Legislation Update

Proposed Amendments Introduce Compulsory Reinstatement and Re-engagement

Currently if an employee has been dismissed unlawfully and without a valid reason, the Labour Tribunal cannot make an award for reinstatement or re-engagement without the employer’s consent. The government has proposed amendments to the Employment Ordinance which, if implemented, will mean that the Labour Tribunal will be able to make such an order without seeking the employer’s consent.

It is proposed that the Labour Tribunal must take the following factors into consideration when determining whether to make the compulsory order:

- The relationship between the employee and the employer;
- The circumstances surrounding the dismissal; and
- Whether the employer may face any genuine difficulties in complying with the order.

Re-engagement by successors or associated companies

It is also proposed that clarifying amendments would be made to the re-engagement provisions (under Part VIA of the Employment Ordinance) to state clearly that a re-engagement order made by the Labour Tribunal shall be directed at the employer alone and not his successor or an associated company. However, if the employee consents, an order for re-engagement can be taken to have been complied with by the employer if the successor or associated company of the employer re-engages the employee on the terms specified in the order. The employee’s continuity of employment would be brought forward to the successor or associated company for calculating entitlements under the Employment Ordinance and in their contract of employment.

Proposed penalty for non-compliance

If the employer fails to comply with the compulsory order, the employee would be entitled to additional compensation of three times the monthly wages of the employee, subject to a maximum of HK$50,000.

It is proposed that if there is a failure to pay the additional compensation, then such a default will be a criminal offence and a maximum fine of HK$350,000 and 3 years of imprisonment on conviction of wilful non-payment of the further sum without reasonable excuse, may be imposed.
The Labour Department is drafting a bill to amend the Employment Ordinance to incorporate the above amendments and this will be introduced to the Legislative Council once finalized. We will keep you posted on any developments.

**The bottom line**

If the proposals are implemented, employers who are found to have dismissed unlawfully and without a valid reason, will be able to avoid an order for reinstatement or re-engagement, but the cost will be higher.

**Good News for Fathers**

The government announced that starting from 1 April 2012, eligible government employees would be given 5 working days of paternity leave on full pay on each occasion of childbirth.

**Eligibility criteria:**

- The child’s expected due date or actual date of birth must fall on or after 1 April 2012 in order to benefit from this measure; and

- The officer must be a full-time government employee (including civil servants, non-civil service contract staff and political appointees) with no less than 40 weeks’ continuous service immediately before the expected or actual date of childbirth.

**What about everyone else?**

At present, the government merely hopes to “encourage” employers to adopt family-friendly employment practices. However, it does seem likely that statutory paternity leave may be on the horizon at some stage. Legislative Council members are reported as expressing support for the government’s policy and have indicated a wish to see statutory paternity leave extended to all workers. The Labour Department is aware that there are concerns amongst small and medium-sized companies and is studying the feasibility of statutory paternity leave. Last year it was reported that a comprehensive study was being prepared in the first half of 2012, in consultation with the Labour Advisory Board and the Legislative Council Manpower Panel. Once this report is published we will be able to more accurately gauge when this entitlement is likely to be required for all employers.

**General Case Update**

**The Saga Continues: Court of Final Appeal Allows Cathay Pacific’s Appeal Application**

**In brief:**

On 23 February 2012, Cathay Pacific was granted leave to appeal the Court of Appeal’s decision in the *Cathay Pacific Airways Limited v Kwan Siu Wa Becky and Others* case. It appeared last year that the long running dispute between Cathay Pacific and its flight attendants over the calculation of statutory leave pay and annual leave, may have been brought to a halt after the Court of Appeal refused Cathay’s application for leave to appeal
to the Court of Final Appeal. However, Cathay lodged a direct application to the Court of Final Appeal and it was granted on the basis that the questions raised in the appeal “are worthy of the Court of Final Appeal’s attention”.

One of the questions being considered is whether annual leave entitlements that exceed the minimum amount required under the Employment Ordinance must be granted in accordance with statutory rules. This would affect how leave is paid and when employees take it. For a reminder of all of the key issues in the Court of Appeal’s judgment in this case, our previous report can be accessed via this link [this was the previous link to the relevant article in our March 2011 update so it may still work but please check on the final version].

We will be waiting with interest to see how this case concludes.

