MAYER | BROWN

Asia Employment Law: Quarterly Review

2018-2019

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Updated as at September 2019

Introduction

Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, Mayer Brown produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 15 jurisdictions in Asia.

In this twenty-fifth edition, we flag and provide comment on anticipated employment law developments during the third quarter of 2019 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2019.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers Mayer Brown has had the pleasure of working with closely for many years. For a list of contributing lawyers and law firms, please see the *contacts page*.

We hope you find this edition useful.

With best regards,

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AUSTRALIA

13 FEB

2019

Proposed law to provide all casual employees with the right to request conversion to full-time or part-time employment

The Australian Government has introduced legislation to amend the Fair Work Act 2009 (Cth) (FW Act) extending the right for casual employees to request conversion to full-time or part-time employment, to apply to all regular casual employees. The amending legislating, the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Casual Conversion Bill) incorporates a right to request conversion to full-time or part-time employment into the National Employment Standards.

Under the Casual Conversion Bill, an employee will have the right to request conversion from casual to full-time or part-time employment if the employee has:

- been designated as a casual employee by their employer for the purposes of the employee's contract of employment or any fair work instrument that applies to the employee; and
- in the previous 12 months worked a regular pattern of hours on an ongoing basis which without significant adjustment the employee could continue to work as a full- or part-time employee.

Employees who meet these two requirements may submit a written request to their employer for their employment to be converted to full-time or part-time employment, as consistent with the regular pattern of hours worked by the employee during the previous 12 month period. The employer may only refuse the employee's request if:

- it has consulted with the employee; and
- there are reasonable grounds for refusing the request based on facts known or reasonably foreseeable at the time of refusing the request.

The reasonable grounds for refusing an employee's request include:

- that converting to full-time or part-time employment would require a significant adjustment to the employee's hours of work;
- within the period of 12 months after giving the request:
- the employee's position will cease to exist;
- the hours of work which the employee is required to perform will be significantly reduced; or
- there will be a significant change in the days and/or times that the employee is required to work that cannot be accommodated within the days or times the employee is available to work; and
- granting the employee's request would not comply with a recruitment or selection process required under Commonwealth or State law.

The Casual Conversion Bill still requires the approval of the Senate before it is passed into law.

Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 Explanatory Memorandum
Second Reading Speech

AUSTRALIA

14 FEB

2019

Potential changes to casual loading offset regulations

The Australian Federal Opposition has proposed a motion in the Senate to disallow the Federal Government's *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (**Casual Loading Offset Regulations**), which came into effect in December 2018. The Casual Loading Offset Regulations were introduced in response to the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, in which the Court decided that employees who were paid a casual loading in lieu of leave entitlements but who were actually employed as permanent employees could claim against their employer for unpaid leave entitlements.

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The Casual Loading Offset Regulations provide that employers who have paid identifiable casual loading to employees engaged as casuals but later found to be permanent employees can apply to have the loading offset against claims by such employees for National Employment Standards entitlements (including leave entitlements).

On 14 February 2018, federal Labor Senator Doug Cameron proposed a motion in the Senate to disallow the Casual Loading Offset Regulations, which was postponed until 2 April 2019. From 2 April 2019, if the motion is agreed to or has not been resolved or withdrawn within 15 sitting days after having been given, the Casual Loading Offset Regulations will cease to have effect.

Fair Work Amendment (Casual Loading Offset) Regulations 2018
Fair Work Amendment (Casual Loading Offset) Regulations 2018 Explanatory Statement

AUSTRALIA

19 FEB

2019

Changes to Australian whistleblower protection laws

The Australian Federal Parliament has passed the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (**Whistleblower Bill**). The Whistleblower Bill harmonises current whistleblower regimes under Federal law, expands existing protections and remedies for whistleblowers, and creates a whistleblower regime for tax-related misconduct and contraventions. The Whistleblower Bill has currently not received Royal Assent; it will likely commence on 1 July 2019.

The Whistleblower Bill will apply to disclosures made on or after commencement, and that relate to matters that occurred before, on or after commencement. The Whistleblower Bill also:

- requires public companies and 'large proprietary companies' (see definition below) to have mandatory whistleblower policies;
- facilitates the making of protected disclosures about a wide range of misconduct, including the existence of an 'improper state of affairs';
- broadens the range of people who may make protected disclosures than under the previous regime;
- allows anonymous disclosures;
- provides protections to whistleblowers on the basis that the disclosure was made to an 'eligible recipient' of the disclosure, which includes officers or senior managers (but not other employees generally) of the company, auditors, actuaries, or another person authorised by the company;
- no longer requires a whistleblower to act in good faith to gain the benefit of protections;
- expands the protections and redress available to whistleblowers who suffer reprisals, including access to compensation;
- allows for 'emergency' or 'public interest' disclosures to be made to the media or members of Parliament in extreme cases; and
- excludes most disclosures of personal work-related grievances from protection.

Public companies and 'large proprietary companies' must, within six months of the commencement of the Whistleblower Bill, implement a whistleblower policy. A 'large proprietary company' is currently defined as a company that meets at least two of the following three requirements: (a) consolidated revenue of $25 million or more; (b) gross assets of $12.5 million or more; and (c) the company and any entities it controls have 50 or more employees. Failure to comply with the requirement to implement a whistleblower policy is a strict liability offence, with a penalty of 60 penalty units (currently $12,600).

A company's whistleblower policy must set out information about:

- protections available to whistleblowers;

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- the person / organisation to whom protected disclosures may be made, and how they can be made;
- how the company will support whistleblowers and protect them from detriment;
- how the company will investigate protected disclosures;
- how the company will ensure fair treatment of employees who are mentioned in protected disclosures, or to whom the disclosure relates; and
- how the whistleblower policy is to be made available to officers and employees of the company.

There will be significant penalties for corporations and individuals that contravene the provisions of the Whistleblower Bill. In relation to breaching confidentiality of the identity of the whistleblower:

- for an individual:
  - » a civil penalty of up to $1.05 million or three times the benefit derived or detriment avoided; and
  - » six months' imprisonment or a fine of up to $12,600 or both; and
- for a body corporate:
  - » a civil penalty of up to $10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to $525 million); and
  - » a fine of up to $12,600.

The penalties in relation to victimisation or threatened victimisation of the whistleblower are:

- for an individual:
- a civil penalty of up to $1.05 million or three times the benefit derived or detriment avoided; and
- two years' imprisonment or a fine of up to $50,400 or both; and
- for a body corporate:
- a civil penalty of up to $10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to $525 million); and
- a fine of up to $50,400.

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018
Revised Explanatory Memorandum
Second Reading Speech

AUSTRALIA

7 MAR

2019

Report of the Migrant Workers' Taskforce

The Australian Federal Government has committed to introducing the recommendations made by the Migrant Workers' Taskforce (**MWT**) in its Report released on 7 March 2019 ("**Report**"). The recommendations in the Report are intended primarily to 'deter unscrupulous businesses that profit by underpaying migrant workers, and to improve avenues for migrant workers to recover underpayments'.

The Report found that Australia's current regulatory model (primarily based on civil liability for workplace law breaches) 'is unable to tackle serious and systemic underpayments of workers'. The Report ultimately made 22 recommendations, the key ones being that the Government:

- introduce criminal sanctions into workplace legislation for the most serious forms of exploitative conduct where the exploitative conduct is clear, deliberate and systemic;
- increase the general level of penalties for breaches of wage exploitation related provisions of the *Fair Work Act 2009* (Cth);

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- empower courts to make additional enforcement orders, such as adverse publicity orders and banning orders, against employers who underpay migrant workers;
- extend accessorial liability provisions for breaches of workplace laws to situations where business contract out services to other persons;
- introduce a mandatory National Labour Hire Registration Scheme for labour hire operators, and require that host employers in the horticulture, meat processing, cleaning and security sectors use only registered labour hire operators;
- consider legislation making a person guilty of an offence where that person knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a visa condition; and
- explore mechanisms to exclude employers from employing temporary visa holders for a defined period, where they have been convicted by a court of underpaying migrant workers.

The Government accepted in principle all 22 recommendations in the Report, intending to '[send] a strong and unambiguous message to those employees who think they can get away with the exploitation of vulnerable employees'. It committed to implementing the measures recommended by the MWT in order to protect vulnerable workers.

Report of the Migrant Workers' Taskforce
Government Response to the Migrant Workers' Taskforce Report

AUSTRALIA

6 APR

2019

Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019

The Australian Federal Parliament has passed the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019* (**SPEE Act**), which is designed to deter and penalise company officers, including company directors, from trying to avoid liability for employee entitlements in corporate insolvency.

The SPEE Act is aimed at stopping certain employers' inappropriate reliance on the Fair Entitlements Guarantee (**FEG**). The FEG is a scheme whereby the Federal Government provides financial assistance to cover certain unpaid employment entitlements to eligible employees who lose their jobs due to the liquidation or bankruptcy of their employer. The FEG covers Australian citizens and certain permanent residency visa holders who have lost their job due to, or less than six months before, their employer's liquidation or bankruptcy. It does not cover independent contractors or company directors.

The SPEE Act was introduced after concerns that certain corporate employers have adopted a practice of 'phoenixing', whereby a company transfers its assets to a new company without paying market value, before placing the first company into liquidation. By doing so, those employers have avoided liability for outstanding employee entitlements which would be covered by the FEG. This practice has enabled some employers to effectively shift the cost of payment of those entitlements from their businesses to the publically funded FEG scheme.

The SPEE Act amends the *Corporations Act 2001* (Cth) by lowering the fault element required to establish the criminal offence of avoiding employee entitlements, to include both 'intention' and 'recklessness'. Accordingly it is a criminal offence for an officer of a company to enter into a transaction or causing the company to enter into a transaction with the intention or while being reckless as to whether the transaction will:

- avoid or prevent the recovery of the entitlements of employees of the company; or
- significantly reduce the amount of the entitlements of employees of the company that can be recovered.

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2019

Further, a person is also liable for a civil penalty if the person knows, or a reasonable person in the position of the person would know, that the transaction would have the effect above.

Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019 (Cth)
Explanatory Memorandum
Second Reading Speech

AUSTRALIA
8 MAY
2019

Recent FWC decisions demonstrate willingness to overlook minor errors in agreement-making

In December 2018, the Federal Parliament passed an amendment to the *Fair Work Act 2009* (Cth) that allows enterprise agreements to be approved despite minor procedural or technical errors, so long as those errors are not likely to have disadvantaged employees in the bargaining process.

A number of decisions in the Fair Work Commission (**FWC**) have now applied this amendment, shedding light on what does and does not constitute a minor procedural or technical error. The errors have tended to relate the Notice of Employee Representational Rights (**NERR**), a document with mandated form and content that must be distributed to employees by their employer at the commencement of any enterprise bargaining. Other errors have related to the voting process required to approve proposed agreements.

The vast majority of errors that have been reviewed by the FWC have been declared minor and unlikely to disadvantage employees. Examples of these errors include:

- an out-of-date version of the NERR provided to employees;
- Legal name of the employer listed incorrectly on the NERR;
- NERR printed under employer letterhead/logo;
- Information fields left blank in the NERR, but this missing information was provided in an attached covering letter;
- Some employees initially overlooked in NERR distribution;
- Voting to approve an agreement commenced less than the necessary 7 days after employees were notified of voting details;
- Voting commenced less than the necessary 21 clear days after the last NERR was issued.

Since the amendment there have only be two instances where an error was not determined to be minor or unlikely to disadvantage employees. These were:

1. Alteration of the content of the NERR by omitting the union's role in the bargaining process; and
2. Ultimate scope of the types of work covered by the agreement was broader than that initially specified in the NERR.

These errors were deemed likely to disadvantage employees in the bargaining process; the first because it prevented employees from being fully aware of their rights to union representation and the second because different groups of employees were captured by the proposed agreement than those to whom the NERR was issued.

Corrs In-Brief Publication

AUSTRALIA
18 MAY
2019

Coalition Government re-elected in Federal Election

The Coalition Government, led by Prime Minister Scott Morrison, has been re-elected with an outright majority in the recent Federal Election held on May 18, 2019. While Labor, the Federal opposition party, had campaigned with an agenda of significant industrial relations reforms, the Coalition has said relatively little regarding any possible changes in IR policy beyond a commitment to retain the Australian Building and Construction Commission and the Registered Organisations Commission. The Government's commitment to the implementation of the Migrant Workers' Taskforce recommendations was not repeated in campaigning.

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18 MAY

2019

The Prime Minister stated during the campaign that it would be up to businesses to make the case for any further substantial reforms. Some of the issues industry and employer organisations have been advocating for include:

- the re-introduction of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* which passed through the Lower but not Upper House of Parliament. The Bill imposed a public interest test on union mergers, and also allowed the Federal Court to cancel the registration of a union on the grounds of corrupt conduct;
- enterprise agreements that last for the entire duration of mega-projects;
- more appointees to the Fair Work Commission with business experience. The Coalition has already appointed 20 consecutive members to the FWC from an employer background;
- government action to boost productivity; and
- a simplified enterprise agreement option tailored to small businesses;

The Coalition have confirmed they will not introduce national industrial manslaughter laws, despite the adoption of state-level laws in Queensland and Victoria.

Pending the finalised results, it is unlikely the Coalition will obtain a majority in the Senate (the Upper House of Parliament). In order to pass any industrial relations reform that Labor will oppose, the Coalition will therefore need the support of minor party/independent crossbenchers.

The Coalition has also announced a new cabinet following the election. Attorney-General Christian Porter has been appointed as the Minister for Industrial Relations, following the retirement of previous Minister, Kelly O'Dwyer.

AUSTRALIA

21 AUG

2019

Federal Court clarifies correct method for calculating 'sick leave' for part-time employees and shift workers

The Full Court of the Federal Court of Australia handed down its decision in *Mondelez v AMWU* [2019] FCAFC 138, which clarifies employees' entitlements to paid personal/carer's leave (sometimes referred to as 'sick leave') under section 96(1) of the Fair Work Act 2009 (Cth) (**FW Act**).

Section 96 of the FW Act relevantly provides that:

1. for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.
2. an employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

There was controversy as to whether part-time employees and shift workers accrued personal/carer's leave on a pro-rata basis or are entitled to 10 separate calendar days of leave.

A majority of the Court held that an employee's entitlement to 10 days of personal leave in the FW Act is an entitlement to be paid for 10 separate 24 hour periods where the employee is not able to attend for scheduled work because they are ill, injured or face an unexpected emergency.

Mondelez Australia Pty Ltd provided all employees with a fixed pool of hours of personal leave each calendar year but then deducted personal/carer's leave based on the hours actually 'worked'. For some employees who were rostered on longer shifts, this system meant that they could potentially exhaust their allocation of paid personal leave before they had the benefit of 10 separate calendar days of leave (and have to access any additional leave as unpaid leave).

The *Mondelez* decision requires employers to provide all full time and part time employees access to at least 10 'working days' of personal/carer's leave each year, regardless of how long a shift on a particular day might be.

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2019

On 16 August 2019, the Morrison Government and Mondelez International announced that they each intended to make an application for special leave to appeal the decision to the High Court. Unless and until the High Court determines the matter in their favour, however, it reflects the current state of the law.

Our detailed summary and analysis of the decision
Federal Court judgment

AUSTRALIA

29 AUG

2019

Exposure draft of *Religious Discrimination Bill 2019* released for consultation

The Morrison Government intends to introduce a bill as early as October 2019 that would prohibit discrimination on the basis of religion and would specifically prohibit such discrimination in employment.

In anticipation, the Attorney-General, Christian Porter has released an exposure draft of the *Religious Discrimination Bill 2019* (Cth) (Draft Bill) with detailed commentary and notes.

Under the terms of the Draft Bill a person would be allowed to make a complaint to the Australian Human Rights Commission alleging that they have been subject to unlawful discrimination on the basis of their religious belief or activity if the:

- person has or engages in a religious belief or activity (defined broadly as 'holding or not holding a religious belief' or 'engaging, not engaging or refusing to engage in lawful religious activity')
- person has been subject to direct or indirect discrimination on the basis of their religious belief or activity
- discrimination occurs in a specified area of public life, and
- conduct is covered by this Bill and an exception does not apply.

The Draft Bill prohibits both direct and indirect discrimination on religious grounds in a range of areas, including employment.

The prohibition would be in addition to the existing provisions in the Fair Work Act 2009 (Cth)(FW Act) which prohibit an employer from taking 'adverse action' against an employee or prospective employee because of the person's religion and also terminating employment on the grounds of a person's religion (sections 351(1) and 772(1)(f) of the FW Act).

For employers, the Draft Bill "imposes additional requirements on large businesses [defined in the Draft Bill as employers with a revenue of at least $50 million] relating to standards of dress, appearance or behaviour which limit religious expression"

If a large business imposes a condition relating to the standards of dress, appearance or behaviour of their employees, and that condition would restrict or prevent an employee from making statements of belief in their private capacity, the business is required to prove that compliance with the condition is necessary to avoid unjustifiable financial hardship to the business. If the business is unable to demonstrate that the condition is necessary to avoid unjustifiable financial hardship, the condition is not reasonable, and is therefore discriminatory, whether or not it would otherwise be reasonable under the general reasonableness test.

The Draft Bill is intended to implement recommendations 3, 15 and 19 of the 2018 Religious Freedom Review.

Discrimination on the basis of sexual orientation or gender identity continues to be regulated by the Sex Discrimination Act.

Consultation on the Draft Bill closes October 2.

Religious Freedom Bills homepage
Draft religious freedom bills, outline of reforms

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Explanatory notes – Religious Discrimination Bill 2019
Exposure draft – Religious Discrimination (Consequential Amendments) Bill 2019
Explanatory notes – Religious Discrimination (Consequential Amendments) Bill 2019
Exposure draft – Human Rights Legislation Amendment (Freedom of Religion) Bill 2019
Explanatory notes – Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

AUSTRALIA
18 SEP 2019

Bill to grant employers 'amnesty' to report unpaid superannuation

Australian employers are required to contribute a minimum percentage of each eligible employee's earnings (ordinary time earnings) to a complying super fund or retirement savings account in accordance with the *Superannuation Guarantee (Administration) Act 1992* (Cth). This is known as the 'superannuation guarantee' (SG).

On 18 September 2019, the Morrison Government reintroduced the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* which, if passed will:

- provide a one-off amnesty to encourage employers to self-correct historical SG non-compliance;
- allows employers who qualify for the amnesty to claim tax deductions for payments of SG charge and contributions made to offset SG charge made during the amnesty period.

The Bill was first introduced prior to the Australian Federal election in May 2019.

To qualify for the amnesty an employer would be disclose to the Commissioner of Taxation (Commissioner) information related to an SG shortfall.

If passed, the amnesty would run from May 2018 – when the measure was first announced – until six months after it receives Royal Assent.

Explanatory Memorandum for the Bill
Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019
Parliament of Australia, Bills and Legislation

AUSTRALIA
19 SEP 2019

Attorney-General's consults on Industrial Relations reform; considers introduction of crime of 'wage theft'

Attorney-General and Industrial Relations Minister Christian Porter has commenced a review of 'potential improvements in Australia's Industrial Relations system.'

In a speech to the Committee for Economic Development of Australia The Attorney-General has stated that any reform will be 'incremental' rather than 'wholesale changes' and has placed emphasis on employers providing evidence to support any changes to the IR system.

Reforms, including possible amendments to the *Fair Work Act 2009* (Cth) (FW Act), will proceed by way of consultation with employers, employee-groups and the community. Over the coming months, the Attorney-General's Department will release 'discussion papers' on a series of topics which will include:

- The enforcement and penalties regime
- Greenfields agreements
- The Building Code applicable to Commonwealth funded building work;
- Casual employment;
- Small Business Fair Dismissal Code; and
- Several aspects of enterprise bargaining

Discussion papers covering the first two topics were released on 19 September 2019 (for return on 25 October 2019 and 1 November 2019 respectively).

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LOOKING BACK

AUSTRALIA

19 SEP 2019

It will take some time before possible amendments are formulated, but it is worth noting that the discussion paper regarding the enforcement and penalties regime considers 'new and strengthened penalties' for non-compliance with the FW Act, including criminal sanctions for 'clear, deliberate and systematic' conduct. The Attorney General has previously stated that 'the issue of wage theft, and specifically the criminalisation of deliberate underpayments, is one of the areas that will be examined as a priority.'

Separately the Morrison Government has substantially increased funding to the Fair Work Ombudsman (the body responsible for regulating the FW Act) for the 2019-2020 financial year. Following the successful high-profile prosecution of restaurant group MADE Establishment Pty Ltd in July, Fair Work Ombudsman Sandra Parker said Made's "massive back-payment bill should serve as a warning to all employers that if they don't get workplace compliance right from the beginning, they can spend years cleaning up the mess".

The second discussion paper calls for feedback on a proposal to increase the term of enterprise agreements (beyond the current four-year nominal expiry date under the FW Act) that cover major new 'greenfields' projects.

Speech by Attorney-General to the Committee for Economic Development of Australia (19 September 2019)
Discussion Paper: Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance (Closing date for submissions: 25 October 2019)
Discussion Paper: Attracting major infrastructure, resources and energy projects to increase employment – Project life greenfields agreements (Closing date for submissions: 1 November 2019)

AUSTRALIA

30 SEP 2019

'Single Touch Payroll' reporting requirement becomes mandatory for all Australian employers from 30 September 2019

From 30 September 2019 all Australian employers are required to send up to date employee salary and wage information, pay as you go (PAYG) withholding and super information to the Australian Taxation Office (ATO) each time employees are paid.

This is described as 'Single Touch Payroll' (STP) and has been a reporting requirement for businesses with 20 or more employees since 1 July 2018. From 30 September 2019 employers with 19 or fewer are also required to report to the ATO via STP.

The STP reporting requirement was legislated in the *Budget Savings (Omnibus) Act 2016* (Cth).

Under STP there are a number of payments subject to withholding that are either:

- mandatory to report to the ATO;
- voluntary to report to the ATO; or
- cannot be reported.

Details of the requirements are set out in the ATO's 'employer reporting guidelines' (link below).

Employers who do not report via STP and without a referral may be contacted by the ATO. If employers do not start reporting within a reasonable amount of time, the ATO may apply penalties.

Australian Taxation Offices' Single Touch Payroll Portal
Australian Taxation Offices' Single Touch Payroll employer reporting guidelines

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LOOKING BACK

CHINA

28 FEB

2019

Circular on Further Regulating Recruitment Practices to Promote Female Employment

Nine departments, including the Ministry of Human Resources and Social Security ("MOHRSS"), jointly issued the Circular on Further Regulating Recruitment Practices to Promote Female Employment on 18 February 2019. The Circular gives a further detailed description of particular forms of gender discrimination in recruitment activities, clearly requiring that in preparing the recruitment plans or in other recruitment activities, all types of employers and human resource service agencies shall neither impose limits on gender or have gender preference, nor refer to the gender as an excuse to restrict opportunities available to women to seek employment or refuse to employ women. Also, the Circular calls for establishing the joint interview mechanism, under which authorities will hold a joint interview to talk with those employers on suspicion of gender discrimination during the recruitment process, according to whistleblower reports and complaints they have received; employers will be investigated and punished if they refuse to attend such talk or to make corrections after the talk, and their illegal practices will be exposed among the general public through the media. Moreover, the Circular stresses that, efforts shall be made to improve training services concerning women's employment, promote the development of care services for infants under the age of three, step up after-school services for primary and middle schools, optimize and put in place the maternity insurance system, and thus create a good environment and favorable conditions for women's employment.

