and setting the aggregate working hour threshold at 68 hours. The new arrangement is yet to come into effect. 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 4 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 HKCU, 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 of the provisions of the First Schedule, and in that way avoid liability for entitlements which become payable after a specified period of continuous service.

For the purposes of counting an hour of service, any hour in which an employee is:

- incapable of work because of sickness or injury (supported by a medical certificate if the absence is more than 48 hours); or
- absent from work for compliance with the restriction on movement requirements under the Prevention and Control of Disease Ordinance (Cap 599); or
- absent from work but he or she is regarded (by law, mutual agreement, or custom) as continuing in employment,

still counts towards the period of service. It is important to remember that if an employer agrees to a period of unpaid leave and the relationship continues to be recognised, some paid benefits (for example, paid annual leave and statutory sickness allowance) will continue as continuity will be recognised by mutual agreement, even though the parties have agreed that the leave itself is to be unpaid.

Where there has been a transfer of a business undertaking from one person to another, an employee's period of service with the transferor counts as a period of employment with the transferee, and such transfer will not break the continuity of the period of employment.

The provisions of the First Schedule specify whether a period of service with an employer "counts" towards a period of employment for the purposes of the Ordinance.

Which entitlements depend on a continuous contract?

All employees covered by the Ordinance, irrespective of whether the employment is continuous, are entitled to basic protection, including:

- payment of wages;
- restrictions on deductions from wages;
- the granting of statutory holidays (though for employees who have not been continuously employed for more than three months, the entitlement is only to an unpaid holiday);
- protection against anti-union discrimination; and
- employment protection in respect of unlawful dismissal (see ¶20-140 for more details).

However, many of the minimum terms and conditions of employment provided by the Ordinance only apply to employees who are employed under a continuous contract. These include rest days, paid statutory holidays, annual leave, sickness allowance, maternity leave, paternity leave, severance payments and long service payments on termination (subject to the specific length of service requirements for each). An employee under a continuous contract is also entitled to protection against termination in certain circumstances (see Chapter 20 "Termination of the Employment Contract"). Failure on the part of an employer to provide a continuously employed employee with the minimum statutory rights and benefits gives rise to a variety of offences which have potential criminal liability.

[¶2-050] The term of an employment contract

The term of an employment contract is usually agreed between the parties: it may be for a fixed term, tied to the completion of a project or a prescribed duration, or for an indefinite period. Where the term of an employment contract is not expressly agreed between the parties, the Ordinance contains a presumption that all "continuous contracts" are to be regarded as contracts of one month's duration, automatically renewable from month to month.

All employment contracts for a duration in excess of one month must be evidenced in writing and signed by both parties, otherwise the contract will be treated as being for one-month renewable from month to month. This is an important practical point. Copies of the signed contract must be obtained and kept for future reference.

"Manual workers" are separately dealt with in the Ordinance. The duration of a contract of employment for a manual worker must be less than six months. When an employment contract of a manual employee is equivalent to, or exceeds, six months, it is treated as a contract for one month, renewable from month to month. A "manual worker" is not specifically defined in the Ordinance.

The duration of a fixed term contract is not addressed in the Ordinance; the term of such contracts is as agreed between the parties. However, certain provisions in the Ordinance relating to entitlements upon termination treat certain fixed term contracts as having been "terminated 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 statutory minimum wage rate was raised to HK$40 per hour with effect from 1 May 2023 and will be raised to HKD 42.1 per

hour with effect from 1 May 2025. 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 to not 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 (or a proportion of the end of year payment if the employee has not been employed for the whole of the payment period but has been employed for a period of not less than three months), 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. By way of limited exception, a sickness allowance will be payable for any period of less than four days when an employee is receiving maternity-related medical treatment.

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, unless the employer is summarily dismissing the employee and is justified in doing so (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, 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 14 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 (MPF) scheme or in a voluntary MPF-exempt Occupational Retirement Scheme (ORSO) scheme, which are both administered by the Mandatory Provident Fund Schemes Authority.