Employers Beware: The Changing Landscape of Assignments to Hong Kong

*Cantor Fitzgerald Europe & Others v. Boyer & Others (HCA11/60 2011)*

**In brief:**

The Plaintiff employers, Cantor Fitzgerald Europe and Cantor HK brought proceedings against four former employees for alleged breaches of employment contracts, fiduciary and fidelity duties. The Court of First Instance dismissed the majority of the Plaintiffs’ claims in a decision that contained some unexpected elements which may signal a changing landscape for employers and senior employees. There are a number of noteworthy features to the judgment and we set out a few key highlights below:

- **Application of the Employment Ordinance to foreign employment contracts**: The Court held that the Employment Ordinance (“EO”) applies to foreign employment contracts if the individual works in Hong Kong. This means that secondees may rely on provisions of the EO such as the right to buy out their notice periods. Foreign employers are unlikely to be prepared for this given that it is a reversal of the position under the previous authority of *HSBC Bank plc v Wallace [2008]*. This challenging situation may be exacerbated if the employee is senior and there is a concern that their post termination restrictions may be unenforceable, thus enabling them to join a competitor within days of leaving their former employer.

- **Fixed notice periods**: The Court found that the EO overrode an express term which specifically prohibited the employee from serving notice until a fixed term had passed, allowing the employee to serve notice at any time and to make a payment of wages in lieu of notice.

- **Post termination restrictions**: The Court took a fairly strong line on the restrictive covenants and found them to be either not breached or unenforceable due to insufficient tailoring or evidence to justify the period of restriction.
BACKGROUND

The Cantor Fitzgerald group is a global financial services provider operating in major financial centres throughout the world. In the UK, the company operates as Cantor Fitzgerald Europe, ("CFE") and in Hong Kong as Cantor HK. The first Defendant, Boyer, was employed in the UK by CFE and seconded to Cantor HK where he was a Managing Director. The second and third Defendants, Ainslie and McGonegal were Managing Directors of Cantor HK’s Cash Equities Desk. The fourth Defendant, Von Parpart was a Managing Director and Chief Economist and Strategist in Cantor HK.

Each Defendant resigned from their respective employment on 30 May 2011 and all signed employment contracts with Mansion House Financial Holdings Ltd ("Mansion House") on the same day. Mansion House had recently been re-structured and the Cantor Fitzgerald group had been offered the opportunity to invest as part of an alliance with a Hong Kong businessman, but negotiations had broken down and no deal was concluded.

On 5 July 2011, four more Cantor HK employees resigned to join Mansion House and on 8 September 2011, CFE and Cantor HK successfully obtained limited interlocutory injunctions against the Defendants based on their restrictive covenants. The injunctions had expired by the date of the trial and the Plaintiffs’ claims were for damages against the Defendants for various breaches of their employment contracts and for breach of fiduciary and fidelity duties.

THE SPECIFICS:

There were several claims made against each of the Defendants. We examine the significant ones below in conjunction with the findings of the Court of First Instance.

1. Allegations of breach of fiduciary duties or duties of fidelity owed to the Plaintiffs

It was established that the Defendants owed one or more of the following duties to the Plaintiffs:

(i) a contractual duty of fidelity to CFE (Boyer);
(ii) a fiduciary obligation to Cantor HK as a Managing Director (Boyer);
(iii) a contractual duty to disclose in writing if an approach was made to take up employment with a competitor (Boyer);
(iv) a contractual duty of fidelity to Cantor HK (Ainslie, McGonegal and Von Parpart);
(iv) a contractual duty to inform Cantor HK “as soon as reasonably practicable” if he became aware that another employee had been invited or approached to take up employment, or enter into a business relationship, with a “competitor” (Ainslie).

The above duties, contractual or otherwise were alleged to have been breached by the Defendants when they allegedly procured the other Defendants to resign to join a competitor or acted in concert with other Defendants to leave together to join a competitor.
In relation to fiduciary duties, it was considered that Ainslie and McGonegal held corporate Managing Director titles with no board of director or management of Cantor HK responsibilities, unlike Boyer. The Court held that for the purposes of this case, the duties were not distinguished too finely, but where either duty was owed, that individual was obliged not to act in a way which is contrary to the interests of an employer or company.