More...

CHINA

28 APR

2019

Circular of the Ministry of Human Resources and Social Security, the Ministry of Finance, the State Taxation Administration and the National Healthcare Security Administration on Executing the Comprehensive Plan for Reducing the Social Insurance Contribution Rates

Four departments, including the Ministry of Human Resources and Social Security ("MOHRSS"), have issued the Circular on Executing the Comprehensive Plan for Reducing the Social Insurance Contribution Rates (the "Circular") on April 28 2019. The Circular reads that contributions to the employees' basic endowment insurance borne by enterprises in each region may be reduced to 16%, if the current level of contributions they make is higher than 16%; if the current level is lower than 16%, research shall be conducted to work out transitional measures. Further, the Circular expressly states that efforts will continue to lower the work-related injury insurance contribution rate, and that where privately-owned business and personnel seeking flexible employment opt to join the employees' basic endowment insurance scheme, individuals making the insurance contributions are allowed to select a proper base that ranges between 60% and 300% of the officially assessed base. The portion of state-owned capital allocated to supplement the social insurance fund will be enhanced and be set at 3.5% in 2019. Moreover, the Circular requires that practices to intensively settle and collect previous contributions in arrears without approval, and any practices to increase the actual burden of contributions on small and micro firms, are prohibited in all regions during the social insurance contribution collection regime reform, in order to ensure that the burden of social insurance contributions on enterprises, particularly on small and micro firms, will be substantially reduced.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

There are no significant policy, legal or case developments within the employment space during 2019 Q3.

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HONG KONG

18 DEC 2018

Recommendations to increase Maternity leave from 10 weeks to 14 weeks

In her 2018 Policy Address, the Chief Executive proposed that the statutory maternity leave ("SML") under the Employment Ordinance ("EO") be extended to 14 weeks (from the current 10 weeks). Following this, the Labour and Welfare Bureau submitted recommendations on this in the document "Review of Statutory Maternity leave". Their recommendations include:

1) extending SML to 14 weeks, with details including:
   a. the newly added 4 weeks will continue from the current 10 weeks granted to expectant mothers;
   b. the pay for the additional 4 weeks will remain at four-fifths of the employee's average daily wages;
   c. the government will fund the additional 4 weeks of SML wages – this will be paid by the employer to the employee following the current procedure for paying the 10 weeks of SML pay, and upon proof of payment the government will reimburse the employer;
   d. the additional 4 weeks SML pay will be capped at $36,822 per employee.

2) amending the EO as follows:
   a. amend the definition of "miscarriage" to "the expulsion of the products of conception which are incapable of survival after being born before 24 weeks of pregnancy" (currently it is 28 weeks) – this will entitle an employee whose child is incapable of survival after being born in the 24th week of pregnancy or after to SML (currently a termination of pregnancy in the 24-27th week will only entitle an employee to sick leave);
   b. require an employer to pay sickness allowance to a pregnant employee who attends a pre-natal medical examination provided that she provides a medical certificate and relevant documentary proof of her having done such medical examination.

The Government intends to introduce a bill amending the EO to the Legislative Council in late 2019.

More...

HONG KONG

3 JAN 2019

Hong Kong District Court Strikes Out Discrimination Claim Against Judges

Hong Kong's District Court (the "Court") in 庄裕安 v 关淑馨及另二人 [2018] HKDC 1589 struck out the Applicant's discrimination claim against the Respondents, who were the judges who dismissed the Applicant's appeal in a Court of Appeal case CACV 185/2017. The Court also gave a Restricted Proceedings Order against the Applicant.

Facts

The hearing of CACV 185/2017 was scheduled on 1 June 2018, but the Applicant was unable to attend the hearing due to his sickness. The Respondents dismissed the Applicant's appeal in the absence of the Applicant. The Applicant claimed that the Respondents discriminated him on the ground of his disability by refusing to adjourn the hearing.

For the present case, the Respondents applied for a striking-out order while the Applicant submitted an application to appoint an amicus *curiae* and an application to list the Judiciary as a respondent.

Decision

The Court struck out the Applicant's claim.

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Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG **3 JAN** 2019

The Court held that there was no reasonable cause of action in the Applicant's claim as it was inconsistent with the immunity from legal action provided by Article 85 of the Basic Law to the members of the judiciary in the performance of their judicial functions.

It is also impossible for the Applicant to pass the "but for" test used in the determination of whether there is "discrimination". The reason why the Respondents refused to adjourn the hearing was that they did not accept the Applicant's reason for his failure to attend the hearing. The Applicant claimed that he was suffering from a stomach ache, however, according to the medical certificate he was diagnosed as suffering from upper respiratory tract infection. Therefore, the Court held that the Respondents' refusal to adjourn the hearing was totally unrelated to the Applicant's alleged disability. The Applicant's claim was vexatious and was an abuse of the court's process.

The Court also refused the Applicant's applications to appoint an amicus curiae and to list the Judiciary as a respondent.

The Court awarded costs to the Respondents on an indemnity basis.

Finally, the Court also imposed a Restricted Proceedings Order on the Applicant. Given that the Applicant has also issued unmeritorious legal proceedings against judges before, the Court was of the view that he has abused and is likely to continue abusing the court's process. The Applicant was prohibited from initiating new legal action against judges or members of the judiciary without the leave of the Court.

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Hong Kong Statutory Paternity Leave Increased from Three Days to Five Days from 18 January 2019

The Employment (Amendment) (No.3) Ordinance 2018 (the "**Amendment Ordinance**"), which increased the statutory paternity leave in Hong Kong from three days to five days, commenced on 18 January 2019.

Male employees must provide his employer with proper notice if he wishes to take paternity leave. If the employee already provided notice to his employer at least 3 months before the expected date of his child's delivery, he may take paternity leave once he informs his employer of the dates he will be on leave. Failing this, the employee must notify his employer of the dates he intends to take paternity leave at least 5 days in advance of taking such leave.

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HONG KONG **18 JAN** 2019

Increased Minimum Wage Rate to take effect from 1 May 2019

On 18 January 2019, the Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2019 was gazetted to increase the Statutory Minimum Wage ("SMW") rate to HK$37.50 per hour. This is a HK$3.00 increase from the current rate of HK$34.50 per hour. The new rate will, subject to the approval of the Legislative Council, come into effect on 1 May 2019.

To reflect the change to the SMW rate the current HK$14,100 monthly cap on keeping records of hours worked will be increased to HK$15,300 per month. This will take effect on the same day the new SMW comes into force.

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Guidance Note on How to handle Data Breaches published by the Privacy Commissioner

The Privacy Commissioner has published a note to guide data users on the remedial procedures to take after a data breach. The guidance note includes the following steps:

1. Immediately gather information about the breach and assess the damage done to the data subjects
   - The data users should create a designated team to investigate the breach and issue a report on its findings. The details that the team should collect include:
     - The time, date and location of the breach
     - The cause of the breach
     - Who detected the breach
     - The types of data and number of data subjects involved
2. Seek assistance from relevant authorities and attempt to contain the situation
   - The data user should contact the relevant authorities and experts for assistance in stopping the breach. Some methods of containment include:
     - Engaging technical experts to spot and cure the system loopholes to halt current and future hacking
     - Removing the access rights of individuals who are suspected to be involved
     - Changing the passwords of all those having access to the personal information
     - Contacting the police if there is a risk of identity theft
3. Evaluate the extent of harm done
   The damage done to data subjects include identity theft, financial loss, danger to personal safety, humiliation or damage to reputation and loss of employment and business opportunities. The degree of harm done depends on many factors, including the type and volume of data being hacked, whether such data was encrypted, whether the hackers are traceable and whether the harm is capable of being mitigated. Thus, it is imperative that the data users contain the breach as soon as possible to prevent the losses from exacerbating.
4. Notify the data subjects of such breach
   It is recommended best practice to formally notify those involved in a data breach as soon as possible by phone, writing email or face to face, although this is not required under the PDPO. Parties involved could include the data subjects, the Privacy Commissioner and any relevant law enforcement authorities. The contents of such notification could include:
   - a description on what happened – the time, date, and location
   - the cause of the breach
   - the level of harm done
   - actions done to mitigate and control the situation
   - contact details of a designated individual who could provide assistance to the data users affected
5. Measures to take to avoid recurrence
   During the data breach investigation, it is essential for the data user to identify the insufficiencies in the user's system and make improvements to prevent another breach. The data user should review:
   - whether the security measures in place is sufficient to safeguard the personal data
   - whether the access rights is adequately controlled
   - whether the current privacy policy is updated

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- the need to provide training to the data user's employees to raise awareness of data privacy risks and how to manage data safely
- the mechanism used to supervise employees and data processors to ensure they are following the data user's privacy policy

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Investigation report published by the Privacy Commissioner regarding the HKBN Database intrusion

After the Hong Kong Broadband Network Limited ("HKBN")'s database intrusion in mid-April 2018 which lead to a personal data leakage affecting 380,000 individuals, the Privacy Commissioner published an investigation report and made the following findings:

Facts

The hacked database ("database A") was an inactive database which should have been deleted after a system migration many years ago. The failure to delete database A was due to human oversight and the failure to perform a comprehensive follow up review after the system migration to check that the database was deleted. It was also found that HKBN failed to consider an appropriate retention period for the personal data of its former customers and failed to give internal guidance to its employees on the retention period and procedure to deleting such personal data. Thus, HKBN contravened s26 PDPO and Data Protection Principle (DPP) 2(2) of Sch 1 PDPO by failing to erase all personal data in database A when it was no longer needed and retaining such data for longer than necessary.

By failing to protect the personal data in database A from unauthorized access, HKBN contravened DPP4(1) of Sch 1 of the PDPO. The contents of database A was not encrypted and the password of the compromised account used to hack into HKBN's network had not been changed for over 3 months, which shows the lack of enforcement of HKBN's password policy.

In light of the incident, the Privacy Commissioner served an enforcement notice on HKBN instructing it to:

1. Devise guidelines on the procedure, time limits and review measures for erasing unnecessary personal data following a system migration
2. Provide a clear data retention policy stating the retention period for personal data, ensuring that such retention period is no longer than required;
3. Formulate a data security policy to conduct regular review of the security controls of the remote access service;
4. Ensure that all employees are aware, informed and able to follow the guidelines mentioned in 1-3
5. If any personal data was found to be retained after the expiration of the retention period, all such data be deleted in accordance to 2.

Recommendations of the Privacy Commissioner

Personal data collectors should review and monitor their data inventories and retention periods. The duration of the retention period should be devised in accordance with the purpose of the data and collectors should ensure that such data is deleted when it is no longer needed. The Privacy Commissioner recommends the use of a privacy management programme along with a periodical review and ongoing monitoring process to ensure long term personal data protection. In the event of a data leak, the Privacy Commissioner recommends collectors to notify the Privacy Commissioner and those affected although there is no requirement to do so (good practice which was performed by HKBN).

The Privacy Commissioner deems it necessary for the Government to review the current law and consider imposing a fine for contravening the PDPO and increasing the sanctions as deterrence from noncompliance with the PDPO and DPPs.

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HONG KONG

20 MAR 2019

Maximum tax deduction of HK$60,000 per taxpayer in place starting in the next financial year

In efforts to encourage the working population to make earlier retirement savings and be more prepared for retirement, The Inland Revenue and MPF Schemes Legislation (Tax Deductions for Annuity Premiums and MPF Voluntary Contributions) (Amendment) Bill 2018 was passed on 20 March 2019 and the Ordinance will take effect on 1 April 2019. This amendment will allow taxpayers to benefit from tax deductions under salaries tax and personal assessment for their contributions paid into tax deductible MPF voluntary contribution accounts and qualifying deferred annuities premiums. Each taxpayer can get a maximum of HK$60,000 per year in tax deductions, which is an aggregate limit for tax deductible MPF voluntary contributions and qualifying deferred annuity premiums.

For deferred annuity premiums, taxpayers are also entitled to tax deduction covering their spouse as joint annuitant or either one of the two as sole annuitant. The new Ordinance also allows taxpaying couples to allocate the deferred annuity premium tax deduction between themselves so that they can claim a total of HK$120,000 in tax deductions, as long as each taxpayer doesn't exceed the maximum limit per individual.

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HONG KONG

4 APR 2019

Hong Kong Government Publishes Proposed Amendments to the Occupational Retirement Schemes Ordinance (ORSO)

On 4 April 2019 the Hong Kong government published the long-awaited Occupational Retirement Schemes (Amendment) Bill 2019. This Bill is designed to:

- ensure that retirement schemes which are registered or exempted under ORSO are "employment-based" (thereby outlawing certain purely investment-based products which have sprung up since ORSO commenced in the mid 90s)
- grant the MPF Authority (MPFA) increased powers and discretion to investigate, approve or reject applications for registration, and
- limit the circumstances in which retirement schemes can, in the future, apply for exemption under ORSO

These anticipated changes have been previously considered in our earlier alerts of:

Hong Kong's Mandatory Provident Fund Schemes Authority proposed new changes to the Occupational Retirement Schemes Ordinance, 19 June 2018

MPFA Launches Consultation to Overhaul Hong Kong Retirement Schemes Regime, 14 December 2017

Below are some of the more important consequences of the proposed legislation and some of the concerns arising from the proposed changes.

1. *Requiring all registered or exempted ORSO schemes to be "employment-related"*

   This is the most fundamental, and intrusive, change to the Hong Kong retirement schemes regulatory regime. It will require the employer of every single one of the over-4,000 ORSO registered or exempted schemes to confirm annually that each scheme satisfies the "employment-related criterion".

   A scheme satisfies the "employment-related criterion" if, in simple terms:
   - the only persons who are members of the scheme are employees (or former employees) of the employer, or employees of a former employer

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in respect of which a transfer has been made to the scheme, and

- no other types of person (i.e., non-employees) are permitted to become members of the scheme

The current draft of the Bill contains unusual provisions deeming "full-time" independent contractors to be "employees". Precisely how this is intended to work (or, indeed, why it is even in the proposed legislation) will no doubt be explained in due course.

An unexpected consequence of the proposed legislative changes is a material narrowing of the definition of "occupational retirement scheme" in ORSO by excluding from such definition any scheme or arrangement which does not limit membership to, in essence, "employees". Whilst this means that any scheme or arrangement which is open to any non-"employee" cannot be registered or exempted under ORSO, it also means that it will not be unlawful under section 3 of ORSO to contribute to or administer such a scheme. It is unclear whether this was the intention of the government. If it was, and so if this drafting is adopted, then it is possible that this may give rise to a new class of arrangement which is non-registered, non-exempt retirement schemes which cannot provide tax efficient benefits, but which are broadly unregulated.

Comment: The essence of this change is well intentioned and should be relatively easy for employers to embrace (other than, of course, the schemes which are not employment-related!). It will require each of the 4,000 schemes in existence to be considered in order to ensure that the membership rule is sufficiently tight so as to exclude "non-employees". We do have a slight concern that there may be overseas schemes that are currently exempt under ORSO and may have standard membership clauses which do not expressly exclude non-employees. If this is the case then this could result in major restructuring arrangements for such schemes, their employers and the impacted employees.

2. *Increasing the investigation powers of the MPFA*

The Authority is seeking powers of investigation which are broadly aligned with those provided to other regulatory authorities in Hong Kong.

Comment: This change should not be a cause of any particular concern.

3. *Limiting the circumstances in which a future retirement scheme can be exempted under ORSO*

This change has been the subject of substantial discussion over the last year or so. It is also the primary topic of the two previous alerts from us referred to above.

This change will materially narrow the circumstances in which a retirement scheme can obtain an ORSO exemption certificate in the future. The principal concern is that it is not at all uncommon for an international business looking to set up in Hong Kong (or send globally mobile international executives to Hong Kong) to wish to employ executives in Hong Kong who are members of an overseas retirement scheme (a "**Home Country Scheme**"). In order to avoid committing an offence under ORSO the employer must obtain an exemption certificate for the Home Country Scheme.

Currently there is a clear and obvious route to enable the Home Country Scheme to obtain an exemption certificate (the "no more than 10 percent or 50 members being Hong Kong permanent identity cardholders" route). The proposed changes will result in this clear and obvious route being removed in its entirety. This will mean that

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the ONLY way in which the Home Country Scheme can obtain an exemption certificate is by applying under the (very rarely used) section 7(4)(a) ORSO. This section enables the MPFA to grant an exemption certificate where the applicant scheme is "*registered or approved by a regulatory authority outside Hong Kong performing functions which are generally analogous to those of the [MPFA]*" (the "**analogous authority exemption**").

Comment: The MPFA has historically failed to provide any guidance as to which "*regulatory authorities outside Hong Kong*" satisfy the criteria of providing analogous functions.

Notwithstanding numerous requests and despite the hugely increased importance of this analogous authority exemption, the MPFA continues to refuse even to commit to providing information to the retirement scheme industry of which overseas authorities it considers satisfy the condition of "*performing functions which are generally analogous*" to those of the MPFA.

This refusal to provide such information is a cause of concern. Either the MPFA is refusing to explain its position due to a desire to keep this exemption option very narrow (which would be a material issue for employers, and lawmakers, to consider when debating the impact of this legislation on Hong Kong) or the MPFA is unaware of the powers and functions being undertaken by its fellow regulators generally, which raises a separate set of concerns!

In any case, we would strongly encourage the MPFA to clarify this important issue, and for lawmakers to insist on a disclosure by the MPFA of the manner in which it intends to apply the analogous authority exemption.

Conclusion

When it gets to the stage of commenting on the drafting of the Bill then much of the "devil" will almost inevitably be in the "detail". Certainly most of the changes set out in the Bill were expected. That does not, however, mean that the implementation of the changes or, indeed, the impact of the changes is going to be seamless or painless. There will be pain and there will be disruption. The amount of pain and the amount of disruption can be minimised by transparency from the regulators who will oversee these changes, and by continued constructive dialogue with the industry as a whole. Many of these changes will be felt hardest by global employers who have operations in Hong Kong. If the new legislation is introduced in a clumsy or heavy-handed manner then this will impact Hong Kong's reputation globally.

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The Occupational Retirement Schemes (Amendment) Bill 2019: "Devils" in the Details

Our recent update commented on the broad aim of the changes proposed to be made to the Occupational Retirement Schemes Ordinance (ORSO) by the ORS (Amendment) Bill 2019. This update dives deeper into the Bill to identify three of the ugliest or weirdest "devils" in the details of the Bill.

Devil 1 - Increased powers for the Registrar

The Bill grants the Registrar of Occupational Retirement Schemes materially increased powers of investigation. Such powers are broadly fine as they bring the Registrar in line with other Hong Kong regulators.

However, the Bill also looks to grant the Registrar the unilateral power to "*impose conditions for [exemption/registration]*" as "*the Registrar considers appropriate*". Such broad (and unfettered) power could be a concern for employers and the retirement scheme industry generally. In effect, it would give the Registrar quasi-legislative powers to determine the circumstances under which schemes can be exempted or registered under ORSO.

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The Bill also replaces the current *obligation* of the Registrar to register a scheme which satisfies each of the specified statutory conditions with a *discretion*. As such, even where a scheme satisfies all required conditions the Registrar will, if the Bill is approved in its current form, be able to refuse to register such scheme.

Devil 2 - Codification of trust law obligations into ORSO

Over the course of several centuries, the general principles of trust law have been determined by the courts and such determinations have resulted in many thousands of pages of judgments and academic tomes. Such writings include a comprehensive analysis of how trustees should act and the extent of their obligations under different circumstances (also known as the "fiduciary obligations" of trustees).

The Bill attempts to condense the fiduciary obligations of trustees into around 160 words. There is no explanation as to why this is considered necessary. There is also no analysis on the impact such codification of fiduciary obligations may have on the rights of a beneficiary of the trust (for instance, will an aggrieved beneficiary now have to bring an action for breach of statutory duty as opposed to breach of fiduciary duties?).

Rather strangely, the Bill also contains an obligation on the employer of a retirement scheme which is applying for registration to confirm that the trustee has complied with the relevant obligations set out in the 160 words purporting to describe the fiduciary obligations of a retirement scheme trustee.

Precisely how any employer will satisfy itself that it can give such confirmation will, no doubt, be a cause of considerable discussion between the employer and the trustee.

Devil 3 – Amended definition of "occupational retirement scheme"

ORSO came into being in 1995 as a direct result of the Mirror Group/Robert Maxwell pension scandal in the early 1990s, which involved the theft of several hundred million pounds worth of Mirror Group Pension Fund assets. ORSO created an oversight structure designed to ensure that "occupational retirement schemes" set up for Hong Kong employees were properly funded and the assets appropriately secured.

To this end, the original (and current) definition of "occupational retirement scheme" was drafted in a broad manner to capture as many of these post-termination-of-employment-promise type arrangements as possible.

The Bill will narrow the definition of "occupational retirement scheme" by inserting a condition that only a scheme limiting its membership to employees or former employees[1] will fall within such definition of "occupational retirement scheme". Therefore, a current or future scheme that admits (or is drafted in a manner such that it *could* admit) even one person who is not an employee (or former employee) will cease to be an "occupational retirement scheme" for the purposes of ORSO. As such, it means that (1) such an arrangement is not governed by ORSO at all, and (2) such an arrangement is therefore not subject to any of the structural, funding or investment restrictions imposed by ORSO.

This would be a bizarre outcome and, we can only assume, is not the intention. This "devil" may well be a mistake!

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1 The actual phrase used in the Bill is "eligible person", which is slightly more complex than "employee or former employee", but is generally equivalent.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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Statutory Entitlements to Sickness, Holiday, and Annual Leave Pay

HK District Court in *Mak Wai Man v Richfield Realty Limited* ruled in favour of the employer taking the commission payment and bonus payment into account when calculating what amount may be used to discharge the employer's the statutory obligation to pay certain leave payments under the Employment Ordinance.

Facts

The four plaintiffs (the "**Plaintiffs**") were former employees of the Defendant. Upon termination of their employment, the Plaintiffs claimed for shortfalls in their statutory holiday pay, annual leave pay and/or sick leave allowance (the "**Statutory Entitlements**").

Under sections 35(4), 41(6), and 41C(6) of the Employment Ordinance ("**the Deduction Sub-Sections**"), if, pursuant to the terms of the employee's contract of employment or any other agreement or for any other reason, the employee is paid by his employer a sum of money in respect of a day of sick leave, statutory holiday and annual leave taken by him/her, the statutory leave payment payable to the employee in respect of that day of sick leave/statutory holiday/annual leave is to be reduced by the sum.

The Plaintiffs claimed that the 'team-based' commission ("**Commission**") and team leader bonus ("**Bonus**") they received during their employment were only attributable to working days, and therefore were not paid for or inclusive of Statutory Entitlements and should not be deducted from the calculations. The Defendant argued that since the Commission and Bonus were paid monthly, they should be taken to be payments for every day of the month and are inclusive of Statutory Entitlements.

