What are the Legal Issues Employers should be Aware of in relation to Flexible Working in Hong Kong?

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There is little guidance for employers in Hong Kong on how to deal with the legal issues which underpin flexible working arrangements or, for that matter, on what flexible working actually means. This article deals with the nature of and legal risks associated with flexible working arrangements in Hong Kong.

What is Flexible Working?

Flexible working can include the following arrangements:

- **Part time working** – where an employee works less than the full time equivalent whether during a day, week or month;
- **Flexitime** – where an employee is required to be at work during a specified core period, but can otherwise arrange his or her hours to suit themselves;
- **Compressed hours** – where an employee works the same hours as full time employees but over fewer days;
- **Annual hours** – where an employee agrees to work a given number of hours during the year, but the pattern of work can vary from week to week;
- **Staggered hours** – where an employee is able to start and finish work at different times. Employees may also take time off in lieu;
- **Job sharing** – where a job is shared between two or more people. They may wish to work alternate days, half weeks, or alternate weeks; or one person may work in the morning and one in the afternoon;
- **Remote working** – where an employee may work from home or from another location.

Do employees have a right to family friendly work?

There is no provision under the Employment Ordinance (EO) or at common law granting employees in Hong Kong the right to work flexibly. However, any employer who simply ignores a request to work flexibly or dismisses such request out of hand is putting himself or herself at risk.

Why should An Employer be Careful When a Request for Flexible Working is Made?

The various discrimination ordinances in Hong Kong all operate to make unlawful any practice which disproportionately prejudices one category of persons with a particular "protected attribute" when compared with a category of persons with a different "protected attribute". For example, the Sex Discrimination Ordinance provides that a female employee can bring a claim for indirect sex discrimination if that employee can show a condition or requirement imposed by an employer has a greater adverse impact on women than men, is unjustifiable and she suffers a detriment as a result. The discrimination ordinances in Hong Kong cover the following "protected attributes":

- Sex
- Marital status
- Pregnancy
- Disability
- Family status
- Race

Therefore, where an employer has a simple policy of never permitting flexible working and an employee can show that:

- Such policy has a disproportionate effect on a particular group of persons with one of the protected attributes set out above (e.g. women or married persons or persons with a disability); and
- The application of such policy operates to the employee's detriment.

Then, unless the employer is able to "justify" such policy, the employee will have a claim for indirect discrimination under the appropriate discrimination ordinance. It is not easy to "justify" a refusal to allow part time or flexible working, especially for large employers with substantial resources. Any claim for unlawful discrimination can be made very easily by an employee by a simple letter to the Equal Opportunities Commission (EOC). The employer may then need to respond to an investigation by the EOC which is best avoided.

Are Employees Who Work Flexibly Covered by the Provisions of the EO?

Not all employees have the same entitlements under the EO. Some benefits require the employee to be in continuous employment which essentially means satisfying the "418" rule. This "418" rule is satisfied where an employee works at least 18 hours a week ("week" means a week ending with Saturday) for four consecutive weeks.

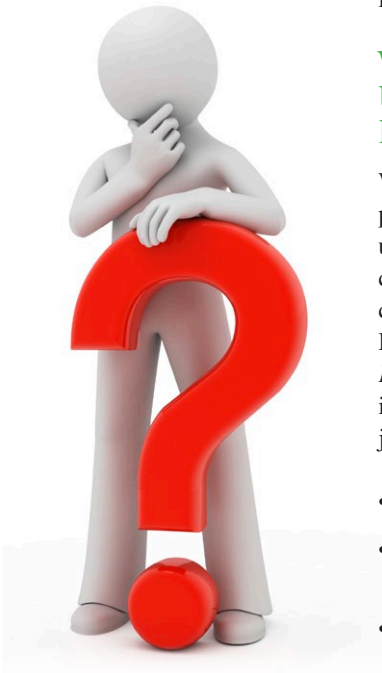
When is An Hour An Hour "Worked"?

Where an employee is at work then that time will be an hour "worked". That is the easy part. However, paragraph 3 of Schedule 1 of the EO provides for certain circumstances where an hour not worked will still be deemed to be an hour worked. This includes where an employee is "*absent from work in circumstances such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer for any purpose….then….that hour shall count as an hour in which he has worked* ". So, it is quite possible that an employee employed under a family friendly flexible work arrangement which appears not to satisfy the "418" rule (due to, say, the employee taking every second week "off") could nonetheless be entitled to full benefits under the EO.

What are the Problems Arising from a Refusal to Grant a Flexible Working Request?

The leading English law case on indirect sex discrimination is *London Underground Ltd v. Edwards* (no.2) [1998] IRLR 364. The plaintiff, Mrs Edwards, claimed indirect sex discrimination in respect of a new roster or shift system for train drivers on the basis that it adversely affected her, a single female parent with a young child.

Under the old roster or shift system Mrs Edwards was able to work hours which were compatible with her parental responsibilities. The new rostering arrangements were a requirement or condition with which Mrs Edwards could not comply. At that time there were 2,044 train drivers in total. Of the 2,044 train drivers, 21 were women. Only Mrs Edwards (i.e. 1 out of 21) could not comply (i.e. 95.2%of women could comply) with the new roster. All 2,023 men could comply (i.e. 100%) with the new roster. The key question before the Court of Appeal was whether 95.2 % was "considerably smaller" than 100%. (This would indicate that the new policy had a disproportionately adverse impact on women as opposed to men.) The Court of Appeal held that it was "considerably smaller" if the numbers were looked at in terms of 4.76% of women could not comply whereas there were no men that could not comply. As such, London Underground was held



to have unlawfully discriminated against Mrs Edwards notwithstanding that she was the only driver (out of 2,044 train drivers) who could not comply with the new policy. Since the case of *London Underground Ltd v. Edwards* the English courts have tended to accept the assumption that women generally have a greater burden of childcare. The cases in this area have largely, therefore, turned upon whether or not an employer's refusal to allow flexible working is justified.