The evidence of the Defendants being fully aware that each was negotiating to join Mansion House was overwhelming. It included:

- All Defendants attending a lunch in January 2011 and a dinner in May 2011 with an investor to discuss working with Mansion House.
- The Defendants discussing the instruction of lawyers and eventually all instructing the same firm which negotiated near identical employment contracts with Mansion House and drafted near identical letters of resignation for the Defendants.
- Boyer told a close colleague that he was planning to leave Cantor Fitzgerald and he had “a few key people” that he was “taking with [him]”.

Ultimately the Court concluded that the Defendants were not in breach of their duties by acting in concert or procuring each other to leave CFE and Cantor HK, on the basis that although they knew each other was thinking of resigning, the Defendants came to their decisions separately. It was considered persuasive that:

- McGonegal was to be appointed CEO of Mansion House which caused some concern for Boyer and Ainslie as their seniority in Cantor HK would not be replicated with their new employer.
- They did not present themselves as a package and each negotiated independently.
- The use of the same firm of lawyers and similarities in contracts and resignation letters represented a costs saving for the Defendants.

In relation to the failure to disclose an approach by a competitor, it was held that the expression “competitor” was vague and the ambiguity was decided against the Plaintiffs. It was further noted that Mansion House was effectively a start up and could not be considered to be a competitor of a global company such as the Cantor Fitzgerald group.

It was also held that a duty to inform an employer of an intention to resign or having been approached to resign, had to be an express one as it was incongruous with the principle that an employee is free to work or not work for a given employer. The only outcome of notifying an employer would be that they had an opportunity to persuade the employee to stay, but this could not be imposed by way of a general legal duty. It was held that even if there was such an express duty, it would be difficult to establish any damages flowing from this. It can be inferred from this that the Court considered that such express provisions are fairly futile in practical terms.

Ultimately the Court concluded that the Plaintiffs failed to make out the alleged breaches of a duty of fidelity or of fiduciary obligations on the basis of the evidence that it reviewed.
2. Application of the Employment Ordinance to a foreign employment contract

Boyer sought to terminate his employment with CFE earlier than his contract of employment permitted, on the basis that sections 6 and 7 of the EO applied thus entitling him respectively to (i) terminate the contract by serving notice “at any time” and (ii) make a payment of wages in lieu of notice to CFE. His exercise of these rights was protected by another provision of the EO (section 70), which safeguards employees against contractual terms that seek to reduce their rights granted under the EO.

Boyer’s contract of employment was governed by English law. Under that contract he could give notice only at a specified time. He was not entitled to buy out his notice period. However, when Boyer was seconded to Cantor HK, his employment was varied by a letter of secondment which provided that the contract was governed by English law “save for any mandatory employment laws of Hong Kong”.

CFE contended that the proper law that applied to the contract was English law, which was chosen in good faith and that Hong Kong law could not override the express terms relating to termination. CFE relied upon the authority of HSBC Bank plc v. Wallace [2008]. In the HSBC case, the defendant was also a secondee to Hong Kong hired on an English employment contract and he had sought to buy out his notice period to expedite his termination date. During an interlocutory hearing the Court of First Instance concluded that the EO did not override the express choice of English law, in particular because the EO had no express overriding provision (unlike the English Employment Rights Act 1996, which states that it applies irrespective of whether an individual’s employment is governed by the law of the UK or not).

The Court of First Instance confirmed that it did not agree with the reasoning in HSBC Bank plc v. Wallace and noted that it was not bound by it. The Court distinguished its position on the basis that in the HSBC case, the judge did not hear full arguments on this question, as it was an application for an interlocutory injunction unlike in the present case, which was a full hearing.

The Court held that Boyer was entitled to serve notice at any time (under section 6 of the EO) and make a payment of wages in lieu of notice (section 7 of the EO) on the basis that reliance on a foreign law could not thwart the protection afforded by the EO to employees working in Hong Kong (on the basis of section 70 of the EO).

It is noteworthy that the Court seems to have taken an even broader approach which goes beyond relying on the variation to the employment contract by the provisions in the secondment letter. The Court concluded that the EO was “intended to apply to all employments in Hong Kong, including employments governed by some law other than Hong Kong law”. This was on the basis of language in the EO (section 4(1)) where it is confirmed that the EO applies to “every employee engaged here under a contract of employment, to an employer of such employee, and to a contract of employment between such employer and employee.” The Court considered that the failure to expressly carve out employments governed by foreign law in the exceptions to the wide ambit of the EO (set out in section 4(2) of the EO), suggested that it should apply to
employments governed by foreign contracts. It is not clear how this analysis would affect other potential breaches of the EO such as grant of annual leave and the prohibition on making deductions from wages. For example, an employee who remains on US payroll while seconded to Hong Kong would continue to have federal and social security taxes deducted from salary as required by US law. Technically, however, this deduction is a breach of the EO and a criminal offence. It is not clear how the Hong Kong courts would deal with such situations. It is also unclear how secondment agreements that expressly disclaim any employment relationship in Hong Kong would be treated.