Court's Decision

The court found both the Commission and Bonus fell within the Deduction Sub-Sections and held that such sums could be used to reduce the employer's obligation to pay the Statutory Entitlements. As such, there was no shortfall and the Defendant is not liable for any further sum to the Plaintiffs. In arriving at this conclusion, the court dealt with two issues:

1. Were the Commission and Bonus paid for or inclusive of Statutory Entitlements?

The amount that can be used to set off an employee's Statutory Entitlements is not limited to the employee's "wages", as defined in section 2. Where an employee is paid "a sum of money" in respect of the leave day, the sum of money which is not necessarily "wages" can be used to set off the Statutory Entitlements.

The court considered that the Commission and Bonus do not wholly fall within the definition of "wages" in section 2 of the Employment Ordinance as the payments cover not only work done by the individual plaintiffs themselves but includes payment for work done by their teammates. As such, for the Commission and Bonus to be included in calculating the Statutory Entitlements, they must fall within the extended definition of wages under the Deduction Sub-Sections.

The definition of "wages" in calculating the daily rate of the Statutory Entitlements covers not only payments by the employer to the employee in respect of work done, but also in respect of a day of leave or a normal working day where the employee is not provided with work.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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Hence, it was held that both the Commission and the Team Leader Bonus were paid for each day of the month and attributable to both working days and notional or non-working days. In other words, the Commission and Bonus include payments to the Plaintiffs for days when they were on leave and therefore is paid for or inclusive of their Statutory Entitlements.

2. Should the Bonus and Commission be deducted pursuant to the Deduction Sub-sections?

The Deduction Sub-Sections allow for deductions of any sums of money paid by the employer to the employee pursuant to 1) the terms of the employment contract; 2) any other agreement; and 3) for any other reason, in respect of a day of holiday/annual leave/sick leave.

There was no express term in the Plaintiffs' employment contracts or express agreement providing that the Commission and Bonus was inclusive of Statutory Entitlements. Therefore, the question for the Court was whether the Commission and Bonus payments fell within the *'any other reason'* limb. The court adopted a purposive approach to interpreting that expression and held that "*any other reason*" encompassed a non-exhaustive list of reasons to further the legislative objective of avoiding double payment by the employer. Examples of such reasons included by operation of law and situations where estoppel may arise.

The court then held that the Commission and Bonus were paid for and inclusive of Statutory Entitlements, a failure to deduct such sums causes double payment by the employer and is inconsistent with the policy objective of the legislation and therefore such sums should be deducted from the calculation of the Statutory Entitlements.

Takeaways for employers

For contracts of employment which involve variable payments or commissions, it is recommended that employers state expressly in the contracts of employment that such sums are paid in fulfillment of the statutory entitlements of the employee to ensure that the payments fall within the Deduction Sub-Sections.

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Hong Kong's New Minimum Wage Effective from 1 May 2019

Effective 1 May 2019, the minimum wage rate in Hong Kong increased to HK$37.50 per hour.

The monthly threshold amount for keeping records of hours worked increased accordingly to HK$15,300 per month.

Employers should ensure that they remain in compliance with the new minimum wage rate.

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Think Twice before Delegating Authority to Employees!

In the case Tien Sau Tong Medicine Company (Hong Kong) Limited v Cheung Po Ling and Wu Chi On [2019] HKCFI 1258, the court considered whether two employees misused company funds for their personal purposes.

Facts

The Plaintiff company (the "**Plaintiff**") was wholly owned by one shareholder, Mr. Ng (who is also the sole director) and the 1st Defendant and 2nd Defendant were mother and son who were both employed by the Plaintiff. The 1st Defendant handled most of the day to day management and administration of the Plaintiff and had signing rights as she was the only authorised signatory for the Plaintiff's bank accounts. There was no dispute the 1st Defendant owed fiduciary duties to the Plaintiff.

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The 1st Defendant used HK$ 6 million belonging to the Plaintiff to purchase a property in the name of the 2nd Defendant for his personal use. After a repayment, the sum of money concerned was reduced to HK$5.8 million. The Defendants pleaded that the money was provided by the Plaintiff by way of a non-interest-bearing loan which was authorised by Mr. Ng pursuant to an alleged oral agreement between the 1st Defendant and Mr Ng. Mr. Ng denied the existence of such oral agreement and stated that the money was extracted without authorisation.

Court's Decision

The court found that there was no oral agreement for the loan. The court reached this decision by considering evidence which included (i) the unlikelihood that Mr Ng would authorise the loan given that the sum involved amounted to a quarter of the total asset of the Plaintiff in the same period; (ii) the fact that it was unrealistic to believe the Defendants could repay the sum and that (iii) key terms of the loan such as who was the real borrower, who would repay the loan and how the loan was to be repaid were not discussed with Mr. Ng which makes the existence of the loan unlikely.

The court also considered the fact that Mr. Ng rarely intervened in the company's operations and seldomly paid attention to corporate documents and just signed the documents as indicated. Thus the court accepted that although the loan was recorded in the Plaintiff's financial statements, he did not notice it and thus did not approve the loan.

The court accordingly held that the claims against the 1st Defendant and 2nd Defendant succeeded. The 1st Defendant breached her fiduciary duty owned to the Plaintiff, and she was a constructive trustee of the $5.8 million. The 2nd Defendant wa held to be a constructive trustee of the Property and restrained from disposing of the property or in any way encumbering it.

Takeaways for employers

Senior management should always keep track of the company's operations and refrain from giving employees unlimited authority with the management of the company. Providing a great degree of autonomy without supervision and scrutiny increases the chance of employees acting in ways which are not in the company's best interests, and increases the risk of senior management having to take legal action to recover assets lost or have no choice but to accept what was done when such act is finally realised.

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3 JUN 2019

Revised Code of Practice published by the Labour Department introducing the new "Extreme Conditions" Announcement

After experiencing the might of Super Typhoon Mangkhut, the Government has revised the "Code of Practice in times of Typhoons and Rainstorms" ("CoP") to include new arrangements for the Government to issue an "extreme conditions" announcement before lowering a Typhoon Signal No. 8 ("T8").

Situations which warrant an "extreme conditions" announcement include major disruption to public transport services, serious flooding or landslides and large scale power outage following a super typhoon. Upon such announcement, other than essential staff who have agreed to work during the "extreme conditions", employees should stay at home/ in a safe place for 2 hours after the cancellation of T8 (the period of the "extreme conditions"). The Government will monitor and review the situation during these 2 hours and further advise on whether the "extreme conditions" will be cancelled or extended. If extended, employees should continue to stay in a safe place. If cancelled, the employees should resume work according to the work arrangements previously agreed with their employer.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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Employers should amend their Weather Work Arrangements Policy to include the work and resumption of work arrangements in the event of an "extreme conditions" announcement being made. Employers are reminded to consult their employees when drawing up such work arrangements and to adopt a flexible approach with due consideration to each employee's circumstances and needs when returning to work after an "extreme conditions" announcement. Top priority should be given to ensure the safety of all employees.

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HONG KONG **6 JUN** 2019

Hong Kong continues its Journey Along the Rainbow-Coloured Road

In 2018 the Hong Kong courts determined that it was irrational for the Immigration Department to refuse to grant the same-sex spouse of an expatriate worker arriving in Hong Kong the same right to work in Hong Kong as is granted to every opposite-sex spouse (see our update *here*). This decision was greeted with acclaim internationally and, generally, was well accepted in Hong Kong also.

On 6 June 2019 the Hong Kong Court of Final Appeal took a further (lengthy) step towards internationally accepted norms by making it unlawful for the Hong Kong Government to provide lower benefits to a spouse in a same-sex marriage than to a spouse in a heterosexual marriage, and that it is unlawful for the Inland Revenue Department to refuse to accept same-sex marriages when considering individual tax treatment.

On 6 June 2019 the Court of Final Appeal issued its judgment in the case of *Leung Chun Kwong v. Secretary for Civil Service and Commissioner of Inland Revenue*.

The case involved a same-sex couple (Angus Leung and Scott Adams) who had been legally married in New Zealand (where it is lawful for same-sex couples to marry). Angus Leung works for the Hong Kong government as a civil servant. The terms of employment for a civil servant entitle the employee to certain benefits (medical and dental) which can be extended to the spouse of the civil servant. Mr. Leung applied for his spouse (Mr. Adams) to be granted such benefits. His application was rejected on the grounds that same-sex marriages were not recognised in Hong Kong.

In addition, the Hong Kong tax system contains preferential tax treatment for married couples. Mr. Leung sought to file tax returns with the Hong Kong Inland Revenue Department (IRD) naming Mr. Adams as his spouse. The tax returns were rejected by the IRD on the grounds that spouses cannot be of the same sex.

Mr. Leung challenged both of the above decisions and, having suffered various losses in the lower courts, the matter was heard by the Court of Final Appeal earlier this year. The primary argument put forward by the Government and by the IRD to justify their decision to reject the various applications made by Mr. Leung was that differential treatment between different-sex and same-sex relationships was necessary in order to protect the institution of traditional marriage.

The Court of Final Appeal (CFA) rejected the arguments put forward by the respondents. In particular the CFA determined as follows:-

- There is no rational connection between denying Mr. Leung (or his spouse) employment and tax benefits and protecting the institution of marriage, and
- The argument that spouses in same-sex marriages should be treated less favourably due to the fact that same-sex marriages are not possible in Hong Kong is a circular (and therefore flawed) argument.

The CFA held in favour of Mr. Leung on both counts.

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What does this mean for the future?

This is a very clear indication of the way in which the Hong Kong judiciary view the issue of same-sex marriages. It is probable that more and more cases are going to be filed with the court seeking equality of treatment for gay couples, particularly in relation to the public sector. It is also probable that the Government's appetite for defending these cases will reduce and that it will begin being more proactive and taking steps to equalise the position without being directed to do so by the courts.

After all, even Taiwan now permits same-sex marriages!

Whilst neither this decision, nor any prior decision, impacts private sector employment contracts, it is a fact that the large number of public sector (and quasi-public sector) employees in Hong Kong will, in our opinion, drive a new "normal" in the HR landscape. That new "normal" will be the provision of equality of benefits for employees regardless of their sexual orientation.

Hong Kong is renowned for its ability to change its landscape rapidly through the creation of new infrastructure projects. It is now becoming known for its ability to change in other ways also.

This is a day to celebrate.

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HONG KONG

14 JUN 2019

Lessons Learned: The Significance of Restrictive Covenants

In McLarens Hong Kong Limited v Poon Chi Fai and others [2019] HKCFI 1550, the court refused to grant a springboard injunction in favour of the employer.

Facts

The 1st to 9th Defendants ("**D1 to D9**") were employed by the Plaintiff, a corporation providing insurance loss adjusting services. The 1st Defendant ("**D1**") was a director to the Plaintiff and the 2nd to 9th Defendants ("**D2 to D9**") were full-time employees. D1 to D9 terminated their employment contracts with the Plaintiff and joined the 10th Defendant ("**D10**"), which provided similar services as the Plaintiff and was a competitor of the Plaintiff.

The Plaintiff alleged D1 to D9 breached their duties of confidentiality, and in particular, D1 breached their fiduciary and director's duties; and alleged D10 was a party to the conspiracy to injure the Plaintiff and also vicariously liable for D1 to D9's breaches. In addition, the Plaintiff sought a springboard injunction against D1 to D9, restraining them from engaging in a similar business and soliciting any of the Plaintiff's customers and business partners for a period of six months.

Court's Decision

In refusing to grant a springboard injunction against D1 to D9, the court turned to five factors to decide whether a springboard injunction should be granted.

1. Whether there was unlawful use of the confidential information.

From the evidence, most of the Defendants copied and took away large quantities of the Plaintiff's documents, in particular, D1 who deliberately requested a confidential document from the Plaintiff a day before his resignation. The 3rd and 6th Defendants also copied a vast amount of documents that were unrelated to their duties. The court agreed that there is a legitimate concern of a real risk that the confidential information would be misused.

2. Whether the defendants obtained an unfair competitive edge (built a springboard) by reason of the breaches.

The Plaintiff has the burden to prove the causal link between the misuse of the confidential information and the building of the springboard. On this regard, although it was certain that D1 to D9 took client lists of the Plaintiff when they terminated their employment contracts, the court found that D1 to D9 did not

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need to use the information for their own benefit, because some information taken by D1 to D9 was publicly available online. Further, the court agreed that without a restrictive covenant to this effect, D1 to D9 are entitled to persuade the Plaintiff's clients to move their case files to the 10th Defendant. Therefore, the Plaintiff failed to establish the causal linkage.

3. Whether the unfair advantage still existed on the date the springboard injunction is sought.

The court held that even if there was any unfair advantage previously, it would now be non-existent because the Plaintiff's information and documents had been returned and/or deleted.

4. Whether damages are an adequate remedy to the Plaintiff.

The court found a monetary award would be adequate to compensate the Plaintiff.

5. Whether a springboard injunction is a remedy that carries the lower risk of injustice if it turned out to be wrong.

The court decided that the grant of a springboard injunction does not carry the lower risk of injustice because the Plaintiff's interests were already protected by the Modified Undertakings (which was in effect an interim injunction) and the possibility of an account of profits or damages if they won at trial; whereas D1 to D9 would be out of a job for a significant period if the springboard

injunction was wrongly granted.

Takeaways for employers

Employers should consider carefully the types of information and connections/ goodwill it needs to protect when an employee leaves, and take steps to protect those interests. This can be done through a combination of things such as a longer notice period, garden leave clause, post termination restrictive covenant, express confidentiality obligation and/or long term incentive plan or other incentive payments.

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Terminating engagement in good faith and with rationality

Hong Kong Court of Appeal ("**CA**") in *FWD Life Insurance Co (Bermuda) Ltd v Poon Cindy* [2019] HKCA697 remitted a claim regarding an agency agreement to the Court of First Instance with the Judge to decide on whether the Defendant can successfully resist the Plaintiff's claim on the argument of Good Faith and Rationality, which was only raised at Appeal.

Facts

The Defendant claimed that her engagement was wrongfully terminated after she refused to accept a demotion. One of her arguments was that there was an implied term in her Agent Agreement ("**AA**") that it would not be terminated without valid reasons and an implied term to the Letter of Offer that she would not be demoted from the position as Agency Director without any valid reasons given.("**Valid Reason implied term**").

Decision

At the hearing in the Court of First Instance the Judge rejected the Valid Reason Implied Term argument as he decided there was no necessity for such an implied term in the AA and the Letter of Offer. Although the Judge was aware of the nexus of the proposed demotion and the termination, he did not give much consideration to the Valid Reason Implied Term against demotion since the Defendant did not actually accept the demotion. . The CA found that the Judge in the court below erred on this point because 'given the nexus between the proposed demotion and the termination, the Judge should examine the Valid Reason Implied Term in both contexts together.

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The necessity for a Valid Reason Implied Term to restrict the power of demotion could affect the necessity for a Valid Reason Implied Term for termination. If the court is satisfied that there was indeed a Valid Reason Implied Term for demotion, it would go far in establishing the Valid Reason Implied Term for termination in the context of a termination based on refusal to accept demotion.'

The common law on an implied term based on good faith and rationality (the "Good Faith and Rationality Implied Term") had developed since 2015. As such, at the hearing of the appeal, Defendant's counsel advanced arguments based on the Good Faith and Rationality Implied Term, stipulating that:

'The power to terminate the Agent Agreement would be exercised in good faith and would not be exercised for arbitrary, capricious, perverse or irrational reasons. The power to demote the Defendant from her position as Agency Director would be exercised in good faith and would not be exercised for arbitrary, capricious, perverse or irrational reasons.'

The CA was of the view that it would be unjust if the Defendant wasn't given a chance to rely on and present arguments on the Good Faith and Rationality Implied Term. The CA viewed 'the Valid Reason Implied Term and the Good Faith and Rationality Implied Term to be two sides of the same coin. The Valid Reason Implied Term requires the Plaintiff to give a valid reason for the proposed demotion and (if demotion was not accepted) termination. In the context of the Good Faith and Rationality Implied Term, the requirement on the Plaintiff is to 'exercise the power of demotion and termination in good faith and rationally.' Therefore, the case was remitted to the Court of First Instance to decide whether the Defendant can successfully resist the Plaintiff's claim and pursue her counterclaim based on the Good Faith and Rationality Implied Term and the Valid Reason Implied Term.

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HONG KONG **26 JUN** 2019

Hong Kong Government Publishes Proposed Amendments in the Mandatory Provident Fund Schemes (Amendment) Bill 2019

At the meeting of the Executive Council on 11 June 2019, the Council advised that the Mandatory Provident Fund Schemes (Amendment) Bill 2019 be introduced into the LegCo. The Bill was gazetted on 28 June 2019 and the first reading was scheduled to be on 3 July 2019. The amendments mainly affect two areas: (i) a Centralized Platform ("**CP**"), and (ii) an Annual Registration Fee ("**ARF**").

Setting up wholly owned subsidiary for the CP

Currently, the inefficient administration of the MPF schemes and the cumbersome, paper-based administrative processes result in the high administration cost of the MPF system. The CP will facilitate the centralization of the Mandatory Provident Fund ("**MPF**") scheme so as to facilitate the reduction of MPF management fees and to reduce paper use. The Financial Services and the Treasury Bureau ("**Bureau**") considered different options of institutional arrangements for operating the CP, and they decided that creating a subsidiary of the MPF Authority ("**MPFA**") would be the most ideal way. The subsidiary will not be an approved trustee and hence it will not be regulated by the MPFA. The board of directors of the subsidiary will include directors of the MPFA, representatives of the Government, and persons who have relevant expertise.

There is currently no express power under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) for the MPFA to set up a limited company to perform such functions. Hence it was decided that it would be prudent to amend Cap. 485 to provide a legal and sound basis for the MPFA to set up the subsidiary to operate the CP. The setting up on the subsidiary would require the approval of the Financial Secretary under the amendment.

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Implementation of an ARF

It was intended that the MPFA be self-financing by recovering from approved trustees its costs of performing its functions for MPF schemes. Under s.22B of Cap. 485, the MPFA has the power to charge trustees ARF. The level of ARF charged is capped. However, the MPFA has never charged trustees ARF since the commencement of the MPF regime in 2000. The existing rate of ARF as provided for in Schedule 1 of the Mandatory Provident Fund Schemes (Fees) Regulation (Cap. 485C) is set at 0%. As such, the MPFA does not have a stable income stream.

The Bureau proposed charging ARF at the level of 0.03% for the first six years in order to allow the trustees to adjust. The ARF level will be revised with effect from the seventh year. In order to avoid the MPF trustees shifting the burden of the ARF to the scheme members, the proposed amendment to the legislation will expressly prohibit the transferal of burden. Even though the ARF would increase the operating costs of MPF trustees, the additional cost burden should be insignificant.

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Remedial Interpretation of the IRO following the Leung Chun Kwong case

In June 2019, the Court of Final Appeal ("**CFA**") handed down its judgment for *Leung Chun Kwong v Secretary for the Civil Service & ors*, granting spouses in a same-sex marriage the right to equal tax treatment (see our update *here*). Following the main judgment, the CFA proceeded to determine the relief to be granted and the costs order to be given.

In respect of the decision relating to entitlement to employment benefits for a same-sex spouse, the CFA ordered a declaration that the Applicant (Mr. Leung) and his same-sex married partner were entitled to the benefits and allowances that the Government provided to heterosexual married civil servants of the same employment terms and conditions of the Applicant and their spouses respectively. In respect of the decision relating to the joint assessment of tax return for same-sex marriage couples (**the "Tax Decision"**), the CFA ordered a declaration that provided for remedial interpretation of relevant terms in the Inland Revenue Ordinance ("**IRO**").

The term 'marriage' in section 2 of the IRO will be read as 'any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so, provided where the persons are of the same sex and such a marriage between them would have been a marriage under the IRO but for the fact only that they are persons of the same sex, they shall be deemed for the purposes of such a marriage to have the capacity to do so'. For the purpose of IRO, references to 'husband and wife', 'not being a wife living apart', and 'either husband or wife' shall be read as 'a married person and his or her spouse', 'not being a spouse living apart from the married person', and 'either the married person or his or her spouse' respectively.

The Commissioner of Inland Revenue was given time to implement the above remedial interpretation, as revisions to the Inland Revenue Department's computer system and practice notes were needed. However, it was also stated by the Commissioner of Inland Revenue that in the meantime, the Inland Revenue Department would process tax returns and assessments in accordance with the judgment.

Employers should keep an eye on the upcoming revisions and guidelines published by the Inland Revenue Department. This landmark judgment and revised interpretation of the IRO represent another step in the advancement of LGBTQ rights in Hong Kong. More LGBTQ people are bringing claims to court

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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through judicial review in order to fight for equal treatment in different aspects of the society. The most recent legal challenge is brought against the Hong Kong Housing Authority by a same-sex couple applying for public

housing under the 'ordinary family' category. As Hong Kong and surrounding jurisdictions advance in this area of human rights, employers can certainly benefit from a heightened awareness of relevant events.

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HONG KONG **10 SEP** 2019

Discrimination claim vs. summary dismissal

Hong Kong District Court ("**the Court**") in *Sarniti v Lee Suk Ling* [2019] HKDC 1158 held that Lee Suk Ling ("**the Employer**") exercised her right to summarily dismiss the domestic helper employed in her household ("**the Claimant**") justifiably, following the Claimant's argument that the Employer dismissed her in breach of the Employment Ordinance (Cap. 57) ("**EO**").

Facts

The Claimant worked in the Employer's household as a domestic helper from April 2016 to February 2017 and was dismissed summarily on 19 February 2017. She was pregnant when she was dismissed and she claimed that the Employer dismissed her upon learning about the pregnancy. Hence the Claimant claimed that the dismissal was unlawful under the provisions of the SDO. The Claimant never directly told the Employer that she was pregnant, until she was dismissed. However, it was alleged that her medical reports as well as pregnancy test, which was placed in the open in the flat, were moved whilst she was not at home. Based on those incidents, the Claimant concluded that the Employer and her husband knew about her pregnancy and dismissed her because of it.

On the other hand, the Employer claimed that she dismissed the Claimant because of the grounds under s.9 of the EO. The Claimant was habitually neglectful in her duties and hence justifying summary dismissal. Despite the Claimant alleging that there had been little complaint about her work performance before her pregnancy was allegedly discovered, the Employer supplied multiple text messages, past warning letters, and a video as evidence of the Claimant's poor attitude and work performance.

Decision

Under s.15 EO, an employer is prohibited from terminating the employment of a pregnant employee where the employee serves notice of pregnancy immediately after being informed of termination. This prohibition does not apply to an employee who is summarily dismissed under s.9 EO. The court found that s.9(1)(a)(iv) was applicable in this case as the Claimant was habitually neglectful in her duties. The court referred to the test laid out in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 in relation to summary dismissal. If summary dismissal is to be claimed as justifiable, the conduct complained of has to show the employee to have disregarded the essential conditions of the contract of service.