Under the *Mandatory Provident Fund Schemes Ordinance* (Cap 485), employers are required to enrol their staff in a Mandatory Provident Fund scheme 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. The *Occupational Retirement Schemes Ordinance* (Cap 426) does not provide for the rules of ORSO schemes such as coverage, contributions and the vesting of benefits; the features of an ORSO scheme (including levels of contribution and payment of benefits) are governed by the individual scheme rules. (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 14 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 14-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. However, maternity leave pay for weeks 11 to 14 is subject to a cap of HK$80,000.

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, unless the employee's conduct warrants a summary dismissal.

(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 five 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 five-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);

- 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); and
- when an employee is away on jury duty.

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 and serious 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.

The employer must lawfully terminate the employment contract honouring all other contractual and statutory obligations (other than in

respect of any severance payment) and the new contract of employment must commence immediately after.

(See Chapter 20 "Termination of the Employment Contract" in relation to employees' entitlements on termination, and Chapter 23 "Redundancies and Lay Offs" in relation to redundancies generally.)

[¶2-220] Change of business ownership

The Ordinance contains special provisions governing a "change of business ownership" situation. A change in ownership of the business is likely to be deemed to have occurred if there has been a sale or transfer of any tangible or intangible assets.

Under the Ordinance, an employer may avoid a severance payment liability where there is a change of ownership of the business and the new owner of the business offers to renew 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.

The former employer must lawfully terminate the employment contracts honouring all other contractual and statutory obligations (other than in respect of any severance payment) and new contracts of employment with the new employer must commence immediately after.

(See Chapter 24 "Long Service Payments" in relation to change of business ownership and an employer's obligations in such a situation.)

[¶2-230] Long service payments

Under the Ordinance, long service payments are payable to employees who have continuous employment (see ¶2-040 above) of five or more years and are dismissed by the employer with notice (i.e. not following an act of gross misconduct by the employee).

A long service payment is calculated in the same way as a severance payment, i.e. 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 long service payment is HK$390,000.

The right to a long service 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, but not if the employee refuses to accept the offer even if such refusal is unreasonable. This is a key difference between severance payments and long service payments.

An employee is not entitled to receive both severance payment and long service payment. Therefore, if an employee is entitled to a severance payment, the employee will not be entitled to a long service payment.

The Ordinance sets out the circumstances in which an employee will be entitled to a long service payment and the method for calculating the amount payable (see Chapter 24 "Long Service Payments").

[¶2-240] Minor Employment Claims Adjudication Board

The *Minor Employment Claims Adjudication Board Ordinance* (Cap 453) provides for a forum for adjudicating minor employment claims through the Minor Employment Claims Adjudication Board (MECAB).

The MECAB adjudicates minor employment claims in a quick, simple forum. A claim which cannot be resolved amicably through conciliation may be referred to the MECAB for adjudication.

The MECAB is empowered to adjudicate employment claims involving not more than 10 claimants for a sum of money not exceeding HK$15,000 per claimant. Employment claims falling outside the jurisdiction of the MECAB are heard by the Labour Tribunal.

Hearings of minor employment claims are conducted in public and no legal representation is allowed as is the position in the Labour Tribunal.

The award or order made by an adjudication officer of MECAB is legally binding. Parties dissatisfied with the judgement of an adjudication officer may apply for a review. They may also apply to the Court of First Instance for an appeal against the adjudication officer's decision on point of law or question of jurisdiction (see Chapter 26 "Labour Disputes").

[¶2-250] Labour Tribunal

The Ordinance provides employees with an avenue for claiming entitlements due under the Ordinance. The Labour Tribunal (Tribunal) has exclusive jurisdiction to hear any claims for a "sum of money" that arise from:

- the breach of a term (expressed or implied) of a contract of employment or apprenticeship; or
- the failure to comply with the provisions of the *Employment Ordinance*, the *Minimum Wage Ordinance* and the *Apprenticeship Ordinance*.

There is no upper limit to the monetary claims which can be heard by the Tribunal, but the Tribunal only hears cases in which the amount of the claim exceeds HK$15,000 for at least one of the claimants in a claim or where the number of claimants in the claim exceeds 10 persons. The Tribunal has the jurisdiction to grant reinstatement, re-engagement, terminal payments and compensation where the employer unreasonably terminates or varies the employment contract. Any such claim for remedies under Part VIA of the Ordinance must be commenced in the Tribunal no later than nine months after the date on which the variation or dismissal occurs.

