

13 March 2006

Employment &amp; Labour

## Hong Kong: The Doctors v The Hospital Authority - What Was It All About?

### Summary

On 1 March 2006 the High Court handed down its ruling on the long standing dispute between public hospital doctors and the Hospital Authority in relation to alleged breaches of the Employment Ordinance and employment contracts arising from doctors' work hours. Apart from the implications for public doctors in Hong Kong, the decision also touches upon what constitutes "work" in the circumstances where employees are required to be at their place of work or on stand-by beyond "normal work hours". This has implications for employers across Hong Kong.

### Full Update

#### **Background**

In the High Court proceedings of *Dr. Leung Ka Lau & Ors v The Hospital Authority*, 165 plaintiff doctors sued the Hospital Authority over alleged breaches of the Employment Ordinance and their respective employment contracts for being required to work on rest days, statutory / public holidays and for overtime work. The claims can be summarised as follows:-

- **Rest days** - The plaintiffs alleged that they were rostered to work on days which would have been their weekly statutory rest days (agreed by the parties to be a Sunday) in breach of section 19 of the Employment Ordinance.
- **Statutory holidays** - The plaintiffs alleged that they were required to work on a statutory holiday without having been granted an alternative holiday in lieu (being in breach of section 39 of the Employment Ordinance).
- **Overtime** - the plaintiffs contended they were contractually entitled to general on-call overtime in respect of the periods that they were "on-call" outside the contractual hours of their employment contracts (which were 44 or 45 hours per week).

In all their claims the plaintiffs sought compensation in the form of time-off in lieu with pay or damages in the alternative. On the latter, the damages sought by the 3 lead plaintiffs amounted to nearly \$28 million, of which the overtime claim was by far the largest component.

The heart of the dispute concerned the on-call system operated by public hospitals the world over to cater for the demands of patient-care after normal working hours. Basically, "on-call" refers to the period after normal working hours until the beginning of work the next day, for

example, for Saturday calls, that period would be from 1 p.m. Saturday to 9 a.m. Sunday.

There are different "grades" of being "on-call". The first such grade is resident call, where doctors are required to be "on-site" (but entitled to utilise call-rooms for rest or sleep). The next grade is being on-call outside the hospital or non-resident call. While a doctor would essentially be free to go about his social family life while on-call outside the hospital there were restrictions, such as the doctor being required to be within a 30 minute distance from the hospital and remaining contactable. Finally, doctors are sometimes required to undertake "a duty ward rounds" after being on-call for a period of 24 hours.

### ***Judgment Of The Court***

On the contractual overtime claim, the Court held that the doctors were not entitled to time off in lieu for work beyond the contractual hours as alleged. According to the employment contracts, the Court stated doctors were expected to work over-time and they were not entitled to any over-time allowance or time off in lieu. The Court also found that this was clearly the construction of the terms of the contract and the understanding between the doctors and the Hospital Authority. Finally the doctors received fixed monthly entitlement of up to HK\$3,500 under the honorarium scheme operated by the Hospital Authority.

Grappling with the more difficult issue of the proceedings - the rest day claim - the Court held that doctors on residential call are to be considered as being at their place of work and working for the entire period which they are on such residential call. For being on-call outside the hospital, it was held that a doctor was not at work or working by virtue of simply being on-call outside his hospital but if he was in fact called back it would be considered as returning to work.

In determining whether a doctor had the benefit of a rest day as defined under the Employment Ordinance after being on-call from 9 a.m. Saturday to 9 a.m. Sunday, the Court found that there would not be a breach of Section 17 of the Ordinance because the doctor would still have the benefit of a period of 24 hours of continuous rest before starting work on 9 a.m. Monday. However, in the circumstances where doctor undertook post call ward rounds for, say, 2 additional hours till 11 a.m. on a Sunday, he would only have 22 continuous hours of rest and would therefore be in breach of Section 17 of the Ordinance.

On the statutory holiday claim the parties agreed that under the Ordinance and as a matter of contract the Plaintiff doctors were entitled to such holidays or an alternative day off if they were required to return to work on a statutory holiday. The principles setting out when a doctor was working and when not apply equally to the statutory holiday claim.

For the purposes of quantum assessment, a doctor on resident call on a rest day or statutory or public holiday (who is considered to be at work for the entire day regardless of how much time is actually spent in wards or how many times the doctor is called) would be entitled to be compensated a full day. The more difficult issue arises from situations where a doctor undertakes post call ward duty rounds after being on-call for 24 hours or where a doctor, on call outside the hospital, is called back to hospital. In such circumstances, is the doctor entitled to compensation for the full day despite having worked for a period less than a full day (which the Court said was unjust to the Hospital Authority) or compensation based on an estimate of time actually spent working? The Court held that this matter should ideally be left

to the internal Hospital Authority administrative process, but if the issue was required to be resolved judicially the latter approach was preferred in terms of fairness.

## **Conclusion**

This case gives a useful analysis of the law relating to when an individual on call is "working". In addition, although not binding authority, the suggestion that a defaulting employer need only compensate an employee for the actual period during which he or she works (rather than the whole day) is to be welcomed by employers.

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