The requests made by the Employer were reasonable but the Claimant failed to carry out her basic duties. Despite the allegations by the Claimant's counsel that the Claimant's behaviour did not bring about severe consequences, the Court considered the 'totality of the evidence'. Even though the individual incidents seemed trivial, however, as a domestic helper, the Claimant's duties include basic housekeeping, cooking, and buying groceries. Her continuous and repetitive failure to carry out such basic duties reflected her lack of intention to perform well on this job. On the whole, her behaviour directly destroyed such employer-employee relationship. Hence, the court held that the Employer reasonably summarily dismissed the Claimant, and the Claimant would not be entitled to the damages claimed.

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Offer of appointment letters and conditions of service

Hong Kong Court of First Instance ("**the Court**") in *Law Ting Pong Secondary School v Chen Wai Wah* [2019] HKCFI 2236 held that the defendant Chen Wai Wah ("**the Defendant**"), who backed out of an employment contract with the School ("**the Claimant**"), was not liable to pay for payment in lieu of notice because his employment had not commenced yet.

Facts

The Defendant signed on the Letter of Acceptance and Conditions of Service for employment on 17 July 2017. The Letter of Acceptance stated that the Defendant 'accept[ed] the appointment offered' in the letter 'in accordance with the attached Conditions of Service for Teachers'. It also stated that the Defendant, once signed, understood that the conditions of the new contract would 'come to immediate effect'. As part of the Conditions of Service, it was required that the Defendant give the Claimant three months' notice in writing, or payment in lieu of notice, or a combination of both in order to terminate the employment contract. The Defendant backed out of the contract on 22 August 2017 without giving notice. The Claimant requested for payment in lieu of notice, and the Defendant refused to pay.

The argument put forward by the Defendant was that his employment would not commence until 1 September 2017. As such, he was not bound by the notice requirement under the Conditions of Service. The Claimant's case was that upon signing the Letter of Acceptance on 17 July 2017, the employment contract came into immediate effect. Therefore, the Defendant should have given notice of intention to terminate.

Decision

The Labour Tribunal said that by the Defendant signing the Letter of Acceptance, the Defendant had understood and agreed to be bound by the paragraph regarding the immediate effect of the Letter. There was hence a consensus between the parties that the termination clause in the Conditions of Service would also become effective immediately. However, the appeal Court, considered the interpretation of the terms of the employment contract. The definition of an offer must involve an expression of willingness to contract by the offeror, and the willingness to contract must be subject to specified terms. The Court concluded that it was the terms set out in the Conditions of Service and not the Letter of Acceptance that were the specified terms of the offer. The reasoning was that in order to decide whether to accept the offer, a person must read the Offer of Appointment in conjunction with the Conditions of Service in order to ascertain the terms. This was also expressly stated in the Offer of Appointment, that the terms could be found in the Conditions of Service.

As such, the Court concluded that the specified terms of the offer were derived from the Conditions of Service. Following this finding, the Court held that it is 'trite law' that acceptance of an offer has to 'mirror' the offer made, in relation to the terms. Applying such law to the case, the terms set out in the Letter of Acceptance did not form part of the offer and hence they could not form part of the accepted terms.

Under the Conditions of Service, the period of employment was expressly stated to be from 1st September 2017 to 31st August 2018. Hence, the Defendant was not under employment at the date of termination and he was not liable to make any payment in lieu of notice.

The Court then considered the function of the Letter of Acceptance, given that it did not form part of the terms of the employment contract. In the Offer of Appointment, the Defendant was instructed to sign both copies of the Letter of Acceptance and Conditions of Service to accept the offer. In effect, the Defendant's act of signing the Letter of Acceptance was simply to comply with

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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the prescribed mode of acceptance stated in the Offer of Appointment. This does not mean the terms in the Letter would then become part of the terms of the contract. Employers hence have to be cautious of the incorporation of terms. More than one document are involved in most recruitment and hiring processes. Employers should therefore consider carefully which document to ask the employee to sign, and where to state the terms of employment.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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INDIA
4 OCT
2018

Amendment to the Kerala Shops & Commercial Establishments Act, 1960 ("**Kerala S&E Act**")

On 4 October 2018, the Kerala State Government amended the Kerala S&E Act by promulgating an ordinance. While the ordinance was in force, the State Legislative Assembly passed a bill to amend the Kerala S&E Act, incorporating the changes introduced by the ordinance. The bill received the Governor's assent on 21 December 2018 and has been made effective retrospectively from 4 October 2018 (i.e., the date of the Ordinance). The key changes introduced to the Kerala S&E Act are:

- **Grant of weekly holiday**: the earlier requirement for every shop to remain closed on one whole day in a week and for the shop-keeper to display a notice of the close-day has now been done away with. Instead, the only requirement now is that employees in shops and commercial establishments should be provided with at least one weekly holiday.
- **Increase in the working hours for women and children**: persons younger than 17 years and women are now permitted to work up to 9 p.m. (previously, allowed to work only up to 7 p.m.). Further, women can be employed between 9 p.m. and 6 a.m., after obtaining their consent, and ensuring that (a) at least 5 employees are present at those hours, of which at least 2 shall be female employees, and (b) adequate protection is provided to protect their dignity and safety, by provision of facilities such as, transportation from the establishment to their residence.
- **Significant increase in the penalties**: the maximum penalties for violating provisions on working hours, rest intervals, annual leave, notice of dismissal, health, hostel and seating facilities have been increased from INR 5,000 (USD 70) to INR 100,000 (USD 1,400) for first-time offences, and up to INR 2,00,000 (USD 2,800) for subsequent offences. Fines for contravention of provisions on overtime, employment of women and children at night, and production of records for inspection have been increased to from INR 50 (USD 7) to INR 50,000 (USD 700), subject to a cap of INR 2,000 (USD 30) per worker. The First-Class Judicial Magistrate is also now empowered to impose fine for violations under the Kerala S&E Act, up to INR 2,00,000 (USD 2,800).
- **Ability to maintain registers and records in electronic form**: registers and records under the Kerala S&E Act may now be maintained in electronic format. However, during the time of an inspection, a duly signed hard copy of the records will need to be submitted to the inspector upon demand.

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INDIA
12 DEC
2018

Amendment to the Payment of Wages Act, 1936 ("**PW Act**")

The Haryana Government has passed a notification dated 12 December 2018 (published on 25 December 2018), which amended the PW Act in its application to the State of Haryana. The PW Act is a central legislation which regulates the payment of wages to a certain class of employees working in specific kinds of establishments. In the first instance, the PW Act is applicable to persons employed in a factory, railways and to persons employed in an industrial or other establishment. "Industrial or other establishment" is defined under the PW Act to include, inter alia, establishments which the appropriate government (here, State Government) may specify by notification. By way of this amendment, the Haryana Government has notified shops and commercial establishments covered within the Punjab Shops and Commercial Establishments Act, 1958 ("**Punjab S&E Act**") (in its application to the State of Haryana), within the definition of "industrial or other establishment" under the PW Act. This would mean that shops and commercial establishments in Haryana will now be covered under the PW Act, and in turn, be covered under the Industrial Employment (Standing Orders) Act, 1946.

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INDIA

18 DEC 2018

Exemption under the Punjab S&E Act

The Punjab S&E Act is a State legislation applicable to persons employed in shops or commercial establishments in the State of Haryana and Punjab. The Haryana Government by way of a notification dated 18 December 2018, amended the Punjab S&E Act to create an exemption in its applicability to the State of Haryana. The employer of every establishment is required to get their establishment registered under the Punjab S&E Act and obtain a registration certificate. Prior to the exemption, the registration certificate had to be renewed every 3 years by 31st March. The notification now exempts shops and commercial establishments in Haryana from the requirement to get the registration certificates renewed.

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INDIA

29 JAN 2019

Digitized Filing of Annual Returns under Certain Central Rules

By way of several notifications dated 29 January 2019, the Central Government has amended the following Rules to require filing of annual returns in electronic form:

- Payment of Bonus Rules, 1975
- Payment of Wages (Mines) Rules, 1956
- Payment of Wages (Railways) Rules, 1938
- Payment of Wages (Air Transport Services) Rules, 1968
- Minimum Wages (Central) Rules, 1950
- Maternity Benefit (Mines and Circus) Rules, 1963
- Industrial Disputes (Central) Rules, 1957

Accordingly, employers are now required to upload electronic unified annual return on the Ministry of Labour and Employment's website on or before 1 February every year, with details relating to the previous year. This amendment is in line with the government's initiatives of digitizing compliances.

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15 FEB 2019

Draft Amendment to the Employees State Insurance (Central) Rules, 1950 ("**ESI Rules**")

15 February 2019, the Central Government published the draft amendment to the ESI Rules. The proposed amendment seeks to decrease the rates of the employees' state insurance (**ESI**) contributions required to be made by both, the employer and the employees. Currently, employers are required to make contributions in respect of all employees earning monthly wages of INR 21,000 (approximately USD 300) or less, at the rate of 4.75% of such wages, whereas, covered employees are required to make contributions at the rate of 1.75% of their wages. However, if the proposed amendment is brought into effect, then the existing contribution rates will be decreased to 4% (employer-contribution) and 1% (employee-contribution) of an employee's wages. Thus, this will reduce the financial burden on both, the employers and employees. The draft amendment to the ESI Rules is now open for public comments up till 17 March 2019 (i.e., 30 days from the date of its publication). The comments would be considered by the Government before finalizing the amendment.

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22 FEB 2019

The Punjab Labour Welfare Fund (Haryana Amendment) Bill, 2019 ("**Bill**")

On 22 February 2019, the Haryana Government published the Bill seeking to amend the Punjab Labour Welfare Fund Act, 1965 (in its application to the State of Haryana). The Bill proposes that the contribution of the employee to the labour welfare fund every month, be revised to 0.2% of his/her salary or wages (subject to a limit of INR 25 i.e. approximately USD 0.36) instead of a flat contribution of INR 10 (approximately USD 0.15). The employer would be required to contribute twice the amount contributed by the employee. Further, the revised limit is proposed to be indexed annually to the consumer price index beginning from first of January each year.

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28 FEB 2019

The Regional Provident Fund Commissioner (II) West Bengal v. Vivekananda Vidyamandir and Ors. (Civil Appeal Nos: 6221 OF 2011]

Under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, employers are required to deposit 12% of an employee's 'basic wages', dearness allowance and retaining allowance towards provident fund ("**PF**"), and employees make an equal contribution through a payroll deduction. For very long, there has been an ambiguity on the wage-components to be included while determining 'basic wages', and several petitions and appeals were pending before the Supreme Court to provide clarity on this issue. The Apex Court jointly heard 5 appeals arising from various High Courts to decide this commonly-raised question of law. It has now laid to rest the long-standing controversy, by holding that the crucial test for inclusion of allowances as part of 'basic wages' is universality i.e. allowances which are uniformly, universally, necessarily and ordinarily paid to all employees in a concern would form part of 'basic wages', on which PF contributions should be calculated. In essence, the Supreme Court has upheld the principles laid out in the earlier case of *Bridge and Roof Co. (India) Ltd. v. Union of India* (1963) 3 SCR 978. *The Bridge and Roof* case had observed that all universal allowances should be treated as part of 'basic wages', and hence should be subject to PF contributions. Organisations should take immediate note of this ruling and carry out a scrutiny of their pay structure and PF contribution practices, especially for employees whose basic salary is below INR 15,000 (USD 220) at present and for employees classified as 'International Workers' (for whom PF contribution caps don't apply).

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14 MAR 2019

The Punjab Labour Welfare Fund (Haryana Amendment) Act, 2019 ("**Act**")

On 22 February 2019, the Haryana Government published the Punjab Labour Welfare Fund (Haryana Amendment) Bill, 2019 ("**Bill**") seeking to amend the Punjab Labour Welfare Fund Act, 1965 (in its application to the State of Haryana). The Bill was brought in to effect on 14 March 2019. As per the Act, employee's monthly contribution to the labour welfare fund is revised from INR 10 to 0.2% of his/her wages (subject to a maximum of INR 25 i.e. approximately USD 0.36). Employers are now required to make monthly contributions at twice the employee's contribution. Further, the revised limit must be indexed annually to the consumer price index beginning from first of January each year.

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INDIA

6 APR 2019

Registration under the Kerala Shops and Establishments Act 1960 ("**Kerala S&E Act**")

The Labour and Skills Department, Government of Kerala passed an order on 6 April 2019 ("**Order**") eliminating the existing system of renewal of registration under the Kerala S&E Act. As per the Order, the registration will be auto-renewed once the self-certification is submitted and fee is paid online. Prior to the Order, employers were required to get their registration certificates renewed after submitting an application as prescribed under the Kerala S&E Act. The intent is to simplify and rationalise existing rules in line with the Central Government's initiative of 'ease of doing business' and to make governance more efficient and effective.

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1 MAY 2019

Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 ("**Gujarat S&E Act**")

The Gujarat S&E Act received the Governor's assent and was published in the official gazette on 7 March 2019. Subsequently, the State Government appointed 1 May 2019 as the date for which the Act comes into force, thereby repealing the Gujarat Shops and Establishments Act, 1948 ("**1948 Act**"). Some of the key highlights of the Gujarat S&E Act include:

- **Scope**: Unlike the 1948 Act which was applicable only in specified local areas, the Gujarat S&E Act applies to all shops and establishments in the State.
- **Substantive provisions do not apply to small establishments**: Establishments employing fewer than 10 workers now only need to notify the Facilitator of commencement of their business. Substantive provisions relating to working hours, leave, holidays, opening and closing hours, etc., do not apply to such small establishments, allowing for greater flexibility in their operations.
- **Applicability of the S&E Act limited to "workers"**: The term "employee" under the 1948 Act is replaced with the term "worker" and the definition itself has changed significantly. "Worker" under the Gujarat S&E Act is defined on the similar lines as the term "workman" under the Industrial Disputes Act, 1947.
- **One-time registration**: Under the Gujarat S&E Act, every establishment needs to complete the registration process only once. Unlike the 1948 Act, there is no requirement for renewal of registration. Establishments having valid and subsisting registrations under the 1948 Act will not be required to register under the Gujarat S&E Act until the existing registration expires or becomes due for renewal. Further, a certificate of registration issued under the Gujarat S&E Act shall remain in force from the date of issue till the change in ownership or nature of business of the establishment.
- **Increase in the overtime limit**: Under the Gujarat S&E Act, an employee can be required to work overtime for a maximum of 125 hours in a period of 3 months. This is a significant increase from the 1948 Act under which employees were permitted to work overtime for a maximum of 3 hours per week.
- **Obligation to provide crèche facilities**: Under the Gujarat S&E Act, crèche facilities with suitable rooms have to be provided in every establishment with 50 or more workers. A group of establishments can however provide common crèche facilities within a radius of 1 km with the approval of the Facilitator.
- **Weekly holiday and women working night shifts**: All establishments will have the ability to remain open on all 7 days of the week as long as every worker is given a weekly holiday. Further, all establishments will be able to employ women in night shifts with the approval of the designated authority, provided the authority is satisfied that suitable measures relating

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1 MAY 2019

to shelter, rest-room, night creche, ladies toilet, adequate protection of dignity, honour and safety and transportation from shops/establishment to residence is ensured and after obtaining consent from the woman worker.

- **Compliances will be moved to electronic mode**: In line with the Central Government's initiatives regarding 'ease of doing business', the Gujarat S&E Act provides for registration and maintenance of registers/records electronically. Inspections will also be done based on a randomised web-generated inspection schedule and will not be at the complete discretion of the labour authorities.
- **Significant increase in fines**: Under the 1948 Act, the maximum penalty was a fine of INR 750 (approximately USD 11). Under the Gujarat S&E Act, however, fines go up to INR 50,000 (approximately USD 710). The Gujarat S&E Act also provides for imprisonment in certain cases. However, opportunity has also been given to employers to compound a first-time offence.

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24 MAY 2019

Exemption under the Industrial Employment (Standing Orders) Act, 1946 ("SO Act")

The Government of Karnataka issued a notification on 24 May 2019 granting an exemption to IT/ ITES/ Start-ups/ Animation/ Gaming/ Computer Graphics/ Telecom/ BPO/ KPO and other knowledge-based industries from the applicability of the SO Act in Karnataka. The Government had earlier granted this exemption in 2014 which was applicable till January 2019. The extension has now been extended for a period of another five years from the date of its publication in the official gazette. This has not been published in the gazette yet.

The exemption will be granted to the above-mentioned industries subject to the following conditions:

- Constitute an internal complaints committee as per the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013;
- Set up a grievance redressal committee which has an equal number of persons representing the employers and employees and which addresses all types of complaints/grievances of the employees in a time-bound manner;
- Intimate the jurisdictional Deputy Labour Commissioner and the Labour Commissioner in Karnataka of the cases in which disciplinary action (such as suspension, discharge, termination, etc.) were taken against the employees;
- Promptly and fully submit all information sought by the jurisdictional Deputy Labour Commissioner and the Labour Commissioner in Karnataka regarding the service conditions of the employees.

More...

INDIA

5 JUN 2019

Notification under the Tamil Nadu Shops and Establishments Act, 1947 ("TN S&E Act")

On 5 June 2019, the Government of Tamil Nadu published a notification permitting all shops and establishments covered under the TN S&E Act to remain open 24x7 on all days of the year for a period of 3 years from the date of publication of this notification. This is, however, subject to the following conditions:

- All employees must be given one day holiday in a week on rotation basis.
- Employers are daily required to exhibit details of the employees who are on holiday/leave at a conspicuous place in the establishment.
- Wages (including overtime wages) must be credited to their savings bank account
- Employer must ensure that no employee is made to work for more than 8 hours on any day and 48 hours in any week and period of work including overtime shall not exceed 10.5 hours in any day and 57 hours in a week.

Continued on Next Page

INDIA

5 JUN 2019

- If employees are found working on any holiday or after normal working hours without proper indent of overtime, penal action can be initiated as per the TN S&E Act.
- Women employees cannot be made to work beyond 8.00 p.m. on any day, unless a written consent has been obtained from the employee and subject to providing adequate protection of her dignity, honour and safety.
- Women employees who work in shifts must be provided with transport facilities.
- Employers are required to provide the employees with restroom, washroom, safety lockers and other basic amenities.
- Employers employing woman employees are required to constitute an internal complaints committee against sexual harassment of women under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

The above conditions need to be complied with in addition to the provisions specified under the TN S&E Act and the Rules thereunder.

More...

INDIA

23 JUN 2019

Maharashtra

1 JUL 2019

Telangana

Additional Obligations on Employers under the Law on Prevention of Sexual Harassment

Under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, a primary obligation on employers is to formulate an internal committee ("**IC**") at each workplace having 10 or more employees. In order to ensure that all employers constitute an IC, the Ministry of Women and Child Development ("**MWCD**") had launched an online portal, SHe-Box in 2017. On this portal, victims of workplace sexual harassment can raise complaints, which would then be forwarded by the MWCD to the relevant employer. The MWCD authorities and the complainants also have the ability to monitor the progress/status of a complaint forwarded to the IC.

Further to this, the Department of Women and Child Development ("**DWCD**") in Telangana and Maharashtra issued orders imposing additional obligations on employers in the respective States. The DWCD in Telangana has setup an online portal (called as 'T-she Box'), and all employers in the State are required to register their ICs on the portal. The last date for registration was 15 July 2019 in Telangana – however, given that the web-link for registration is still valid and it is possible to comply with this requirement even at this stage, it is advisable for the companies to register their ICs as soon as they are constituted. To comply with this requirement, companies need to upload the order constituting the ICs (by visiting this link https://tshebox.tgwdcw.in/icc-registration), and also submit additional details – such as name and address of the establishment, contact details of the Human Resources personnel and the IC members, etc. Further, the order constituting the ICs will also need to be uploaded on the online portal.

In the South Mumbai district in Maharashtra, while there is no specific online portal, the relevant DWCD had issued a notice to all employers in the area to submit details regarding the constitution of their IC in a specific format on or before 20 July 2019.

Failure to comply with the above obligations in both locations could subject employers to a monetary fine of INR 50,000 (~ $750) in the first instance. For repeated offences, employers could be subject to twice the fine, and cancellation of their business license.

INDIA

1 JUL 2019

The Employees' State Insurance (Central) Amendment Rules, 2019 ("**ESI Amendment Rules**")

On 13 June 2019, the Central Government published the ESI Amendment Rules to amend the Employees' State Insurance (Central) Rules, 1950 ("**ESI Rules**"). This amendment reduces the rate of employees' state insurance ("**ESI**") contributions required to be made by both employers and employees. Prior to the amendment, the requirement under the ESI Rules was for contributions to be made in respect of all employees earning gross monthly wages of INR 21,000 (approximately US$300) or less, at the rate of 4.75% of such wages as the employer's contribution and 1.75% of their wages as the covered employees' contribution. The ESI Amendment Rules has decreased these contribution rates to 3.25% (employer contribution) and 0.75% (covered employee's contribution). The ESI Amendment Rules have been made effective since 1 July 2019.

More...

INDIA

9 JUL 2019

Draft Haryana Maternity Benefit (Amendment) Rules, 2019 ("**Draft Haryana Rules**")

By virtue of an amendment to the Maternity Benefit Act, 1961 ("**MB Act**"), establishments having 50 or more employees are required to set up crèche facilities for employees. In pursuance of the same, State Governments are required to frame and notify rules to set out the manner in which such facilities should be set up. Accordingly, the Haryana State Government published the Draft Haryana Rules inviting comments and suggestions from the general public in relation to the provision on crèche facilities on 9 July 2019. As per the Draft Haryana Rules, every establishment having 50 or more employees is required to have 1 crèche for every 30 children (below 6 years of age). The Draft Haryana Rules also lays down specific requirements with respect to location, infrastructure, staff in the facility, working hours, medical records of the children, milk and refreshment facilities, outdoor play facilities and other facilities such as first aid, clean clothes, soap and oil. The Department of Labour in the Haryana Government invited comments on the proposed amendments in the Draft Haryana Rules for a period of 45 days from the date of its publication i.e. till 24 August 2019.

More...

INDIA

27 JUL 2019

Exemption under the Telangana Shops and Establishments Act, 1988

The Telangana Government issued a notification on 25 July 2019 (published in the gazette on 27 July 2019) exempting the IT/ITES establishments in Telangana from certain provisions under the Telangana Shops and Establishments Act, 1988, i.e. the provisions on opening and closing hours, daily and weekly hours of work, special provision for young persons, special provision for women and holidays (other than leaves). This exemption is granted for a period of 5 years with effect from 30 May 2018, subject to several conditions. Some of these conditions are that employees cannot be required to work overtime for over 48 hours per week, a weekly holiday must be given to the employees, young persons and women can be engaged at night only if adequate security and transportation is provided, etc. If these conditions are violated, the Telangana Government reserves the right revoke the exemption granted at any time without any prior notice. Prior to this exemption, a similar exemption was in force for 5 years as per a notification from Telangana Government dated 21 June 2013.

More...