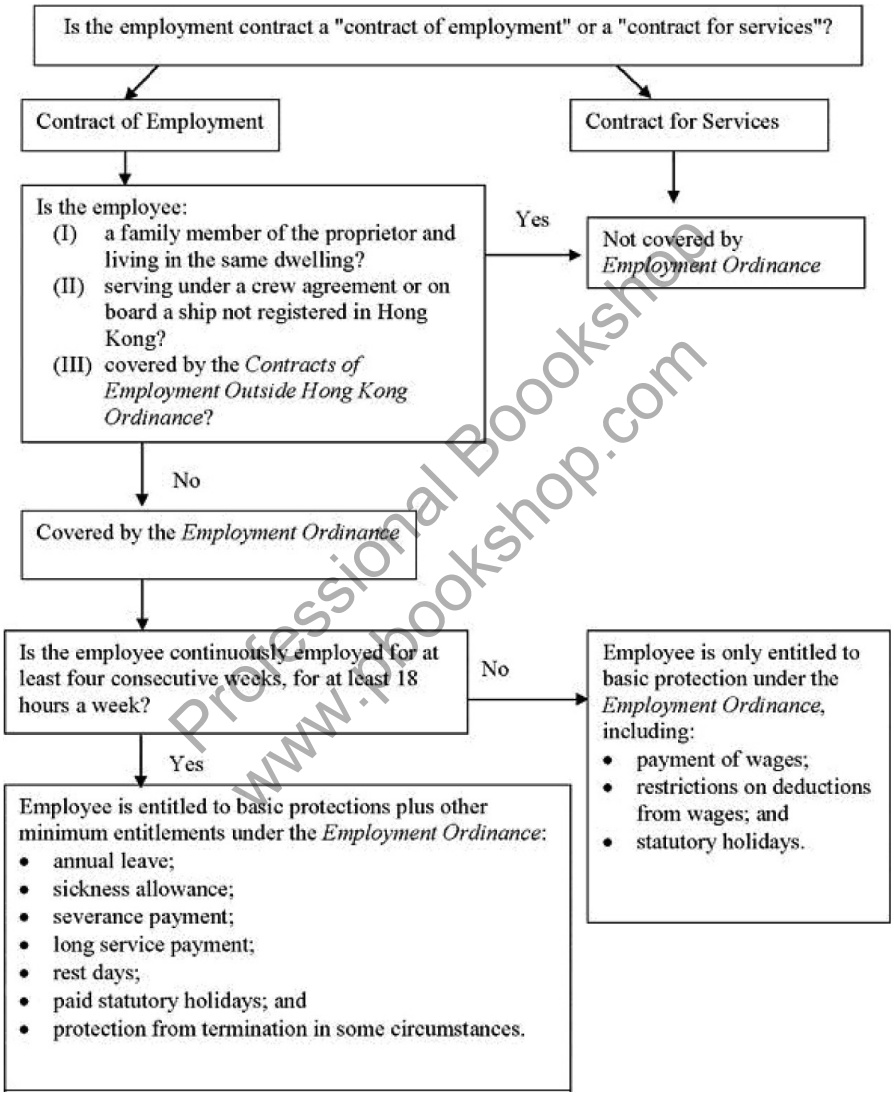
However, the Tribunal only has the jurisdiction to hear monetary claims. Accordingly, claims for non-monetary remedies (for example, an injunction to prevent breach of a post-employment restraint) and claims arising out of a tort (for example, negligence) are heard by the civil courts. The Tribunal also has the discretion to refer any case to the civil courts if the circumstances warrant such a transfer.

The Tribunal's jurisdiction extends to hearing claims arising out of certain employment contracts performed outside Hong Kong, where there is some connection to Hong Kong, or the employer and the employee choose Hong Kong as the governing law for legitimate reasons, but does not extend to claims unrelated to Hong Kong.

The hearing of the Tribunal is informal and conducted in public, and no legal representation is permitted.

The Ordinance also sets out the procedures for appealing against a decision of the Tribunal (see Chapter 26 "Labour Disputes").