What would Constitute an Unlawful Refusal to Permit an Employee to Work Flexibly?

We have already established that a refusal to permit an employee to work flexibly may be unlawful if the refusal cannot be justified. When considering the meaning of "justification", the courts may consider the factors set out in the Hong Kong disability discrimination case of *Siu Kai Yuen v. Maria College* [2005] 2 HKLRD 775 in deciding whether a requirement or condition is justifiable. These factors are:

- Whether the objective was legitimate;
- Whether the means used to achieve the objective are reasonable;
- Whether the conditions are justified when balanced on the principles of proportionality between the discriminatory effect upon the applicant's [racial] group and the reasonable needs of those applying the condition.

In addition, guidance from the English courts indicates that when determining this issue, the courts will try to put themselves in the shoes of the employer and consider the commercial rationale. In this regard, it is likely that the courts would consider the following factors:

- Additional costs;
- Detrimental effect on the ability to meet customer demand;
- Inability to re-organise work among existing staff;
- Inability to recruit additional staff;
- Detrimental impact on quality;
- Detrimental impact on performance;
- Insufficiency of work during the periods the employee proposes to work;
- Planned structural changes.

The lengths to which the English courts will go to challenge an employer's reasons for a refusal are borne out by the case of British Airways Plc v. Starmer [2005] IRLR 862. In this case a commercial pilot with British Airways (Ms. Starmer) sought to work 50% of full-time. British Airways offered Ms Starmer to work 75% of full-time but refused her request to work 50% of full-time due to the:

- Burden of additional costs which British Airways would face;
- Inability for British Airways to re-organise work amongst existing employees;
- Detrimental effect on quality and performance; and
- British Airways' inability to recruit extra employees.

The Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's decision that British Airways' refusal of the request was not justified. The EAT analysed each of British Airways' purported grounds for justifying the refusal to allow Ms Starmer to work 50% as follows:

- **Burden of additional costs**

  British Airways alleged that the costs incurred in accounting for Ms Starmer's removal from the reserve pool (which provided cover for day-to-day eventualities such as sickness) and recruiting another employee to cover the other 50% of her job would amount to GBP53,000.

  It was held by the EAT that, with the resources of British Airways in mind, these costs did not justify the refusal of Ms Starmer's application to work 50%. In particular, whether she worked 50% or 75%, British Airways would have had to remove her from the reserve pool and incur these costs, or a large proportion of them, as a consequence (so their own offer of 75% work undermined this argument).

- **Inability to re-organise work amongst existing employees and detrimental effect on quality and performance**

  British Airways' current employees were already flying more hours than permitted by British Airways' agreement with the relevant trade union. Therefore, British Airways argued it could not meet all its staff requests and a reduction in staff could have a

detrimental impact on customer services due to the delay between recruiting a commercial pilot and the new pilot actually flying.

The EAT rejected this argument on the basis that a business the size of British Airways could always recruit more employees. The EAT saw the agreement between British Airways and the relevant trade union as a voluntary agreement and no more.

- **Inability to recruit extra employees**

  British Airways claimed it could not recruit new employees as it had a freeze on external recruitment and all of its training resources were occupied until either October or November 2004 due to the acquisition of new aircraft during late 2004 and 2005.

  The EAT rejected this argument as the recruitment freeze was British Airways' self-imposed constraint.

Conclusion: Whilst commercial issues will be considered by the courts in determining whether an employee's refusal is "justified", the issues must be genuine and substantial and the size and resources of the employer will always be relevant.

What Practical Steps can Employers Take in Hong Kong to Deal with Flexible Working Requests?

The reality is that requests to work flexibly are increasing in Hong Kong. As such, it is advisable for employers to prepare to deal with them *before* they arise.

Dos

- Have a clear written policy in relation to flexible working and ensure that it is followed;
- Take steps to ensure that all employees are aware of the policy so that the employer's obligations are clear;
- Start from a positive perspective ("How can we do this?" rather than "How can we avoid this?"). Courts are often critical of employers who approach a request to work flexibly by considering why it won't work rather than how any difficulties could be overcome. For example, the employer may wish to consider a trial period;
- If the employee's proposed arrangement is not acceptable, consider (and propose) alternatives. The more flexible the employer can be in suggesting alternative arrangements, the greater the chance of justifying its decision. If there is a reluctance to agree to a permanent change, consider a temporary change or a trial period. Explain and discuss the difficulties with the employee;
- Document the new arrangement carefully. Remember that a lack of clarity leads to disputes;
- Document all reasons for declining a flexible work request carefully.

Don'ts

- Don't dismiss application request for flexible work without considering it. The world (and technology) changes so what may have been impossible five years ago may now be possible;
- Don't give junior staff the power to decline a request for flexible work. All requests should go through a process;
- Don't be inconsistent. Employers should aim to ensure that flexible working requests are recorded and preferably processed in a way that ensures that decisions are made consistently;
- Don't question whether or not the employee should be looking after a child or relative (don't say, for example, "Can't your maid or mother or wife or husband look after the baby?"). If the employee has care of such child (or relative), then the employee is protected, whether or not there is someone else who could care for the child instead.