LOOKING BACK

INDIA

8 AUG

2019

Code on Wages, 2019 ("**Code**")

Wording: The Ministry of Labour and Employment drafted the Code with the intent to consolidate and replace the following four laws that are in force currently i.e. the Payment of Wages Act, 1936 ("**PW Act**"), the Minimum Wages Act, 1948 ("**MW Act**"), the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976. The Code has already been passed by the Lok Sabha (lower house) and the Rajya Sabha (upper house). Further, it has also received the Presidential assent on 8 August 2019, and will come into effect on a date notified by the Central Government. The significant changes introduced by the Code are as follows:

- **Definition of "wages"**: The Code provides for a uniform definition of wages (as opposed to the current laws where the definition of the term 'wages' has differed across employment laws).
- **Remarked introduction of Floor Wage ("Floor Wage")**: The Code has done away with the concept of "scheduled employments" that existed under the MW Act. Instead, it has introduced an obligation on the Central Government to fix a Floor Wage, by considering the minimum standard of living of workers. Additionally, the Central Government has additional powers to fix different Floor Wages for different geographical areas, and the State Governments can fix minimum rate of wages that is at least equal to or higher than the Floor Wage set by the Central Government.
- **Enlarged coverage of payment of wages**: The Code neither restricts its applicability to a specific set of industries nor to employees earning below a particular threshold. Earlier, the PW Act restricted the applicability to specific establishments and to employees earning less than INR 24,000 only.
- **Penal provisions** - The penalties under the Code for first time offences relating to non-payment of dues to the employees have increased to INR 50,000 (~ $700). The penalties currently range between INR 500 to INR 20,000 for the first instance (~ $6 to $275). The Code also allows for compounding of offenses which are punishable with a fine (or with imprisonment and a fine) under that Code.

More...

INDIA

8 AUG

2019

Karnataka Maternity Benefit (Amendment) Rules, 2019 ("**MB Amendment Rules**")

By virtue of an amendment to the Maternity Benefit Act, 1961 ("**MB Act**"), establishments having 50 or more employees are required to set up crèche facilities for employees. In pursuance of the same, State Governments are required to frame and notify rules to set out the manner in which such facilities should be set up. The Karnataka State Government notified the MB Amendment Rules, effective 8 August 2019, to this effect. A brief overview of the requirements under the MB Amendment Rules is as follows:

- Every establishment having 50 or more employees is required to have 1 crèche for every 30 children (below 6 years of age) within 500 metres of the entrance of the establishment.
- The facility must be provided to children of all employees, irrespective of the type and nature of employment, such as permanent, temporary, regular, daily wage, contract, etc.
- Specific requirements in relation to the construction and maintenance of the creche (such as, the height of the walls and rooms, area (in sq. ft.) per child, lighting and ventilation, good sanitary conditions, safe and potable drinking water, supply of milk and refreshments uniforms, clean towels, soap, washroom, water, first aid kit, mattresses, sheets, pillows, toys, sitting accommodation for parents, outdoor play areas, etc).

Continued on Next Page

LOOKING BACK

INDIA
8 AUG 2019

- Each category of staff (i.e. creche-in-charge, creche attendant and ayah) must have received certain basic training.
- Children to staff ratio is set at 10:1 for children below the age of 3, and 15:1 for children above the age of 3.
- Crèche is required to be kept open at all times.
- Regular medical examination of children.

INDIA
23 AUG 2019

Draft Amendment to the Employees Provident Funds and Miscellaneous Provisions Act, 1952

The Ministry of Labour and Employment issued a proposal to amend the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") on 23 August 2019 inviting public comments till 22 September 2019. Some of the significant changes being proposed include, amendment to the definition of wages in order to bring it in line with the Code on Wages, 2019, flexibility with respect to employees' contribution (depending on various factors like age, gender, income, etc.), the option for the covered employees to opt for the National Pension Scheme in lieu of the benefits provided under the EPF Act, limitation period of 5 years for initiation of inquiries, a time period of 2 years for conclusion of inquiry, enhanced penalties, etc.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDONESIA

29 JAN 2019

Occupational Diseases

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases was issued on 25 January 2019 to implement provisions of Work Accident Social Security under the Social Security Administrator (*Badan Penyelenggara Jaminan Sosial* or "BPJS") for Employment.

This new presidential regulation clarifies the definition of occupational disease, the scope of coverage, and the types of diseases that will be covered under Work Accident Social Security.

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases replaces Presidential Regulation No. 22 of 1993 on the same subject.

INDONESIA

26 APR 2019

Minister of Manpower Regulation No. 4 of 2019 dated 26 April 2019 regarding the Amendment of Minister of Manpower Regulation No. 18 of 2017 regarding Online Procedures for Submission of Mandatory Manpower Reports by Companies (MOM No. 4).

On November 6, 2017 the Ministry of Manpower issued Regulation No. 18, which detailed the procedures for companies to submit a mandatory manpower report (WLK) through the ministry's online system. Under the 2017 regulation, all companies were required to submit an WLK once a year.

However, following the integration of business licensing in Indonesia under the Online Single Submission (OSS) system, MOM No. 4 stipulates that all first time reporters must submit their data through the OSS system.

INDONESIA

1 AUG 2019

Amendment to Outsourcing Regulation

Minister of Manpower Regulation No. 11 Year 2019 dated August 1, 2019 regarding the Second Amendment to Minister of Manpower and Transmigration Regulation No. 19 of 2012 regarding the Requirements for the Partial Delegation of Work to Other Companies ("**MOM Reg 11**") introduces several changes and provisions related to delegating work to other companies.

In accordance with the purpose to streamline and ease business licensing services, as provided for in the preamble to Government Regulation No. 24 of 2018 regarding Electronically Integrated Business Licensing Services ("**GR 24/2018**"), Article 1 point 7(a) and (b) of MOM Reg 11 appoints the agency managing the Online Single Submission (OSS) system to issue business licenses for and on behalf of the MOM, and also to organize government matters in the field of investment. Consequently, the OSS system is responsible for issuing Labor Supplier Business Permits.

INDONESIA

27 AUG 2019

New Rules on Positions for Expatriate Workers

Minister of Manpower Regulation No. 228 Year 2019 dated August 27, 2019 regarding Certain Positions Open for Expatriates ("**MOM Reg 228**") details those positions that expatriate workers can hold. Highlights of MOM Reg 228 include the possibility of having an expatriate Commissioner or Director (non-HR) in all 18 business sectors listed in the decree, and the possibility that the MOM will approve positions that are not listed in the decree. Another important point is that the MOM will evaluate the list of positions open to expatriates at least every two years, or whenever necessary. Work Permits (*Izin Mempekerjakan Tenaga Kerja Asing*) issued before the issuance of this new decree will remain valid until their expiration.

MOM Reg 228 revokes 19 MOM regulations on positions open to expatriates in 19 different business sectors and any MOM regulation that provides any positive list for expatriate manpower positions.

Public Holidays for 2020

A new regulation stipulates the public holidays and joint leave days for 2020. The holiday calendar for the coming year is found in the Joint Decree of the Minister of Religious Affairs No. 728 Year 2019, Minister of Manpower No. 213 Year 2019, and State Minister for Administrative Reform No. 1 Year 2019 regarding Public Holidays and Collective Leave for 2020.

There are 15 public holidays in 2020, as follows:

New Year's Day	January 1
Chinese New Year	January 25
Ascension Day of Prophet Muhammad SAW	March 22
Hindu Day of Silence (Nyepi)	March 25
Good Friday	April 10
International Labor Day	May 1
Buddha Day (Hari Raya Waisak)	May 7
Ascension Day of Jesus Christ	May 21
Idul Fitri	May 24 and 25, plus 3-day bridge holiday
Pancasila Day	June 1
Idul Adha	July 31
Independence Day	August 17
Islamic New Year	August 20
Birth of Prophet Muhammad SAW	October 29
Christmas	December 25, plus 1-day bridge-holiday

LOOKING BACK

JAPAN
1 APR
2019

New regulations regarding long working hours under Work Style Reform Act formally came into force on 1 April 2019

Pursuant to so called Work Style Reform Act promulgated on July 6, 2018, some new regulations regarding long working hours and realization of varied and flexible work styles came into force as of 1 April 2019.

Under these new regulations, unless an exception applies, overtime work may not exceed 45 hours a month and 360 hours a year. Even if an exception applies, total of overtime work and work on holidays must be less than 100 hours a month and must not exceed an average of 80 hours a month during any of 2 to 6 month period, and total of overtime work per year must not exceed 720 hours.

Further, an employer must ensure that an employee who is eligible to use 10 days or more of annual paid leave pursuant to the Labor Standards Act actually uses at least five days each year.

More...

JAPAN
5 JUN
2019

Employers will be statutorily required to establish appropriate measures to prevent workplace bullying

Workplace bullying is one of the recent hot issues in Japan. In this regard, on 5 June 2019, the Act on General Promotion of Labor Policy (*rodoshisaku sogo suishin ho*) was amended. The exact enforcement date of the amendment has not been determined, but the amendment will be enforced to large companies before June 2020 and small and medium-sized companies before June 2022. After the amendment is enforced, employers will be statutorily required to establish appropriate measures to prevent workplace bullying. The Ministry of Health, Labor, and Welfare plans to issue guidelines which includes matters such as the definition of workplace bullying and some guidance on what measures employers actually need to establish.

MALAYSIA
1 JAN 2019

Minimum Wages Order (Amendment) 2018

The **Minimum Wages Order (Amendment) 2018** came into effect on Jan 1, 2019. With effect from 1 January 2019, the minimum wage for employees was set at RM1,100 per month or at RM5.29 per hour for workers paid at the hourly rate.

More...
More...

MALAYSIA
1 JAN 2019

Employees Provident Fund (Amendment of Third Schedule) Order 2018

With effect from 1st January 2019, EPF contributions for senior citizens (60 years old and above) , the rate of monthly contribution by the employer shall be calculated at the rate of 4%. The employees do not need to pay contributions.

More...

MALAYSIA
1 JAN 2019

Foreign Workers covered under SOCSO

With the gazetting of **Employees' Social Security (Exemption Of Foreign Workers) (Revocation) Notification 2018**, with effect from 1 January 2019, foreign workers in Malaysia shall be entitled to the protection under the Employee's Social Security (SOCSO). All employers are required to make statutory contributions under Social Security. However, there is a one year cooling off period. Previously, foreign workers are typically covered under the under the Foreign Worker Compensation Scheme (FWCS).

Foreign workers who are still covered under the FWCS shall be covered until the expiry of the scheme. Pursuant thereafter, the employer shall have to register and contribute for the said foreign worker's SOCSO contributions.

More...

MALAYSIA
27 FEB 2019

Possibility of Sectoral-based minimum wage

The Malaysian Minister of Human Resource has proposed that a sectoral based minimum wage may be implemented in the future. As it stands, the minimum wage for employees in Malaysia is RM1,100 based on the Minimum Wage Order 2018. However, the jump in minimum wages is deemed steep by certain employers which led to increased business operations. The Human Resource would thus the National Wages Consultative Council Resources, may make recommendations to the government on the coverage of the recommended minimum wage by business sector, type of employment and regional areas.

More...

MALAYSIA
5 AUG 2019

Implementing legislation to protect domestic workers

The Malaysian government is considering to enact a specific legislation in Malaysia to govern domestic workers in Malaysia. Amongst the salient provisions are legislation in respect of proper working hours, holidays, salaries as well as insurance.

More...

MALAYSIA
2 SEP 2019

Raising the retirement age

The Malaysian Human Resources Minister said that the government of Malaysia will consider the suggestion to increase the minimum retirement age in Malaysia. As it stands, the compulsory minimum retirement age in Malaysia is 60 years old. The Malaysian Trades Union Congress (MTUC) recently suggested the need to raise the mandatory retirement age to 65 years old.

More...

NEW ZEALAND

7 MAR

2019

Employment Relations Amendment Bill

This Bill was passed on 5 December 2018 and returns many provisions of the Employment Relations Act to the pre-2011 position. The general impact of the Bill is the bolstering of union protections and powers.

A number of changes came into effect on 12 December 2018. These changes include:

- Union representatives are now able to enter workplaces without consent, provided employees are covered under, or bargaining towards, a collective agreement. Union representatives are still obligated to follow health and safety /security measures, as well as exercising access rights reasonably. Consent is still required where no collective bargaining exists;
- An employer can no longer make partial deductions in response to partial strikes;
- An employer can no longer opt out of multi-employer collective bargaining. Employers must have a genuine reason based on reasonable grounds for not concluding a collective agreement;
- Reinstatement has been restored as the primary remedy for unjustifiable dismissals;
- Unions can initiate collective bargaining 20 days ahead of an employer;
- The extension of protections against discrimination on the grounds of union membership status.

A number of changes will come into effect on 6 May 2019. These changes include:

- Limiting the use of 90-day trial periods to employers with fewer than 20 employees;
- The reintroduction of greater prescription for rest and meal breaks. For example, an eight hour working day must include two 10-minute rest breaks and one 30-minute meal break.
- The restoration of the duty to conclude bargaining and the 30-day rule.
- Employers must provide new employees with an approved active choice form within the first ten days of employment;
- Where requested, employers must pass on information about the role and function of union to prospective employees;
- Pay rates must be included in the collective agreement.
- Union delegates are entitled to reasonable paid time to represent employees.

Simpson Grierson's coverage

NEW ZEALAND

7 MAR

2019

Employment Relations (Triangular Employment) Amendment Bill

A triangular employment arrangement involves a person being employed by one employer, but working under the control and direction of another business or organization. The purpose of this Bill is to ensure that employees in triangular employment arrangements have the right to coverage of a collective agreement, and are provided with a framework to raise a personal grievance.

The Select Committee report was released 17 December 2018. The Select Committee suggested removing the collective agreement provisions due to the potential difficulties faced by firms who may be required to manage multiple collective agreements. The report also suggested a framework that would facilitate joining the controlling third party to the personal grievance proceedings. The Government is currently considering the Select Committee Report.

Simpson Grierson's coverage

NEW ZEALAND **7 MAR** 2019

Domestic Violence – Victims' Protection Bill

The Bill entitles employees affected by domestic violence to up to 10 days of leave per year. Employees will also be able to request a short term variation to their working arrangements, to which the employer must respond urgently and within 10 days.

This bill received the Royal Assent on 30 July 2018 and will come into force on 1 April 2019.

Recent coverage

NEW ZEALAND **7 MAR** 2019

Privacy Bill

The Bill intends to replace the Privacy Act 1993 and bring New Zealand's privacy law in line with recent international developments and reforms. Key changes include:

- Mandatory reporting of privacy breaches;
- New ways to enforce information privacy principles;
- Stronger powers for the Privacy Commissioner;
- New offences and increased fines.

The Select Committee recently reported back the Privacy Bill, with some significant recommendations. These recommendations include:

- Clarification on the mandatory data breach reporting regime: The introduction of a mandatory data breach reporting regime is endorsed, but a number of amendments to it have been proposed. Most significantly, data breaches will now only be notifiable to the Commissioner and affected individuals if the breach has caused, or is likely to cause, "serious harm".
- Privacy Act extended to apply to activities of a NZ agency offshore: The Privacy Act will apply to all actions taken by a New Zealand agency, whether inside or outside New Zealand. It will also apply to all personal information collected or held by a New Zealand agency, regardless of where the information is collected or held, and where the individual concerned is located.
- Privacy Act extended to apply to offshore agencies: A significant proposed change is to expressly extend the Privacy Act to apply to agencies located offshore, so long as that agency is "carrying on business in New Zealand".
- Further strengthening to cross-border data flow protection: A new information privacy principle has been added for the off-shoring of personal information. If an agency wants to disclose personal information to an overseas person, it will need to rely on an applicable exemption.

Follow the Bill's coverage

NEW ZEALAND **7 MAR** 2019

Equal Pay Amendment Bill

The Bill allows workers to make a pay equity claim within New Zealand's existing bargaining framework, and accelerate the process for progressing claims.

The Bill is currently at the Select Committee stage. The Select Committee report is due to be released on 16 April 2019.

Recent coverage

NEW ZEALAND **7 MAR** 2019

Holidays Act Review

In May 2018, the Government established a Holidays Act Working Group to carry out a full review of the Holidays Act, focusing on the provision and payment of holiday and leave entitlement. Historic underpayments will not be considered. The Group is due to report back in May 2019.

Recent coverage

NEW ZEALAND
7 MAR
2019

Pay Equity Joint Working Group

A Fair Pay Agreement Working Group was established in June 2018 to advise on the establishment of a sector-level bargaining system. This would allow employers and unions to develop "fair pay agreements" that set minimum terms and conditions for workers in an entire industry. The Working Group recommendations were released publicly on January 31 2019. These recommendations included a compulsory system by default (with no opt-outs), and a low threshold whereby 10% of workers in an industry (or 1000 total, whichever number is lower) need to request a fair pay agreement in order to trigger bargaining.

Working Group's report

NEW ZEALAND
31 MAY
2019

Employment Relations Bill

This Bill was passed on 5 December 2018 and returns many provisions of the Employment Relations Act to the pre-2011 position. The general impact of the Bill is the bolstering of union protections and powers.

A number of changes came into effect on 6 May 2019. These changes include:

- Limiting the use of 90-day trial periods to employers with fewer than 20 employees;
- The reintroduction of greater prescription for rest and meal breaks. For example, an eight hour working day must include two 10-minute rest breaks and one 30-minute meal break;
- The restoration of the duty to conclude bargaining and the 30-day rule;
- Employers must provide new employees with an approved active choice form within the first ten days of employment;
- Where requested, employers must pass on information about the role and function of union to prospective employees;
- Pay rates must be included in the collective agreement; and
- Union delegates are entitled to reasonable paid time to represent employees.

From 12 June 2019, an employee's union membership will be added as a ground of discrimination. Employees will be able to raise this ground of discrimination within 18 months of the action complained of. This is an extension to the current 12 month timeframe.

Simpson Grierson's coverage

NEW ZEALAND
31 MAY
2019

Equal Pay Amendment Bill

The Bill allows workers to make a pay equity claim within New Zealand's existing bargaining framework, and accelerate the process for progressing claims.

The Select Committee recently reported back on the Equal Pay Amendment Bill, with some significant recommendations. These recommendations include:

- Prohibiting employers from differentiating between the remuneration rates of employees, on the basis of sex.
- Clarifying that an employee would only be barred from pursuing a claim under the Equal Pay Act or Human Rights Act if they had applied to the Employment Relations Authority for a resolution of a personal grievance. As introduced, the Bill barred claimants from the other legal avenues if they had raised a personal grievance under the Employment Relations Act.
- Inserting a definition for the threshold "predominantly performed by female employees". The Committee recommended inserting a new section to clarify this means work performed by a workforce of approximately 60% women.
- Clarifying that an employer must offer all of the terms of settlement (including back pay) to the employees who qualify for them, if they wish to bar future pay equity claims by those employees.

Coverage

NEW ZEALAND **31 MAY** 2019

Domestic Violence – Victims' Protection Act

The Act came into force on 1 April 2019. Employees affected by domestic violence are now entitled to up to 10 days of paid leave per year. Employees are now able to request a short term variation to their working arrangements, to which their employer must respond urgently within 10 days.

References to 'Domestic Violence Leave' will change to 'Family Violence Leave' from 1 July 2019 to reflect the repeal of the Domestic Violence Act 1995 and the introduction of the Family Violence Act 2018.

Recent coverage

NEW ZEALAND **31 MAY** 2019

Employment Relations (Triangular Employment) Amendment Bill

A triangular employment arrangement involves a person being employed by one employer, but working under the control and direction of another business or organization. The purpose of this Bill is to ensure that employees in triangular employment arrangements have the right to coverage of a collective agreement, and are provided with a framework to raise a personal grievance.

The Bill passed its second reading in early April 2019. The Government responded to the Select Committee's recommendations and:

- Adopted the changes to the key definitions.
- Removed the provisions of the Bill that required workers to be bound by the same collective agreement as the employees of the controlling third party
- Adopted a framework making it easier for an employee, employer and the Employment Relations Authority or Court to join the controlling third party to personal grievance proceedings.

Track the progress of the Bill

NEW ZEALAND **31 MAY** 2019

Postal Workers Union of Aotearoa Inc v New Zealand Post Limited

The Employment Court recently held that delivery agents were entitled to refuse to perform work where an availability clause failed to provide reasonable compensation for making themselves available for work.

The Court held that for availability provisions to be enforceable, reasonable compensation has to be provided. Where remuneration is to incorporate reasonable compensation for availability, an agreement between employer and employee to this effect is required. In this case, there was no evidence of any such agreement, and therefore the availability provision was unenforceable.

Employers will need to be aware of any availability provisions in employee's contracts and ensure that reasonable compensation is provided to the employee.

Copy of the decision

NEW ZEALAND **31 MAY** 2019

Jacks Hardware and Timber Limited v First Union Incorporated

The Employment Court recently upheld the Employment Relations Authority's determination to fix the terms of a collective agreement where the parties were unable to reach an agreement despite five years of bargaining.

The Court found that all the processes provided by the Act to assist the Union and Jacks Hardware in negotiating, and settling a collective agreement, were used unsuccessfully. It was therefore appropriate to fix the terms of the collective agreement in all the circumstances. This is the first time that the Court has approved use of this statutory power to override the parties' contractual freedom to define their own bargain in collective negotiations.

Simpson Grierson's coverage
Copy of the decision

LOOKING BACK

NEW ZEALAND **13 JUN** 2019

Government responds to recommendations of Film Industry Working Group

Workplace Relations and Safety Minister, Iain Lees-Galloway, has announced the Government will restore collective bargaining rights for screen sector workers, adopting a model put forward by the Film Industry Working Group. Legislation is expected to be introduced later in 2019 with changes expected to become law in mid-2020.

Minister Lees-Galloway's press release

NEW ZEALAND **13 JUN** 2019

Government responds to recommendations of Film Industry Working Group

Workplace Relations and Safety Minister, Iain Lees-Galloway, has announced the Government will restore collective bargaining rights for screen sector workers, adopting a model put forward by the Film Industry Working Group. Legislation is expected to be introduced later in 2019 with changes expected to become law in mid-2020.

Minister Lees-Galloway's press release

NEW ZEALAND **27 JUN** 2019

Employment Relations (Triangular Employment) Amendment Act 2019

The Act was passed on 27 June 2019 and will come into force 12 months' after this date (or earlier if the Governor General appoints another date). The Act's purpose is to introduce a new process to allow an employee working for a controlling third party to raise a personal grievance against that party as though it was their employer.

Coverage

NEW ZEALAND **26 JUL** 2019

Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment [2019] NZEmpC 87

The case was in relation to how to treat tour bus drivers' commissions when calculating annual holiday pay once an entitlement to a paid holiday has arisen. The Employment Court held that as the commissions were earned over varying intervals of time, commission payments could not be considered to be the type of regular payment the Holidays Act 2003 contemplated being included in an 'Ordinary weekly pay' calculation.