[¶2-260] Employee entitlements governed by the Employment Ordinance



CHAPTER 3: THE EMPLOYMENT CONTRACT

Key Practical Takeaways

- It is important to see an employment contract as the entire contractual relationship, including implied terms and other incorporated contractual obligations, rather than simply as a document.
- Just as it is not possible to unilaterally change any other legal contract without considering a myriad of possible risks, employers should not unilaterally alter employment contracts without the same degree of consideration.
- Third party rights are a critical feature for employers who operate within a group structure as the artificial legal divide between corporate entities often does not meet the working reality of staff working across such legal structures.

- The topic of terms implied into an employment contract continues to be a dynamic one and is likely to continue to be highly relevant in extending obligations outside of the statutory framework, especially as this is a rapidly developing area in other common law jurisdictions.

[¶3-010] Overview

Every employment relationship is governed by the terms of an employment contract. The terms of the employment contract may be expressly agreed between the parties or may be implied by law. The over-arching legislative provisions of the *Employment Ordinance* (Cap 57) (*Employment Ordinance* or Ordinance) restrict the scope of these terms and conditions by incorporating minimum statutory terms and conditions into the employment contract, as discussed in Chapter 2 "An Overview of the Employment Ordinance".

The following chapter discusses the principles which govern the operation of an employment contract. Employers wishing to introduce new terms, vary or terminate an employment contract must consider the contractual effect of such actions to determine what is required by law.

This chapter also provides an overview of some of the duties which are implied in every contract of employment. Such duties are implied by the common law (that is, case law which has developed over the years) and therefore, exist whether the parties agree to them expressly or not. In addition, the checklist at the end of the chapter provides employers with a summary of the terms and conditions which may be included in an employment contract.

[¶3-020] What is a contract of employment?

The contract of employment is the sum of the terms agreed between the employer and the employee. There is no specific form for an employment contract. It is not uncommon for an employer to make an offer of employment by way of a short offer letter on the understanding that, following acceptance of the offer letter, the employee will be provided with a more detailed written employment contract.

It is then important to ensure that any proposed term that is included in the employment contract is consistent with the terms of the offer letter, or at least there should be a clear statement about what prevails in the event of any conflict.

The staff handbook and other policies may also create contractual terms, depending upon how they are drafted and whether they meet the contractual test. In addition, terms may be created verbally or in writing. There is no requirement in Hong Kong to put employment contracts in writing, although, if the intention is that the contract operates other than as a contract which renews from month to month and subject to one month's notice, then under sec 5(2) of the Ordinance, it must be in writing and signed by both parties.

The legal principles governing contract law

As an employment contract is a contractual arrangement, like any other contractual arrangement in Hong Kong, it must satisfy the usual legal principles governing contract law. These principles require that there is:

- an intention by the parties to create a legal relationship. Both parties must have an intention to create a legally binding agreement. An agreement to agree does not amount to a contract of employment;
- the parties are legally capable of entering into a binding contract;
- an offer. An offer of employment may be made subject to certain conditions, for example, the passing of a medical examination, the conduct of reference checks to the employer's satisfaction, and obtaining and maintaining the immigration requirements to work in Hong Kong;
- acceptance of that offer. An offer of employment may be accepted at any time before it lapses or before it is withdrawn by the employer. Once an offer has been accepted, it cannot be withdrawn unilaterally by the employer;
- consideration or payment in respect of the agreement. Typically, in a contract of employment, consideration from the employer will be in the form of payment of wages and provision of other

benefits to the employee. Consideration from the employee will be the provision of labour; and

- a relationship based on legal certainty. An offer of employment that does not contain sufficiently clear terms will not create a binding contract.

Whenever there is an argument about a particular element of the employment relationship and whether a particular alleged commitment has contractual impact or effect, it is absolutely essential to go back to the basic legal principles. It is very important to establish what amounts to a contractual term. Mere comments and vague promises provided to an employee will not have contractual effect unless the legal test outlined above has been met. This can be very important when an employee claims that the employer has broken the contractual terms of the employment contract. By way of example, if an employer suggests during the recruitment process that there are great opportunities for the applicant to excel or that the particular role has the support of the business, this can lead to issues if these commitments are, in fact, untrue. Whether such comments amount to representations with contractual effect will depend upon all the circumstances.

