

11 June 2008

Employment & Labour

Hong Kong: Court Finds that Employee Can Take Annual Leave During Notice Period

Summary

The Court of Appeal in *Kao Lee & Yip (a firm) v. Lau Wing & Tsui Wai Yu* held that an employee is entitled to take statutory annual leave during the statutory notice period provided that the employee was the party who gave the notice of termination. In these circumstances the prohibition in section 6(2A) of the Employment Ordinance ("EO") which prohibits the taking of statutory annual leave during the notice period will not apply.

Full Update

Background

The two employees of Kao Lee & Yip (a large Hong Kong law firm) who were each required to give 3 months notice, purported to terminate their employment with the firm by working one month and by making a payment of two months' salary as wages in lieu to the firm. The background to the case is set out in our previous Legal Update: "[Hong Kong: Is Agreement Required To Buyout The Notice Period Under A Contract Of Employment? \(29 May 2006\)](#)".

Kao Lee & Yip claimed that one of the employees notice of termination was short by one day because she took one day's annual leave during the notice period. This claim was considered and rejected by the Court of First Instance. The employer appealed to the Court of Appeal.

Court of Appeal finding

Section 6(2A) of the EO states that annual leave to which an employee is entitled shall not be included in the length of notice required to terminate a contract of employment. In the present case, the relevant employee took one day annual leave within the 3-month notice period. The employer argued that her notice period was short by one day and therefore invalid.

The Court held that section 6(2A) was clearly enacted for the protection of the employee only. The effect of section 6(2A) is to prevent an employer from giving notice to an employee during the latter's statutory annual leave period. If an employer is allowed to do so, he would be able to terminate the employment relationship immediately without paying the employee the required payment in lieu of notice. The Court held that section 6(2A) of the EO does not apply when it is the employee who gives notice; alternatively, the employee can waive the prohibition in section 6(2A) if the section does apply.

Conclusion

The prohibition in section 6(2A) of the EO from taking statutory annual leave during the notice period will not apply if it is the employee who gives the notice of termination and requests to take annual leave during such notice period.

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