A copy of the decision

NEW ZEALAND **7 AUG** 2019

Privacy Bill

The purpose of the Bill is to repeal and replace the Privacy Act 1993, as recommended by the Law Commission's 2011 review of the Act, and bring New Zealand's privacy law in line with recent international developments and reforms. On 13 March 2019, the Select Committee reported back on the Bill endorsing many of the proposed reforms but also making some key changes. These included:

- Clarification on the mandatory data breach reporting requirements;
- Extending the Privacy Act to apply to activities of a New Zealand agency offshore;
- Clarifying responsibilities for Cloud Service Provider Actions; and
- Further strengthening to cross-border data flow protection.

The Bill passed its second reading on 7 August 2019. The Bill is expected to pass in late 2019 with a start date of 1 March 2020.

Follow the Bill's progress

LOOKING BACK

NEW ZEALAND

19 AUG 2019

GD (Tauranga) Limited v Price [2019] NZEmpC 101

Wording: This case was in relation to whether relevant daily pay (RDP) or average daily pay (ADP) was the correct remuneration when employees took public holidays, alternative holidays, sick leave and bereavement leave (other leave).

The Employment Court found that if RDP was able to be calculated, the employer was permitted to use that method of calculation, even if the daily pay varied within the particular pay period. Applying the Supreme Court's decision in *New Zealand Post v Postal Workers Union of Aotearoa Inc*, and examining Parliamentary materials, the Employment Court found that the statutory scheme intended to provide the employer with discretion to pay RDP, as long as the employer was in a position to calculate RDP.

A copy of the decision

PHILIPPINES
5 JAN 2019

REPUBLIC ACT No. 11165 also known as the "Telecommuting Act"

The Act institutionalizes 'Telecommuting' as an alternative work arrangement for employees in the private sector. Under the Act, *Telecommuting* refers to a **voluntary** arrangement between the employer and the employee in the private sector allowing the employees to work from an alternative workplace, eg., from home, with the use of telecommunication and/or computer technologies.

More...

PHILIPPINES
22 FEB 2019

REPUBLIC ACT No. 11199 also known as "The Social Security Act of 2018"

The Act rationalizes and expands the powers and duties of the Social Security Commission, repeals Republic Act No 1161 (Social Security Act of 1987) and expands the mandatory coverage of the Social Security System to include Overseas Filipino Workers.

More...

PHILIPPINES
1 MAR 2019

REPUBLIC ACT No. 11210 also known as the "105-Day Maternity Leave Law"

The Act increase the maternity leave period with pay from 60 days (for normal birth) and 78 days (for ceasarian section) to 105 days regardless of mode of delivery for pregnant employees in the public and private sectors, including those in the informal economy, regardless of civil status, or the legitimacy of the child, with the option of extending the leave for an addition thirty (30) days without pay , and granting an additional fifteen (15) days for solo mothers. As defined in the Solo Parents Act, otherwise known as Republic Act No. 8972.

More...

PHILIPPINES
24 APR 2019

Department of Labor and Employment Department Order (DOLE-DO) No. 202-19

Rules and Regulations of Republic Act No. 11165 otherwise known as the "Telecommuting Act".

Telecommuting refers to a work arrangement based on the voluntariness and mutual consent of the employer and employee that allows an employee in the private sector to work from an alternative workplace with the use of telecommunication and/or computer technologies.

More...

PHILIPPINES
1 MAY 2019

Implementing Rules and Regulations of Republic Act No. 11210 otherwise known as the "105-Day Expanded Maternity Leave Law"

The Rules provide for the implementing regulations in the grant of one hundred five (105) days maternity leave with full pay to all covered female employees regardless of civil status, employment status, and the legitimacy of her child , and an additional fifteen (15) days with full pay in case the female worker qualifies as a solo parent under Republic Act No. 8972, or the "Solo Parents' Welfare Act of 2000". In cases of miscarriage or emergency termination of pregnancy, sixty (60) days of maternity leave with full pay shall be granted.

More...

LOOKING BACK

PHILIPPINES
17 MAY 2019

Social Security System Circular No. 2019-009

The Circular provides for the guidelines on the payment of the expanded maternity benefit effective March 11, 2019 pursuant to Republic Act No. 11210.

More...

PHILIPPINES
9 JUL 2019

Department of Labor and Employment Department Advisory (DOLE-DA) No. 01-Series of 2019

Guidelines in the Computation of salary differential of female workers during her maternity leave and its criteria for exemption pursuant to Republic Act No. 111210, otherwise known as the "105-Day Expanded Maternity Leave Law"

More...

PHILIPPINES
29 JUL 2019

DOLE Department Circular (DOLE DC)No. 01-Series of 2019 Implementing Rules and Regulations of Republic Act No. 11210 otherwise known as the "105-Day Expanded Maternity Leave Law"

Guidelines on the issuance of DOLE certification as a requirement for application for payment of unemployment insurance or involuntary separation benefit

More...

LOOKING BACK

SINGAPORE

8 JAN 2019

Company fined $400,000 for fire at Petroleum Refinery in Pulau Bukom

On 8 January 2019, Shell Eastern Petroleum Pte Ltd ("**Shell**") was fined $400,000 for a fire at a petroleum refinery in Pulau Bukom which resulted in six workers suffering varying degrees of burns.

On 21 August 2015, two groups of workers were simultaneously conducting maintenance and project works on a Crude Distillation Unit at the refinery. The first group of workers was carrying out hot works at various points on a scaffold, while the other group was carrying out cold works at the ground level. Flammable vapours from the cold works came into contact with sparks from the hot works. Although the worker was alerted and immediately closed the valve, a fire broke out.

In the process of escaping from the fire, six workers sustained varying degrees of burns, including two workers who were closer to the fire suffering about 50% and 70% burns. The fire was contained and extinguished by the Bukom Emergency Response Team within 30 minutes.

Investigations revealed that there was a systemic failure in Shell's oversight to check for compatibility of different work activities carried out within the same vicinity at the same time. The hot works and cold works carried out by the two groups of workers in the same vicinity were not coordinated, thus creating a situation where flammable vapours generated by the cold works was ignited by sparks from the hot works.

Shell was fined $400,000 after pleading guilty in October 2018 to an offence under the Workplace Safety and Health Act for failing to implement adequate control measures to ensure compatibility of works carried out at the refinery.

More...

SINGAPORE

15 JAN 2019

F&B firm fined for making false salary declarations

On 27 December 2018, food and beverage company, GD Group Pte Ltd ("**GD Group**"), was convicted of seven charges under the EMFA, and fined $94,500 for making false salary declaration in order to fraudulently apply for Employment Passes ("**EPs**"). Another 13 charges were taken into consideration for the purpose of sentencing. MOM has barred the company from hiring foreign employees.

Investigations found that the company had circumvented foreign worker quota rules by hiring foreigners on EPs, but paying them less than the salaries declared in the work pass applications. Between February 2013 and July 2015, the company falsely declared salary amounts of between $4,000 and $4,800 for 20 foreign employees to meet the salary requirement for EPs. However, the foreign employees were paid salaries of between $1,500 and $2,200.

In a statement, MOM's foreign manpower management division director of employment inspectorate Kandhavel Periyasamy said GD Group had gained an unfair advantage in hiring foreigners at the expense of other firms, and that MOM will continue to take stern actions to uphold the integrity of its work pass controls.

All employers in Singapore must make accurate, complete, and truthful declarations to the Controller of Work Passes in their work pass applications. If convicted of making false declarations to the Controller, offenders can be fined up to $20,000 per charge and/or jailed for up to two years under the EFMA. They will also be barred from employing new foreign workers and renewing their permits of their existing foreign workers.

More...

SINGAPORE

22 JAN 2019

Woman employee who stole nearly $340,000 jailed for criminal breach of trust

On 21 January 2019, a 37-year-old administrative executive at a property management firm, Soh Huay Ching, was sentenced to three years and four months' jail for misappropriating almost $340,000 from her employer. Soh pleaded guilty to one count of criminal breach of trust linked to more than $320,000. Two other similar charges involving the remaining amount were considered during sentencing.

The offences took place between January 2012 and November 2014. Soh was tasked to collect rent and utility fees from tenants as well as maintain the season parking at Goldbell Tower in Scotts Road. The maintenance of season parking included allocating spaces and collecting the annual fees of $2,880 from tenants who own vehicles. Although the company's policy is not to offer season parking to non-tenants of Goldbell Tower, Soh went against this policy and sold season parking to 45 vehicle owners who were non-tenants without authorisation. She collected fees from these persons and misappropriated them for her personal use instead of handing them over to the company. She also misappropriated monies for items such as rentals and utilities.

Her illegal activities came to light when she went on maternity leave in October 2014 and her colleagues discovered discrepancies in areas such as the collection of rental payments. A police report was made in November 2014. In early 2015, Soh's employer received complaints that non-tenants were parking at Goldbell Tower. The non-tenants told the company that they had paid Soh for the season parking spaces. Some of them lodged claims against the firm at the Small Claims Tribunals. All 45 affected vehicle owners were given their refunds.

More...

SINGAPORE

1 FEB 2019

Proposed Amendments to the Work Injury Compensation Act

On 31 January 2019, MOM announced that it had reviewed the Work Injury Compensation Act ("**WICA**") to provide injured employees with greater assurance of compensation and much sooner after the accident. The Ministry sought public feedback on the proposed amendments to the WICA.

Broaden WICA Coverage and Increase Payout

The MOM proposed expanding mandatory insurance coverage to prioritise lower-income employees most at risk of financial hardship, if their employers fail to compensate. More than 24,000 currently uninsured employees will benefit from the expanded mandatory insurance coverage by April 2021.

The MOM also proposed expanding the scope of eligibility for compensation. Currently, only injured employees placed on medical leave are compensated. Those who are injured but have been certified by doctors to be well enough to perform light duties are not eligible for compensation. MOM proposed to expand compensation to those placed on light duties as a result of work injury, such that they are no worse off than those given medical leave.

The MOM will also lift maximum compensation levels under WICA by at least 10% to keep pace with wage growth and rising medical costs.

Speed Up Claims Processing

To offer a lower cost and speedier resolution to work injury compensation ("**WIC**") cases as compared to filing a suit in the courts, MOM proposed streamlining various aspects of claims processes to speed up claims processing. One of the measures is making compensation based on the assessment of incapacity at least six months after the date of accident, instead of waiting for the final extent of injury to be determined. For employees with injuries that take longer to stabilise, doctors can still defer assessments to a later date.

Continued on Next Page

SINGAPORE **1 FEB** 2019

MOM will also accredit WIC policies, based on a core set of standard terms and conditions, to ensure adequate WIC insurance coverage to protect both the employers and the employees. This is because currently, WIC insurance policies that exclude coverage of risky work situations increases the risk of employees not being compensated for their work injuries.

To ensure that claims are processed in a fair and timely manner, MOM will license insurers to sell and process all insured WICA claims. MOM will also be empowered to overrule the insurers' decisions if necessary.

Other amendments

The maximum fines for employers delaying or avoiding compensation will also be increased from $10,000 to $15,000. To deter repeat offenders, the maximum fines for second or subsequent WICA offences will be doubled.

More...

SINGAPORE **18 FEB** 2019

Singapore Budget 2019: Lower foreign worker quota in services sector; continued support for unemployed PMETs

On 18 February 2019, Finance Minister Heng Swee Keat delivered his Budget speech. Among several measures announced in his speech, it was announced that the Dependency Ratio Ceiling (DRC) for the services sector – a quota setting the maximum number of foreign workers a firm can hire for every full-time local worker it employs – will be lowered from 40% to 38% on 1 January 2019. The tighter ratio will also place a cap on the number of S Pass holders (i.e. mid-skilled foreigners earning at least $2,300) companies can hire in the next two years - from 15% to 13% on 1 January 2020, and to 10% on 1 January 2021. For firms that exceed the new ceiling, the new quota will apply when they apply for renewals of permits. The DRC will remain unchanged for other sectors.

To help firms adjust to these foreign workforce policy changes, higher funding of up to 70% under two grants will be extended for three years up to 31 March 2023. These are the Enterprise Development Grant (EDG), which funds projects for firms to improve efficiency and internationalise, and the Productivity Solutions Grant (PSG), which subsidises the cost of off-the-shelf technology to help companies boost productivity. MOM still provides some flexibility for companies to employ more foreign workers while they transition to a more manpower-lean operating model under the Lean Enterprise Development Scheme, as well as on a case-by-case basis if companies need to bring in foreign workers with specialised skills lacking among Singaporeans.

Minister Heng also announced that, to help experienced workers, the Career Support Programme will be extended for two years until 2021. It subsidises the wages of Singaporeans who are mature and retrenched or are long-term unemployed, who are hired for professional, manager, executive and technician (PMET) jobs. New professional conversion programmes will also be launched to help workers move into careers in growth areas (e.g. blockchain, embedded software and prefabrication).

More...

SINGAPORE **18 FEB** 2019

Public Prosecutor v Anita Damu @ Shazana bt Abdullah [2019] SGDC 35

On 24 December 2018, 49-year-old Anita Damu ("**Accused**"), was sentenced to 31 months' imprisonment for abusing her 27-year-old domestic helper, Siti Khodijah ("**Victim**"). The Accused pleaded guilty to various charges under the Penal Code (Cap 224) and under section 22(1)(a) of the Employment of Foreign Manpower Act (Cap 91A) ("**EMFA**").

Continued on Next Page

SINGAPORE

18 FEB

2019

During the course of the Victim's employment, the Accused restricted the Victim's sleeping hours to 11:00 pm to 4:00 am, when she would be required to wake up to get the Accused's daughter ready for school. As a result, the Victim felt constantly tired as she did not have enough rest. The Ministry of Manpower ("**MOM**") subsequently received information that the Victim had been abused by her employer.

Given the above facts, the Court held that the Accused had failed to provide the Victim with adequate rest and had thereby committed an offence under Section 22(1)(a) of the EFMA. After considering various factors, including the Accused's plea of guilt, the Court imposed a global sentence of 31 months' imprisonment and ordered a total compensation of $12,000 to be paid to the Victim.

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SINGAPORE

22 FEB

2019

Asplenium Land Pte Ltd v Lam Chye Shing and others [2019] SGHC 41

Asplenium Land Pte Ltd ("**Asplenium**") applied to the Court for orders to restrain various parties from disclosing, receiving and/or using certain documents which Asplenium claimed to be legally privileged pursuant to section 128A(1) of the Evidence Act (Cap 97) ("**EA**").

One of the issues that arose was whether one Mark Hwang ("**Hwang**") could be deemed an employee and therefore the in-house legal counsel of Asplenium at the material time, although Hwang was formally employed by Nuri Holdings (S) Pte Ltd ("**Nuri**"). Nuri held approximately 46.46% of the shareholding of Tuan Sing Holdings Ltd ("**Tuan Sing**"). Tuan Sing was, in turn, the holding company of Asplenium. Although formally under the employment of Nuri, Hwang was also performing legal work for Tuan Sing for which Tuan Sing paid Nuri an equivalent to half of Hwang's salary under a cost-sharing arrangement between Nuri and Tuan Sing.

Since Asplenium was a subsidiary of Tuan Sing, the Court found that as long as Hwang could be regarded as a legal counsel employed by Tuan Sing at the material time, he would also be regarded as a "legal counsel" of Asplenium. Therefore, the dispute turned on how the term "employed" is to be interpreted and applied in the context of section 128A(4) of the EA. The Court considered the following non-exhaustive factors relevant to the identification of an employment relationship:

Extent of control: The evidence showed that Tuan Sing would assign work directly to Hwang without need for clearance from Nuri. There was also no evidence that Hwang had the discretion to turn down assignments given by Tuan Sing. Therefore, the test of control had been met.

Extent of integration: Hwang was seated in Tuan Sing's premises and was involved, on a daily basis, in providing legal advice to Tuan Sing and its subsidiaries through various means. Further, Hwang's work became so integral to Tuan Sing that Nuri proposed in 2014 that Tuan Sing should share the cost of Hwang's salary, and Tuan Sing readily accepted the proposal. Therefore, the test of integration had been met.

Remuneration of the putative employee: Tuan Sing shared in Hwang's remuneration by making a regular monthly payment to Nuri equivalent to half of Hwang's salary. Although Nuri had made the actual payments of Hwang's salary and CPF payments, the Court was of the view that the more important point was that all parties were aware that a cost-sharing arrangement between Nuri and Tuan Sing was in place, under which Hwang would provide his legal services to Tuan Sing, and Tuan Sing would pay Nuri the relevant part of Hwang's salary.

Continued on Next Page

SINGAPORE

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2019

Obligation to work for one employer: The Court was of the view that this did not go against the existence of an employment relationship between Hwang and Tuan Sing. Since Tuan Sing only paid half of Hwang's salary, Hwang could not be expected to work full-time for Tuan Sing to the exclusion of Nuri. Therefore, the fact that Hwang had continued working for Nuri while serving Tuan Sing was not inconsistent with the existence of an employment relationship between Hwang and Tuan Sing.

Provision of tools, equipment and training: The Court accepted that this was a relevant factor and that the evidence did show that Tuan Sing had provided Hwang with office space and equipment. However, it did not consider this factor conclusive and did not place too much weight on it.

Obligation to provide and accept work: The Court accepted that Hwang was obliged to accept work from Tuan Sing. Further, given that Hwang was Tuan Sing's only in-house legal advisor and that Tuan Sing paid half of Hwang's salary, Tuan Sing would have, as a matter of course, provided work to Hwang. However, the Court did not consider this a conclusive factor.

Right to dismiss, suspend, or evaluate the putative employee: The Court said that the fact that Hwang had superiors within Tuan Sing to report to suggested that Hwang would be evaluated by the management of Tuan Sing. Consequently, it is possible that Tuan Sing could terminate its relationship with Hwang. However, the Court did not consider this a conclusive factor.

Taking into account the above factors holistically, especially the control and integration tests, the Court found that an employment relationship existed between Hwang and Tuan Sing in respect of the work which Hwang did for Tuan Sing.

More...

SINGAPORE

5 MAR

2019

World Fuel Services (Singapore) Pte Ltd v Xie Sheng Guo [2019] SGHC 54

World Fuel Services (Singapore) Pte Ltd ("**Plaintiff**") applied to the Court to enforce a confidentiality clause ("**Clause 4**"), as well as a non-competition and non-solicitation clause ("Clause 5") in the Defendant's employment contract dated 15 August 2016 with the Plaintiff. Clause 4 imposed duties of confidentiality on the Defendant, and Clause 5 stated that for six months after the Defendant's termination for whatever reason, he would not compete or participate in businesses that compete against the business of the Plaintiff, and would not solicit the patronage of customers, or any brokers, traders, managers or directors employed by the Plaintiff.

The Defendant tendered his resignation on 19 November 2018 and informed the Plaintiff that he intended to join a company called China Aviation Oil (Singapore) Corporation Ltd ("**CAO SG**") on 19 February 2019 immediately after he ceased employment with the Plaintiff. CAO SG is a public listed company in Singapore, and its controlling shareholder is China National Aviation Fuel Group, a state-run entity in China which supplies aviation oil to the Plaintiff. After tendering his resignation, the Defendant was put on garden leave until 18 February 2019. The Plaintiff also applied to the Court to prevent the Defendant from commencing employment under CAO SG.

The Plaintiff was mainly concerned that the Defendant had contacts with its suppliers in China and knew the prices that the Plaintiff bought and sold its aviation oil. The Plaintiff argued that this constituted clear confidential information that was useful to a competitor, including CAO SG, as CAO SG and its subsidiaries would tender for aviation oil contracts alongside the Plaintiff. The information would enable the competitor to negotiate prices for the purchase and sale of aviation oil to the disadvantage of the Plaintiff.

Continued on Next Page

SINGAPORE
5 MAR
2019

The Court allowed the Plaintiff's application to prevent the Defendant from commencing employment under CAO SG, finding that the Defendant's experience must have been an important consideration for CAO SG to employ him. The Court was also of the view that it was obvious the Defendant carried all his knowledge of the Plaintiff's connections and business with its suppliers and customers. It would be impossible to separate confidentiality from a detached discharge of his duties with CAO SG. In this regard, the Court noted that the Defendant's regular visits to China to meet the Plaintiff's suppliers seemed like a serious and important job. Additionally, the Court was of the view that, as a supply manager for the Plaintiff, the Defendant had access to important and confidential information such as the price that the suppliers sold to the Plaintiff, and the price the Plaintiff sold to its customers.

Even though the Defendant argued that Clause 4, which prevented him from disclosing confidential information, adequately protected the Plaintiff's interests and that he would honour his undertaking under Clause 4, the Court questioned why the Defendant was not similarly willing to honour Clause 5.

Finally, the Court noted that the Defendant will be paid $10,400 a month with unspecified bonuses and a sign-on bonus of $10,400, whereas the Plaintiff had a U$40 million annual trading turnover derived from the aviation oil contracts. Even assuming that the Defendant may lose his job if prevented from working for CAO SG and taking into account the difficulty in finding another job, the loss of his new job was easily quantifiable. On the other hand, the loss of business by reason of price adjustments by the Plaintiff's competitors including CAO SG would be a more difficult exercise.

For the reasons above, the Plaintiff's application was allowed.

More...

SINGAPORE
6 MAR
2019

Government, unions and employers agree to raise retirement, re-employment age

On 5 March 2019, Minister of Manpower Josephine Teo announced that the Government, unions and employers have agreed on the need to raise the retirement and re-employment ages beyond 62 and 67. A workgroup comprising representatives from the Government, labour unions and the private sector has come to a consensus on the matter.

Minister Teo said that the workgroup, to which she is an adviser, believes that a higher retirement age will motivate both workers and employers to invest in skills upgrading and job redesign for older workers, as people enjoy more years of good health. The re-employment age, up to which firms must offer eligible workers re-employment, also remains useful. The workgroup said that the increases in the retirement and re-employment ages should be implemented in small steps over time as employers will need to make considerable adjustments. The workgroup also said that it is critical to ensure employment arrangements remain flexible.

Minister Teo said the WorkPro scheme, which covers various grants that fund efforts by employers to make their workplaces more age-friendly, will also be reviewed and may be extended beyond June this year. The workgroup will also be making recommendations on Central Provident Fund ("**CPF**") contributions for older workers later this year.

More...

SINGAPORE
17 APR
2019

New guidelines to help employers

New guidelines are being published to guide employers on their employment practices.

On 16 April 2019, it was announced that new guidelines on the provision of proper rest areas for outsourced workers will be published to guide employers on how to provide a more conducive work environment for cleaners, security guards and landscape maintenance workers, amongst others. In coming up with these guidelines, MOM representatives visited approximately 200 work sites in Singapore to gain an understanding of current practices. The objective of the guidelines is to enhance the work environment of low-wage and outsourced workers.

On 1 April 2019, MOM, NTUC and SNEF published a new set of tripartite guidelines on wrongful dismissal to provide clear illustrations and examples of what constitutes wrongful dismissal. Amongst other things, the guidelines clarify that for discrimination, it would be wrongful to dismiss someone after his employer made discriminatory remarks about the employee's race and expressed a preference to hire someone of another race. This is so even if notice had been provided to the employee. The guidelines have been introduced following changes to the Employment Act that came into effect on 1 April 2019. Amongst other things, the Employment Act now allows all employees to file claims against their employers for wrongful dismissal. Previously, this was only available to those earning less than $4,500 a month. It is said that these guidelines will provide employees with clarity on the grounds on which aggrieved employees can appeal if they feel they have been wrongfully dismissed.