3. **Enforceability of restrictive covenants**

The Defendants had a range of restrictions from poaching employees to commencing employment with certain classes of persons in a “business...in competition” with the Cantor Fitzgerald group. In the cases of Boyer, Ainslie and McGonegal, some of their restrictions were for a period of 12 months and the Court held that either there was no breach or that there was no cogent evidence to justify such a lengthy period of restriction.

In the circumstances, they were held to be unenforceable on the basis that they were too wide, there was no evidence to justify the restrictions and in relation to “competition”, it had already been determined that Mansion House could not be regarded as being a competitor of the Cantor Fitzgerald group at the time of joining.

The Court also found that even though Ainslie had expressly acknowledged that the restrictive covenants in his contract were reasonable, such an acknowledgment was a factor to be taken into account when assessing the reasonableness but is far from conclusive on the question of reasonableness. Ultimately it was reiterated throughout the analysis that the Court had to be satisfied on the totality of the evidence that the restrictions were no more than what was reasonably required to protect the legitimate interests of an employer. Interestingly, the equivalent restrictions in Von Parpart’s contract were for 3 months and these were still regarded as too wide as there was no evidence to show that the duration was reasonably necessary to protect Cantor HK’s interests.

4. **Notice of termination in HK contracts**

As employees of Cantor HK, Ainslie, McGonegal and Von Parpart’s employment contracts were subject to the mandatory sections of the EO which have been outlined above.

Ainslie’s employment contract provided that notice had to be given “on any date within the last two (2) weeks of the final month of...a Renewal Period”. Such notice will then terminate the employment “on the expiry of three (3) months [which period of notice the parties agree is reasonable] from the latest date notice could have been given”. In spite of this, Ainslie was entitled to give 3 months of notice “at any time” (section 6 of the EO) and to make a payment of wages in lieu of notice (section 7 of the EO).

There was a provision in Ainslie’s employment contract which imposed liquidated damages where Ainslie left Cantor HK without their consent “prior to the expiry of the term of [his] employment contract”. Cantor HK claimed liquidated damages of US$1,430,340.
The Court found that he did not leave in breach of his employment contract as he was entitled to terminate his employment in accordance with the EO. It was held that the terms of Ainslie’s contract had to be read as subject to sections 6 and 7 of the EO. If not, the liquidated damages clause would operate to restrain an employee’s freedom to exercise the rights given by EO sections 6 and 7. It was also noted that even if the clause was otherwise enforceable, it did not constitute a genuine pre-estimate of the damage suffered by Ainslie’s premature departure.

**Take away points:**

1. Foreign employers need to be aware that there is a risk that mandatory terms of the EO may override some of their express terms in the employment contracts of secondees or other staff working on foreign employment contracts in Hong Kong. It may be that this case will be distinguished on its facts, but that will not be known until the point is argued before a higher court. Therefore at present, employers need to beware that this changes the landscape. Greater care needs to be given to the review and/or drafting of post termination restrictions of employees working in Hong Kong, particularly in light of the position that this Court took on enforceability. It is noteworthy that the Court criticized the Plaintiffs for failing to appropriately tailor the restrictions and provide statistical data to justify the length of some of the restrictions.

2. Employers are encouraged to review secondment arrangements and ensure that if wording is included which may be construed to vary the base employment terms and render them subject to mandatory Hong Kong employment laws, that this reflects the intention of the employer. It is also worth noting that if a secondee does not have any fiduciary duties to the host company then it may be worth imposing contractual fidelity duties in the secondment agreement.

3. It is important to also consider in a secondment arrangement that if a secondee breaches their post termination restrictions and the loss is suffered by the host company, whether there is a contractual relationship between the two such that any loss can be recovered through a claim for damages. In this case, it was noted that had the post termination restrictions been enforceable, CFE had not claimed for damages and Cantor HK (who did allegedly sustain a loss) had no contractual relationship between the two such that any loss can be recovered.

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