[¶3-030] Varying employment contracts

Many employers at various times during the employment relationship wish to consider introducing variations to employees' employment contracts for a variety of different reasons. In cost cutting exercises, for example, the strategy may include reducing salaries, taking away benefits, reducing working hours, requiring employees to take a period of unpaid leave or changing the terms and conditions of a bonus scheme. In addition to cost-saving measures, sometimes employers need to adapt some of the contractual terms to meet the changing needs of the business or to harmonise terms after a change of business ownership.

In considering how to make such a variation, it is absolutely essential to remember basic contractual principles with respect to the ability of one of the contracting parties to vary the contract unilaterally. As a matter of contract law, one party cannot unilaterally vary a contract unless such a variation is authorised in the contract itself, and such variation must not be contrary to the minimum statutory provisions.

Therefore, in the absence of an express term in the contract enabling the employer to unilaterally vary the contract, the employer should obtain the employee's consent to the proposed variation, either at the time the contract is entered into or subsequently. Failure to do so may result in a breach of contract, giving rise to claims such as constructive dismissal, unreasonable variation or termination under the *Employment Ordinance* or unlawful deduction of wages.

Even if the contract does expressly allow for such unilateral variation, the power to achieve a variation is subject to:

- the power to vary unilaterally being reserved using very clear language (for example, employers may not be able to rely on a provision in a contract of employment providing for a general right to unilaterally vary a contract as this may be void for uncertainty or not clear enough to cover the specific proposed variation);
- the employer exercising the right in accordance with the contractual provision allowing the variation; and
- the employer exercising the right in accordance with the implied duty of mutual trust and confidence (see below). Employers cannot simply rely upon a clause in the employment contract that gives power to vary the contractual terms in isolation. Such variation must be looked at in the light of the relationship and the obligation of the employer to behave in such a way so as not to undermine the basis and understanding of the parties at the time they entered into the contract. It is often forgotten that the understanding and intention of the parties when the agreement was made, and not some later date, is the key to determine the terms of the contract.

Employers who wish to vary key terms in the future, for example, salary or duties, should expressly reserve the right to vary within the clauses dealing with those terms. While that will not give an employer total freedom to vary these terms, for the reasons already mentioned, it will provide some stronger arguments to justify imposing changes.

[¶3-040] Consideration

Even if the employee is willing to agree to new terms, it is important to satisfy the legal requirements of consideration or payment outlined above. Therefore, new burdens placed upon employees, for example, the introduction of a new post-employment restriction, should be accompanied by some benefit. Employers often address this issue by ensuring that any variations to the contract introducing more onerous or detrimental terms are brought into effect when a non-contractual payment is made. Obvious examples are when a discretionary bonus is paid or a promotion with a pay rise is introduced. It is important to remember that if the change coincides with a payment due under the contract, for example a contractual bonus arising under the existing agreement, this will not amount to adequate "new" consideration or benefit as the payment made was already an entitlement of the employee under the existing contract.

The issue of consideration is more difficult when the employer is proposing, for example, to reduce an employee's salary. Often the very purpose of the variation is to reduce payments, so it is often the case that the employer does not want to make any additional payment. If it is possible to accompany the variation with some benefit, for example, a non-contractual payment, that is ideal. If not, an employer may decide to carry out the proposed variation by deed to avoid the need for legal consideration. The employer should check its Memorandum and Articles of Association to ensure that the deed is duly executed by it. The general principle is that an agreement or variation of an existing agreement is legally effective without legal consideration if executed as a deed. However, it should be noted that in the English cases of *Mitchel v Reynolds* [1711] 1 Pwms 181 and *Gravely v Barnard* [1874] LR 18 Eq 581, it was held that even though an employer seeking to enforce a restrictive covenant did so by deed, this was not sufficient without the provision of additional legal consideration: 'to require consideration for a promise in a deed is a departure from the normal rule but arguably justifiable on grounds of public policy'. Therefore, while there is no case law on point in Hong Kong, there is a risk that this may have wider application in an employment context where the bargaining powers are not equal, and the deed may be found to be insufficient to avoid the need for consideration