On 8 May 2019, Senior Parliamentary Secretary for Manpower and Education Low Yen Ling said that more than 960 companies employing almost 500,000 workers in Singapore have adopted a set of good practices to address workplace unhappiness, including sexual harassment complaints. In Singapore, the Tripartite Alliance for Fair and Progressive Employment Practices ("**TAFEP**") has introduced the Tripartite Standard on Grievance Handling, which is voluntary for employers. Despite the voluntary nature of the advisory, Ms Low said if a workplace harassment case has not been handled fairly, the TAFEP may advise the employer to review the case again. MOM may also commence action against the company in more severe cases, such as failure to provide a safe working environment.

More...
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SINGAPORE
18 APR
2019

Former employee jailed for accepting bribes

On 17 April 2018, former senior procurement officer of Keppel Shipyard Neo Kian Siong ("**Neo**") was sentenced to a year and nine months' imprisonment for receiving more than $740,000 in bribes from some of the company's suppliers. Neo had accepted bribes in return for telling these suppliers the prices of products quoted by their competitors, even though he was not authorised to divulge such information. Further, Keppel Shipyard considered such pricing information to be confidential. Keppel Shipyard said in a statement that all their employees must abide by its code of conduct, which prohibits bribery and corruption, amongst others. For each count of corruption, Neo could have been jailed for up to five years and fined up to $100,000.

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SINGAPORE
23 APR
2019

PAP Community Foundation [2019] SGPDPC 6

On 23 April 2019, the Personal Data Protection Commission ("**PDPC**") issued its decision against PAP Community Foundation ("Organisation") for breaching the Personal Data Protection Act ("**PDPA**").

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LOOKING BACK

SINGAPORE

23 APR 2019

One of the preschools managed by the Organisation organised a school trip which involved the children's parents. Personal data of the parents, including their National Registration Identity Card ("**NRIC**") numbers, were collected by the preschool for identity verification purposes. A few days prior to the trip, a teacher at the preschool sent a photograph of the attendance list to a WhatsApp chat group to remind parents of the upcoming trip. The attendance list contained personal data relating to students and their parents, including their contact numbers and NRIC numbers. After reviewing the evidence, the PDPC was of the view that the Organisation had failed to make reasonable security arrangements to protect the personal data in its possession, in breach of its obligation under section 24 of the PDPA. The PDPC noted that the breach is attributed to the Organisation's lack of specific policies to guide its employees on how to use, handle and disclose personal data. Without such policies, the Organisation cannot be assured that its employees were consistently discharging their duties in compliance with the PDPA. Therefore, the Organisation had fallen short of its obligation to provide reasonable security arrangements.

In reaching the decision not to impose a financial penalty, the PDPC pointed out the mitigating value in the Organisation acting swiftly to address its inadequate policies. Amongst others, the Organisation developed a practical employee handbook and conducted refresher training for its employees. The PDPC was of the view that these measures sufficiently addressed the gap in policies and practices relating to the handling of personal data by the Organisation's employees. Therefore, the PDPC decided to issue a warning to the Organisation without further directions or imposing a financial penalty.

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SINGAPORE

23 APR TO **30 APR** 2019

Employment agency fined $48,000 for insensitive online advertising of Foreign Domestic Workers on Online Market Place and Providing Inappropriate Living Conditions

Several companies and their directors have been penalised for their treatment of foreign workers.

MOM fined SRC Recruitment LLP ("**SRC**"), an employment agency $48,000 for insensitive advertising of foreign domestic workers ("**FDWs**") on an online marketplace, in breach of its EA Licence Conditions on responsible advertising. It was also fined an additional $30,000 on charges for other offences under the Employment Agencies Act (Cap. 92) ("**EAA**"). These advertisements had been posted on online marketplace Carousell. According to MOM, the advertisements likened the FDWs to commodities. These advertisements were posted despite MOM having informed the EA industry through various alerts regarding the EA Licence Condition on responsible advertising. The breach of any EA Licence Condition is an offence under the EAA. Offenders may be fined up to $5,000 and/or jailed up to six months per charge. MOM said that it will not excuse any offensive and insensitive advertising methods that depicts FDWs in a negative light. It added that it will not hesitate to take stern enforcement actions against errant employment agencies, including revocation of EA licences.

In another case, MOM and Urban Redevelopment Authorty ("**URA**") announced that Shi Bao Yi ("**Shi**") and Chen Ming ("**Chen**"), directors of construction companies Genocean Enterprises and Genocean Construction, were fined for letting foreign workers live in illegal dormitories which were severely crowded and unsanitary. Guidelines from the URA only allow a maximum of eight people to reside in the properties. However, investigations revealed that 66 foreign workers and 116 beds had been crammed into a shophouse in Geylang. The shophouse was illegally converted into a dormitory without URA's permission. Genocean Enterprises was fined $60,000 for converting private residential properties into workers' dormitories without

Continued on Next Page

SINGAPORE
23 APR TO **30 APR**
2019

planning permission, while Shi and Chen were fined $137,000 and $60,000, respectively, for similar offences. Genocean Enterprises has also been banned from hiring foreign workers.

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More...

SINGAPORE
3 MAY
2019

Dentist jailed for role in $388,700 Medisave scam

On 3 May 2019, dentist Daniel Liew Yaoxiang ("**Liew**") was sentenced to two year's imprisonment for his involvement in a scam involving fraudulent CPF claims, after pleading guilty to various cheating and forgery charges. Over a period of three years, Liew certified that certain dental procedures were performed on patients on multiple dates to circumvent the daily withdrawal limits set by the MOH. However, in reality, the procedures only lasted one or two days. As a result, he received a total of $388,700 from patients' Medisave accounts. After the company deducted the costs for various items such as anaesthesia, Liew received half of the remainder as his profit. Liew had made restitution of more than $470,000, comprising the principal sum of $388,700 and an interest of 4% per annum.

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SINGAPORE
13 MAY
2019

Taishan Sports Engineering Pte Ltd v Sivalingam Pragadesh Vinoth [2019] SGHC 123

Taishan Sports Engineering Pte Ltd ("**Applicant**") appealed against the decision of the Assistant Commissioner who ordered the Applicant to pay $86,220 to its former employee Mr Sivalingam Pragadesh Vinoth ("**Respondent**") who suffered an injury at work. The Court dismissed the appeal. In reaching its decision, the Court was of the view that the purpose of the WICA is to provide a speedy and inexpensive mechanism for employees to obtain compensation for injuries suffered in the course of their employment, and an employer must not take out an appeal to delay or frustrate payment of compensation. Second, Section 29(3) of the WICA requires an employer to deposit the compensation award with the Commissioner pending an appeal. However, this had not been done. Third, the Court said that the Applicant had notice of the hearing date, and the appeal was uncomplicated. The Court went on to examine the merits of the appeal. On the day of the accident, the Respondent was instructed by his superior to supervise the unloading of the steel panels, and the accident took place during the unloading of the panels. Even though the Applicant argued that the Respondent was instructed not to participate in the loading or unloading process, the Court said that the Applicant would still be liable as Section 3(4) of WICA provided that it is immaterial whether the employee contravened any orders given by his employer.

For the above reasons, the Court dismissed the Applicant's appeal.

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SINGAPORE
15 MAY
2019

Two Malaysians arrested for working illegally as food delivery riders in Singapore

On 15 May 2019, MOM announced that it has commenced investigations against food delivery companies Foodpanda and Deliveroo for employing foreigners who did not possess valid work passes. This announcement came after two Malaysians were arrested in two separate occasions for delivering food orders without valid work passes. They were caught using other people's Deliveroo and Foodpanda accounts to illegally carry out the deliveries. Foreigners who want to work in Singapore must first obtain valid work passes.

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SINGAPORE
15 MAY
2019

If caught working without a valid work pass, they may be fined up to $20,000 or sentenced to a jail term of up to two years, or both. Foreigners found guilty will also be banned from entering and working in Singapore. Employers who employ foreigners without valid work passes will also face a fine of up to $30,000 or imprisonment of up to 12 months, or both.

More...

SINGAPORE
13 APR TO **22 MAY**
2019

Companies and their supervisors penalised for workplace accidents

There have been several cases involving companies and their supervisors breaching the Workplace Safety and Health Act (Cap. 354A) ("**WSHA**"), which led to serious or fatal workplace accidents.

In the first case, site supervisor of ZAP Piling Pte Ltd ("**Company**") was sentenced to 8 weeks' for offences related to a fatal workplace accident that led to the death of Mr Arumugam Elango ("**Mr Arumugam**"). He was also sentenced to 8 weeks' imprisonment under the Penal Code (Cap. 224) for asking a worker to take the blame for the fatal incident. The Company was convicted and fined $290,000. On the day of the accident, Tay instructed crawler crane operator to shift a boring bucket that was in front of the bore piling machine to another location, which was next to a stack of bore pile casings. During the process, the bucket knocked against the casings, which toppled and pinned Mr Arumugam against the tracks, causing him to die. MOM's investigations revealed that Tay was negligent and had endangered the safety of his employees by failing to apply for a permit-to-work ("**PTW**") as required under the Code of Practice. He also instructed the crane operator to carry out the lifting without any lifting plan as required under the WSHA. Further, MOM said that he attempted to obstruct the course of justice by asking another employee to take the blame.

In a separate case, MOM announced on 22 May 20109 that it has fined construction company Ava Global Pte Ltd ("**Ava**") $210,000 for breaching the WSHA. Ava's construction supervisor, Sarkar Mithun ("**Sakar**"), was also sentenced to nine weeks' imprisonment for an offence under the WSHA. These breaches resulted in workplace accident, which left Ava's worker Miah Jobayed ("**Jobayed**") permanently disabled. On the day of the accident, under Sarkar's supervision, Jobayed used a boom lift to get to the ceiling, but did not wear any fall protection equipment. Unfortunately, the panel that Jobayed was standing on dislodged, and he fell to the ground. Despite undergoing surgery at National University Hospital, Jobayed suffered a spinal cord injury which left him permanently paralysed. MOM's investigations revealed that, amongst other things, Sarkar did not obtain a PTW before carrying out the installation works, and did not ensure the workers wore safety equipment. Separately, Ava as an employer was required to take reasonably practicable measures to protect the safety and health of its employees. However, it did not establish a proper method of carrying out the works and did not manage the risks arising thereof, including requiring its employees to wear protective equipment. It also failed to ensure that its employees were sufficiently trained to carried out the tasks.

MOM highlighted that it will take firm action against employers and supervisors who disregard the safety and health of their workers.

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SINGAPORE
22 MAY
2019

Public Prosecutor v Chia Puay Yeoh [2019] SGMC 22

55-year-old Chia Puay Yeoh ("**Accused**") pleaded guilty to 16 charges under the Employment of Foreign Workers Act ("**EFMA**") for engaging in a conspiracy with others to obtain work passes for foreign employees for a business that did not require such foreign workers. For these offences, the

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2019

Accused was sentenced to a total of 25 months' imprisonment. The Court also imposed a fine of $15,000 and a penalty of $54,490. The Accused asked one Guay Boon Chwee ("**Guay**") to register a company, which would be used to sell its work permit quotas to other companies. The Accused promised to pay Guay $1000 every month. The offences involved work permits issued under the company although the company did not actually employ the foreign workers. Subsequently, the Accused sold work permits to a food stall owner who wanted to employ foreign workers but did not have any foreign worker quota, at $1,000 per worker. The Accused even roped in his wife, who helped the Accused collect payment from the food stall owner.

The Court pointed out several aggravating factors, such as the foreign workers being deprived of the protection that were otherwise afforded to them by the conditions under their work passes. This is because the workers were not employed by companies stated in their work passes. Although the Accused claimed that he had helped generate employment and helped food stalls with their manpower shortage, the Court did not accept that as a mitigating factor, as the Accused should not be given credit for violating the law.

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SINGAPORE

29 MAY

2019

Arpah bte Sabar and others v Colex Environmental Pte Ltd [2019] SGHC 137

On 19 July 2017, 62-year-old Abu Samad bin Omar ("**Deceased**") died at his workplace because of his ischaemic heart disease. The Deceased's next-of-kin ("**Claimants**") appealed against the Assistant Commissioner's decision, who ruled that the Deceased's death was caused by his own medical condition and did not arise out of his employment. Accordingly, the Assistant Commissioner said that the Claimants were not entitled to a payout by the Deceased's employer ("**Employer**") and the Employer's insurer. On the facts, the Employer's insurer took the view that the Deceased's death was due to his own medical condition and not caused by or arisen out of and in the course of his employment. The Assistant Commissioner ruled in the insurer's favour, and The Court affirmed the three requirements for establishing an Employer's liability to pay compensation, namely: (a) the workman has suffered a personal injury; (b) the injury has been caused by an accident; and (c) the accident arose out of and in the course of his employment.

The first requirement was satisfied as parties did not dispute that the Deceased suffered a personal injury in the form of his death.

On the second requirement, the Court affirmed earlier authorities that said an accident may include an internal medical condition that caused an unexpected injury while the worker was carrying out his work. In this case, the Deceased suffered from severe coronary heart disease, which is the internal medical condition, and the death is the personal injury. Therefore, the Court held that the Deceased's injury was caused by an accident, thus satisfying the second requirement.

On the third requirement, the Court held that there are two aspects to it: (a) the accident must arise in the course of the workman's employment; and (b) accident must arise out of the workman's employment. On the first aspect, the heart attack happened during the time that the Deceased was on scheduled work and within the Employer's premises. Further, the Employer was also aware that the Deceased frequently volunteered for bin duty. Hence, the Court was of the view that the accident arose in the course of the Deceased's employment. In relation to the second aspect, section 3(6) of the WICA provides for the presumption that an accident arising in the course of an employee's employment is deemed to have arisen out of that employment. The Court said that the Employer has not rebutted the presumption.

For the reasons above, the Court held that the Claimants are entitled to the assessed sum pursuant to section 3(1) of the WICA.

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SINGAPORE

1 APR TO **18 JUN** 2019

Employees jailed for misappropriating from their employers

Several employees were sentenced to jail terms for misappropriating their employers' monies.

In the first case, former car salesman Tan Sze Hian ("**Tan**") was sentenced on 18 June 2019 to 3 ½ years jail for misappropriating almost $370,000 from his employer, Subaru distributor Motor Image Singapore. His role as a sales executive included serving walk-in customers, preparing sales documentation and collecting payments from buyers. Some customers would write cheques when paying for their purchases. Despite the employer's standard policy of writing a crossed cheque, Tan asked the customers to issue him cash cheques, representing that he would transfer the payment to his employer. Through such acts, Tan misappropriated monies from his employer, reportedly to fuel his gambling habit.

In a separate case, restaurant manager Lee Sung Eun ("**Lee**") was sentenced on 10 June 2019 to 2 ½ years' imprisonment for misappropriating more than $200,000. Despite being entrusted by the restaurant owner with a debit card and cheque book that were linked to the restaurant's bank account, Lee made numerous cash withdrawals and debit card transactions for his personal use. His offences came to light when the restaurant owner became suspicious that the eatery was not making any profit and only admitted to misappropriating the monies when confronted.

In the third case, primary school customer service officer Siti Rafeah Abd Hamid ("**Siti**") was sentenced on 1 April 2019 to four months' imprisonment after pleading guilty to misappropriating $36,000. She was entrusted with money collected from the students for activities like school trips, events and co-curricular activities ("**CCA**"). Siti was required to document the collection of money in the school system and pass the monies to the school's operation manager, who would deposit the monies into the school's bank account. However, she did not do so but instead used the money for her own expenses. The offences came to light when the school discovered it was unable to pay a CCA vendor due to lack of funds. Internal investigations revealed that Siti failed to hand over more than $36,000 to the operation manager.

For criminal breach of trust as an employee, these employees could have been jailed for up to 15 years and fined.

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SINGAPORE

12 JUN 2019

Singapore ratifies ILO convention, strengthens commitment to Workplace Safety & Health 2028 targets

On 12 June 2019, Minister for Manpower Mrs Josephine Teo announced that Singapore will be adopting the International Labour Organisation's (ILO) Occupational Safety and Health Convention ("**Convention**"). This announcement is aligned with Singapore's recent announcement of its Workplace Safety and Health 2028 strategies. These strategies are aimed at making Singapore one of the countries with the safest and healthiest workplaces globally. The MOM said this aim will be achieved by lowering workplace fatality rate, which is currently at 1.4 per 100,000 workers. MOM hopes to achieve a workplace fatality rate of less than 1 per 100,000 workers by 2028. Singapore's ratification of the Convention will therefore reinforce its commitment to the 2028 targets, and to give its workers safe and healthy work conditions.

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SINGAPORE
12 JUN
2019

CPF Board fails to claim alleged arrears from country club

On 12 June 2019, the Singapore High Court ("**Court**") rejected the Central Provident Fund Board ("**CPF Board**")'s attempt at recovering approximately $417,000 in arrears of Central Provident Fund ("**CPF**") contributions. The CPF Board alleged that the arrears were owed for gym instructor Mr Mohamed Yusoff Hashim, who worked at Jurong Country Club ("**JCC**"), which is no longer in operation.

Mr Yusoff was employed by JCC in 1991 as its gym instructor. In 1998, his status was purportedly converted to an independent contractor. JCC not only stopped contributing to his CPF, it also terminated his other employee benefits, including paid annual leave, medical coverage and annual wage supplements. Thereafter, Mr Yusoff continued to work at JCC under several contracts negotiated every year or every two years. Investigations began in 2016 when Mr Yusoff found out that JCC was closing, and approached the CPF Board to enquire whether he was entitled to employer's CPF contributions.

The Court held that Mr Yusoff was not an employee of JCC, but an independent contractor. In reaching its decision, the Court set out the legal test for determining whether an individual is an employee falling under the Central Provident Fund Act (Cap. 36). In applying the test to the present case, the Court said that various factors pointed to Mr Yusoff being an independent contractor. For example, Mr Yusoff was not part of JCC's headcount and was not subject to employee performance appraisal. Further, the Court noted the fact that Mr Yusoff's contract was negotiated annually or biennially, suggesting that his working relationship with JCC was not intended to be permanent. The Court said that the evidence also suggests that both JCC and Mr Yusoff himself did not consider Mr Yusoff an employee. Although Mr Yusoff was shocked when told about the change in his status in 1998, including the fact that he would have to pay his own CPF, he nonetheless accepted the arrangement.

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SINGAPORE
19 JUN
2019

Feedback sought on proposed changes to Income Tax Act

On 19 June 2019, the Ministry of Finance ("**MOF**") invited members of the public to provide feedback on proposed changes to the Income Tax Act (Cap. 134). Amongst the key proposed amendments sought to be introduced include the cessation of the Not Ordinarily Resident ("**NOR**") scheme introduced in 2002, which provides tax breaks to highly skilled foreigners who meet the qualifying criteria. The scheme is now set to cease after the tax year of assessment ("**YA**") 2020, with the final NOR status to expire by YA 2024.

More...

SINGAPORE
4 JUL
2019

Cleaners and landscape maintenance workers to get bonuses from 1 Jan 2020 and annual pay rises

The Progressive Wage Model, which is developed by tripartite committees comprising unions, the government and employers, sets out minimum pay, increments and bonuses for job levels in the cleaning, security and landscape industries. The Commissioner of Labour has accepted recommendations in relation to the cleaning and landscaping industry.

Eligible landscape maintenance workers will be entitled to a bonus that is at least two weeks of their basic monthly salary. This is payable at least once a year. The minimum monthly salary will be increased progressively on a yearly basis. The first increase will be S$150, from July 2020.

Eligible cleaning workers will be entitled to a bonus from 1 January 2020. They will also be entitled to a 3% annual increment from 1 July 2020 to 2022.

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SINGAPORE **4 JUL** 2019

Companies in these industries must ensure that their wage arrangements comply. Otherwise, if licensing conditions are breached in this regard, companies will face financial penalties and may face suspension or revocation of their licenses.

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SINGAPORE **4 JUL** 2019

First prosecution under the Foreign Employee Dormitories Act 2015

The Ministry of Manpower ("**MOM**") MOM inspected four purpose built dormitories ("**PBD**") that were managed by dormitory operator Labourtel Management Corporation Pte Ltd ("**Labourtel**"). The MOM found that the PBDs were poorly maintained, which included missing or damaged light fixtures, defective shower taps, rusted railings and staircases, lack of natural and mechanical ventilation, lack of shower point partitions, as well as dirty and unacceptable living conditions, where cockroaches were found in the rooms. Consequently, Labourtel and its director were prosecuted under the Foreign Employee Dormitories Act 2015 for failure to comply with licensing conditions, which is the first prosecution of its kind in Singapore. Offenders face a fine of up to S$50,000 and/or 12 months' jail, for each count of violation of a licensing condition.

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SINGAPORE **19 JUL** 2019

Chiew Kok Chai v Public Prosecutor [2019] SGHC 169

The accused was a director of a Wan Fu Builders Pte Ltd ("**Wan Fu**") that was not entitled to a foreign manpower quota, due to previous levy defaults. The accused hence provided false information in three work pass applications, which indicated that the three foreign employees will be employed by a different company, even though the intention is for them to be employed by Wan Fu instead.

A question arose as to whether a financial penalty or a custodial sentence should be imposed. The court observed that Parliament's intention to deter circumventions of the rules on the hiring of foreign manpower is reflected in the increases of the maximum punishment under the relevant provisions of the Employment of Foreign Manpower Act.

Consequently, a custodial sentence should therefore be the starting point for the furnishing of any false or misleading information in a work pass application.

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SINGAPORE **22 JUL** 2019

Genki Sushi Singapore Pte. Ltd. [2019] SGPDPC 26

Following a notification by Genki Sushi Singapore Pte Ltd ("**GSSPL**") that a server on its network storing its employees' personal data had been the subject of a ransomware attack, the Personal Data Protection Commission ("**PDPC**") commenced an investigation as to whether GSSPL had failed to comply with the Personal Data Protection Act 2012 ("**PDPA**").

GSSPL uses and licenses an off-the-shelf payroll software application, which was used by employees to view their e-payslips as well as by supervisors to confirm the employees' attendance at the various GSSPL restaurants. The application hence contained, amongst other things, personal data of GSSPL's former and current employees. The ransomware attack caused an unauthorised modification of GSSPL's data, including the employees' data files, and the ransomware encryption caused the data files to be unreadable. The data files included, amongst other things, the employees' names, identity numbers, bank account information, gender, marital status, date of birth, salary details, address, phone numbers, etc.

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SINGAPORE

22 JUL 2019

The question before the PDPC was whether GSSPL had put in place reasonable security arrangements to safeguard the personal data hosted on the server. The PDPC highlighted that where personal data was sensitive, including without limitation identity numbers, bank account details or salary details, higher standards of protection should be implemented. The standard for security arrangements in relation to IT systems was that it must be sufficiently robust and comprehensive to guard against possible intrusions or attacks. The PDPC emphasized that organizations need to have an "all-round" security of its system and while the security system need not be perfect, it must be reasonable in the circumstances.

The PDPC found that GSSPL had failed to implement "all-round" security of its system, finding the following gaps:

(a) the server's firewall was not set to filter out unauthorised traffic and block unused ports;

(b) penetration tests were not carried out periodically to assess the robustness of the IT security and to identify any vulnerabilities; and

(c) the server and application were not regularly patched.

Consequently, GSSPL was found to have breached its obligations under the PDPA and was ordered to pay a penalty of S$16,000.

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SINGAPORE

30 JUL 2019

Avant Logistic Service Pte. Ltd. [2019] SGPDPC 28

On 25 November 2017, a customer ("**C1**") of an e-commerce platform raised a complaint to the PDPC, on the basis that her personal data had been disclosed without her consent to another customer ("**C2**") of the same platform, by an employee ("**Employee**") of Avant Logistic Service Pte Ltd ("**ALSPL**"). The facts were as follows:

(a) C1 sought to self-collect a package that was ordered from the e-commerce platform. At the collection point, the Employee gave C1 two packages. C1 informed the Employee that the packages were not hers as they showed a user ID and mobile number that was not hers. The Employee told C1 to take the packages, which C1 then did;

(b) C2 arrived later and was informed by the Employee that her packages had been collected by someone else. Subsequently, the Employee sent C2 screenshots of two delivery lists containing user IDs and mobile numbers of some customers of the e-commerce platform; and

(c) C2, using C1's user ID, found C1's Facebook and Instagram pages and sent her messages to recover the packages.

The issue that arose was whether ALSPL had made reasonable security arrangements to protect personal data in their possession. The PDPC found that even though ALSPL had required its delivery personnel to comply with the e-commerce platform's Privacy Policy and Employee Handbook, this was inadequate because the employees were not briefed on what exactly they needed to do to protect customers' personal data. ALSPL itself did not have policies or procedures in place to prohibit disclosure of personal data by its delivery personnel, nor had provided training on proper handling to the same.

Significantly, ALSPL sought to argue that the Employee's employment contract contained a confidentiality clause that prohibited him from disclosing customer information, without ALSPL's consent. The PDPC stated that even though such clauses are relevant to the protection of personal data, by themselves, they are insufficient. This is because they usually do not contain elaboration as to what constitutes personal data and how employees are to handle and protect personal data. Instead, companies are expected to provide employees with specific and practical instruction on the same.

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SINGAPORE

1 AUG

2019

Palraj Duraiarasan v Chia Lip Seng t/a Mong Seng Construction [2019] SGDC 156

The plaintiff, Palraj Duraiarasan, was a construction worker employed by the defendant, Mong Seng Construction. The plaintiff allegedly met with an accident on 15 January 2016 at a construction worksite. Four days later, on 19 January 2016, the defendant provided the plaintiff with a company chit, to attend the company doctor. Subsequently, a metal piece was removed from his eye. The plaintiff alleged that he was "hammering in a nail on a concrete wall as instructed at the worksite when some metal debris from the tip of the nail entered into his right eye through the gap of the goggles that he was provided with". On 4 April 2016, the MOM's Notice of Assessment for the plaintiff's work injury compensation claim stated that no compensation was payable as the injury was not caused by an accident arising out of and in the course of his employment. The plaintiff then commenced a claim against the defendant under common law.

The court found that the plaintiff had succeeded in establishing his case on a balance of probabilities, for reasons including the following:

(a) even though it would be optimal to seek immediate medical attention, people have different thresholds for pain and hence it was not unreasonable for the plaintiff to seek treatment only after 4 days. The court also stated that the circumstances of the plaintiff as a foreign worker should also be taken into account;

(b) the defendant's argument that the injury was not sustained on 15 January 2016 was unsupported. In this regard, the court highlighted that the strongest evidence in this regard would have potentially been the attendance records at the worksite. The court added that "clearer and better record keeping beyond scribbled signatures on an attendance sheet or tamper resistant records would have helped established the Defence"; and

(c) the fact that the MOM ruled that no compensation was payable in respect of the plaintiff's workman compensation claim was inconclusive either way. In any event, MOM's notice of assessment itself expressly allowed a party to dispute the assessment within a prescribed time.

The court further noted that it was constrained from apportioning liability against the plaintiff, as the defendant did not plead contributory negligence on the part of the plaintiff.

SINGAPORE

8 AUG

2019

Pradeepto Kumar Biswas v East India Capital Management Pte Ltd [2019] SGHC 183

Between July 2015 to August 2015, Pradeepto Kumar Biswas ("**Pradeepto**") and one Simon John Hopkins had discussed forming East India Capital Management Pte Ltd ("**EICM**") and its wealth and fund management business. On 15 October 2015, Pradeepto commenced work with EICM. Subsequently, on 21 October 2015, the finance manager of EICM wrote to Pradeepto, agreeing that Pradeepto would be paid a "notional" monthly salary of S$20,000 when EICM became profitable. Pradeepto, having control of Indian Ocean Group Pte Ltd ("IOG") purchased 24% shares in EICM on 12 November 2015. On 18 June 2017, EICM terminated Pradeepto's engagement with the company alleging misconduct. Consequently, Pradeepto made a claim against EICM for unpaid salary amounting to S$351,312.64. EICM counterclaimed against Pradeepto for, amongst other things, breach of fiduciary duties.

One issue that arose was whether, in the absence of any employment contract, Pradeepto was an employee of EICM (in which case he would be entitled to salary), or a partner (in which case he would only be entitled to EICM's profits).

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SINGAPORE
8 AUG 2019

The court held that the parties had an employment relationship, even though there was no employment contract. There were several factors pointing to the existence of the same. First, based on the evidence, Pradeepto was to be employed to find business for IOG. In return, he was to be paid a "notional" salary, which the court held to mean that the actual payment would be deferred. Second, EICM had made employer's contributions to Pradeepto's Central Provident Fund ("**CPF**"). Third, wordings such as "terminated Pradeepto's employment" were used in correspondences in relation to his termination.

Hence, Pradeepto's claim for deferred salary was allowed, in spite of an absence of an employment contract.

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SINGAPORE
14 AUG 2019

Company fined S$220,000 for breach of Workplace Safety and Health Act

On 25 July 2016, four workers from Environmental Landscape Pte Ltd ("**ELPL**") were instructed to clean an underground storage tank. The tank was situated in a confined space which was 3.2m deep. This was only accessible via a ladder at an open manhole. Three of the workers entered the confined space. The workers switched on the socket extension to turn on the floodlight, sparking an explosion. Upon investigations, MOM found that ELPL failed to:

(a) conduct risk assessment for the described work activities, and hazards including toxic or flammable gases were not identified prior to the commencement of the work; and

(b) ensure that the four workers were trained to work in a confined space, did not brief them of the risks involved in doing so, and did not set out safety precautions or implement emergency procedures to deal with issues arising from such work.

Employers are subject to fines of up to S$500,000 for violation for violating section 12(1) of the Workplace Safety and Health Act, In the instant case, ELPL was fined S$220,000. The MOM had indicated that they will "continue to press for high fines against employers who knowingly put their workers at risk".

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SINGAPORE
19 AUG 2019

Retirement and re-employment ages to be raised incrementally, CPF rates for older workers to be adjusted

It has recently been announced that the retirement and re-employment ages will be raised incrementally by the year 2030. The retirement age will be raised to 63 by 2022, and 65 by 2030. The re-employment age will be raised to 68 by 2022, and 70 by 2030.

The Central Provident Fund contribution rates for workers above the age of 55 will be raised from 2021 onwards. This is expected to be implemented in the following manner:

(a) for workers above 55 years old to 60 years old, the CPF contribution rate will be increased from the current 26% to 28% by 1 Jan 2021, to 37% by 2030;

(b) for workers above 60 years old to 65 years old, the CPF contribution rate will be increased from the current 16.5% to 18.5% by 1 Jan 2021, to 26% by 2030; and

(c) for workers above 65 years old to 70 years old, the CPF contribution rate will be increased from the current 12.5% to 14% by 1 Jan 2021, to 16.5% by 2030.

The change in contribution will be split between employer and employee.

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Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

3 SEP

2019

Work Injury Compensation Bill 2019 passed on 3 September 2019

The Work Injury Compensation Bill 2019 was passed on 3 September 2019 and will come into force on 1 September 2020 as the Work Injury Compensation Act 2019 ("WICA"). The amended WICA includes, amongst other things, the following changes:

(a) The WICA will allow information sharing between insurers of their clients' past claims record. This is intended to facilitate more accurate premium pricing, so that companies that have safer workplaces will be rewarded. Consequently, employers with good safety records would be able to enjoy lower premiums than those with poor safety records.

(b) The WICA will allow compensation for permanent incapacity ("PI") claims to be based on the prevailing state of incapacity at the earliest opportunity six months from the date of accident. This expedites claims for PI. Otherwise, PI claims are only settled after several months due to the time taken to assess the PI.

(c) For serious or fatal injuries, employees or their representatives need not file claim applications. Processing begins upon notification to the MOM or the insurer of the accidents.

(d) Employers will be required to purchase work injury compensation insurance for non-manual employees earning up to S$2,600 by April 2021, on a progressive scale. Previously, for these employees, employers were not required to purchase the same if they earn more than S$1,600 per month.

(e) Employees suffering work injury and placed on light duties will be compensated for loss of earnings as well, so as to be consistent with the treatment for employees placed on medical leave due to work injuries. This compensation applies if they are receiving lower salary during their period of light duties.

(f) Employers are to report all medical leave or light duties arising from work injury to the MOM. The level of detail required for reporting will differ depending on the number of days of medical leave or light duties in question.

(g) If an employer's doctor provides unfair or inadequate incapacity assessment, an employee will be able to switch doctors, on a case-by-case basis.

(h) The compensation limits for death and permanent incapacity will be respectively increased by about 10%, to $225,000 and $289,000. The compensation limit for medical expenses will be increased by about 25%, to $45,000.

(i) The WICA will prescribe a core set of standard terms that is complaint with WICA. This ensures adequate coverage, as currently employers may find that some work scenarios are excluded.

(j) Persons found to be withholding necessary information or documents for claims processing will face a fine of up to S$5,000 and/or 6 months' imprisonment.

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LOOKING BACK

SOUTH KOREA
15 JAN
2019

Amendment to the Labor Standards Act ("LSA") regarding Notice of Dismissal provision

The amendment to the LSA inserted an exception to the advance notice of dismissal requirement in Article 35 for employees whose consecutive service period is less than 3 months (i.e., regardless of whether they are probationary employees or not). The amendment deleted other existing exceptions to the notice of dismissal – which were based on the types of employment – to reduce controversy on the fairness of the existing system. This change was largely driven by the Supreme Court's holding that it was unconstitutional to exclude a salaried employee whose consecutive service was less than 6 months from the notice of dismissal requirement.

This amendment to the LSA has become effective from January 15, 2019, immediately upon its promulgation. However, as the amendment is applicable to employment contracts executed after 15 January 2019, the employment contracts executed before 15 January 2019 remain governed by Article 35 of the LSA before the amendment.

SOUTH KOREA
15 JAN
2019

Promulgation of an amendment to the Labor Standards Act ("LSA"), which defines and prohibits workplace harassment for the first time in Korea

An amendment to the LSA was promulgated on 15 January 2019, which established a new obligation to prohibit workplace harassment as follows.

The Amendment to the LSA prohibits workplace harassment, which is defined as an "act by an employer or employee[,] which causes physical or mental suffering, or worsens the working conditions/environment of another employee, by taking advantage of his/her (superior) status or (power) position in a relationship within the workplace beyond the appropriate scope of work" (Article 76-2 of the LSA Amendment).

An employer is required to include or amend the workplace harassment-related provisions on preventive and responsive measures upon occurrence of workplace harassment in the company's Rules of Employment ("ROE"), and report the new or amended ROE to the relevant labor authorities.

Any employee may report the occurrence of workplace harassment to the employer. An employer is required to promptly conduct an investigation if the employer receives a complaint, or is otherwise made of aware of workplace harassment. If workplace place is confirmed through the investigation, the employer is required take appropriate measures, such as disciplinary action, against the harasser.

During the investigation process, an employer is required to take appropriate measures (e.g., changing the victim's workplace, placing the victim on paid leave, etc.) to protect the victim-employee from (further) harassment after hearing the opinion from the victim.

If an employer takes any disadvantageous measures against the victim-employee or the employee who reports the occurrence of workplace harassment, the employer may be subject to a fine of up to KRW 30 million or imprisonment of up to 3 years.

Workplace harassment-related provisions in the LSA will become effective on 16 July 2019, which is 6 months from date of official promulgation.

SOUTH KOREA
19 APR
2019

Announcement/Enforcement of the Rules on the Occupational Health and Safety Standards

On April 19, the Ministry of Employment and Labor (the "**MOEL**") announced and enforced the "Rules on the Occupational Health and Safety Standards". These Rules have been adopted to prevent accidents that may occur during various operations relating to shunting trains (e.g., separation/combination of

Continued on Next Page

coaches, redirection of railways), and to strengthen health measures to protect workers who handle harmful chemicals.

As workers may fall, collide, or be dangerously cramped while climbing up a train to conduct various shunting operations, the MOEL enacted these rules to prohibit the operation of a train while a worker remains situated on a ladder during the course of his/her duties. Moreover, the MOEL enacted the rules mandating the instalment of a safety rail at a location where an employee would board the train in order to mitigate the risk of falling.

SOUTH KOREA

19 APR 2019

The MOEL included Indium and 1,2 dichloropropane, which have been confirmed as carcinogens causing lung disease and bile duct cancer in Japan, in the list of substances subject to control pursuant to the Occupational Health and Safety Act, and required the employers to subject the workers to appropriate health measures.

Indium, which has been confirmed to cause lung disease, was designated as a "harmful substance subject to control" posing a significant health hazard, and the MOEL mandated the instalment of a ventilation system, leak prevention measures, and other health measures for handling Indium. 1,2 - dichloropropane, which has been confirmed to cause bile duct cancer, was designated as a "substance under special control" posing serious health hazards. In addition to aforementioned measures, the MOEL required additional measures, such as notifying workers of health hazards and drafting handling report of the substances.

Implementation of the 52-hour work week to businesses falling under special categories

SOUTH KOREA

1 JUL 2019

Wording: The 52-hour work week, which includes overtime and holiday work, has been implemented in phases depending on the size of a business. The 52-hour work week became effective on July 1, 2018 for businesses with more than 300 or more employees and on July 1, 2019 for businesses falling under special categories. The same requirement will become effective on January 1, 2020 for businesses with 50 or more, but fewer than 300 employees and on July 1, 2021 for businesses with 5 or more, but fewer than 50 employees.

Businesses falling under special categories for which the 52-hour work week became effective as of July 1, 2019 include 21 types in the following industries: auto/auto parts, wholesale and brokerage of goods, retail, storage and warehouse, finance, insurance and pension finance, finance and insurance-related services, mail, educational services, research and development, hospitality, food and beverage, advertising, market research and polling, business facilities and landscape management, beauty salons/public bath or similar services, production and distribution of motion pictures and audio records, broadcasting, telecommunications, waste water and human waste processing, social welfare, etc.

Workplace Harassment laws go into effect

SOUTH KOREA

16 JUL 2019

The amended Labour Standards Act prohibiting workplace harassment and requiring measures to prevent and address workplace harassment went into effect on July 16, 2019.

Once a workplace harassment incident takes place, the employer is obligated to investigate and take appropriate measures. The employer shall not dismiss or treat the reporter or the victim in a disadvantageous manner. Moreover, the employer shall have workplace harassment provisions (e.g., prevention, measures to address workplace harassment, etc.) in the rules of employment.

LOOKING BACK

SOUTH KOREA

17 JUL

2019

An amendment to the Fair Hiring Procedure Act goes effective

Wording: As of July 17, 2019, the amended Fair Hiring Procedure Act became effective to prohibit any act that undermines fairness of the hiring process or any request/collection of personal information unrelated to job performance such as an applicant's physical appearance.

The amendment prohibits improper requests, pressure and/or coercion with respect to hiring, and prohibition of providing and/or receiving money, goods, entertainment or proprietary benefits regarding hiring in violation of the law. Moreover, applicants cannot be required to provide personal information unrelated to work of themselves, their direct lineal ascendants/descendants and siblings

SRI LANKA

1 FEB 2019

The minimum wages for six trades have been amended with effect from 1st February 2019

Amendments to the minimum wages for the to the following six trades :-

1. Motor Transport;
2. Hosiery Manufacturing;
3. Coconut Manufacturing;
4. Prawn Culture and Exports;
5. Match Manufacturing and
6. Brick and Tile Manufacturing.

have been notified by the Secretary, Ministry of Labour by notices dated 28 and 29 January 2019 was published in the Ceylon Daily News of 1st February 2019.

SRI LANKA

6 MAR 2019

Agrapathana Plantations Ltd. and (2) Lanka Tea and Rubber Plantations (Pvt.) Ltd. – Respondent-Appellants v. Seevali Arawwawala [Supreme Court].

The Applicant-Respondent-Respondent ["the applicant"] had been employed as an Assistant Manager of an estate owned by the [1st] Appellant ["the employer"]. He was so appointed on 1 July 2009 and placed on probation for a period of six months from that date but, on 28 January 2010, the period of probation was extended for a further period of three months from 1 January 2010 to 31 March 2010.

Thereafter, by letter dated 17 March 2010., his employment was terminated with effect from 1 March 2010 as his performance had not improved.

The applicant sought relief from the Labour Tribunal which, in its order dated 30 September 2011., directed the employer to reinstate the applicant and transfer him to another estate controlled by the employer. The employer then appealed to the High Court, which affirmed the order of the Labour Tribunal.

Before the Labour Tribunal, the employer, while admitting that it terminated the services of the applicant further stated that the termination had been effected whilst the applicant was on probation.

The Labour Tribunal ordered that, as the employer had admitted the termination, the employer should begin the case. It was contended by the Appellant that this was erroneous since the termination had occurred while the applicant was on probation. Counsel for the Applicant, on the other hand, contended that the applicant was not on probation at the time of the termination of his services since, by the time the period of probation was extended on 28 January 2010, the period of probation had already come to an end on 31 December 2009.

In considering this issue, the Supreme Court noted that the letter of appointment provided, inter alia, that the employer had reserved to itself the right to extend the period of probation and also provided that confirmation would be in writing and the applicant would continue to be on probation until so confirmed. Noting further that the applicant had never been confirmed, the Supreme Court held that the services of the applicant had been terminated while he was on probation.

Proceeding to the next question as to which party should begin the case in such circumstances, the Court adverted to one of its previous judgments [Anderson v Husny – 2001 SLR 168] where it had held that

> "upon proof that the termination had taken place while the employee was on probation the burden was on the employee to establish unjustifiable termination and the employee must establish at least a prima facie case of mala fides before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

Continued on Next Page

SRI LANKA

6 MAR

2019

Accordingly, the Supreme Court held that the order of the Labour Tribunal was wrong, could not stand and held further that the High Court had also erred in that while (rightly) holding that the probation had been lawfully extended, nonetheless affirmed the order of the Tribunal.

The order of the Labour Tribunal and the judgment of the High Court were set aside and a 'retrial' was ordered by the Supreme Court.

SRI LANKA

7 MAY

2019

CA (Writ) Application 13/2019 Kotuwegedara v. Commissioner General of Labour and Six Others

This case was decided on 7th May 2019.

The 6th Respondent, Unilever Sri Lanka Limited, made an application (P2) under section 2 of the Termination of Employees (Special Provisions) Act no. 45 of 1971, (hereafter "the Act") to the Commissioner General of Labour, (hereafter "the Commissioner"), seeking permission to terminate the services of the Petitioner - who had been employed by it for 25 years and last held the post of Production Assistant at the Company's factory at Horana.

The basis on which the application was made, was that the production facility at the said factory had been completely destroyed by fire and that this necessitated the termination of the Petitioner's services. At the time of making the application to the Commissioner, the Company had also written to the Petitioner (by P3) instructing him not to report for work until a final ruling was made by the Commissioner. The Petitioner was also informed that he would continue to be paid his salary and would be entitled to his medical benefits.

It was not in dispute that:

a) until the application was made, the Petitioner had - apart from his salary - been paid all allowances which included a traveling allowance and a special overtime allowance; and
b) that upon the application being made, the payment of the said allowances had been discontinued;

At the inquiry, the Petitioner took up a preliminary objection on the basis that the non-payment of the allowances constituted a termination of his services and that there could be no inquiry into the application, (which was for permission to effect the termination).

It was contended that the 2nd Respondent, (the Assistant Commissioner who held the inquiry), had initially informed the Company, (by decisions marked P7 and P12), that its application would not be proceeded with unless the allowances were paid. The latter had not complied - but subsequently, the 2nd Respondent decided to proceed with the inquiry.

The Petitioner made this application to the Court of Appeal, seeking writs of Certiorari and Mandamus respectively, to quash the decision to proceed with the inquiry and to compel the Commissioner to dismiss the application of the company. An interim order to stay/suspend the continuance of the inquiry until compliance by the company with the orders P7 and P12 was also sought.

The Petitioner prayed for the aforesaid reliefs on the basis that the non-payment of the allowances was tantamount to a termination of his employment and that, as such, proceeding with the application, (for permission to terminate), was illegal. He relied on section 2(4) of the Act which states:

"For the purposes of this Act the scheduled employment of any workman shall be deemed to be terminated by his employer if, for any reason whatsoever, other than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include:-

Continued on Next Page

a) non-employment of the workman in such employment by his employer whether temporarily or permanently; or
b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade industry or business."

The Court which referred to previous decisions of the Supreme Court and juristic opinions made the following observations.

a) Sections 2(1) and 2(2) did not specify that payment of wages pending an application was a condition precedent to maintaining an application under section 2(1) but, in view of the provisions of subsection (4), it was clear that the payment of wages until the date of the application was mandatory as non-employment without the payment of wages would result in the termination of employment.
b) Section 6 of the Act empowered the Commissioner to conduct an inquiry where there had been a termination contrary to section 2(1) and, if it was the contention of the Petitioner that his services had been terminated contrary to the provisions of the Act, he was entitled to have made an application under section 6 of the Act or section 31B of the Industrial Disputes Act – neither of which he had done.
c) In fact a finding by the Court that the non-payment of the allowances had resulted in the services of the Petitioner being terminated in September 2017– which would be the effect of a writ of Mandamus prayed for, would be to the detriment of the Petitioner as any application to challenge such application would be out of time.

Having considered a decision of the Supreme Court [Samalanka v. Weerakoon – 1994 (1) SLR 405], where the Court observed, inter alia - as follows -

"But even if there had been a failure to pay wages pending the inquiry, I do not think that in the circumstances of this case, it could constitute a "termination" ....." [at p.411], the Court of Appeal, (in the instant case), went on to state that:

"The reasoning of the Supreme Court thus makes it clear that once the process under section 2(1) is triggered by making an application, non-payment of wages thereafter does not make the Commissioner General of Labour functus in respect of that application. The 1st Respondent is required by law to proceed with the inquiry and make a decision on the application. This Court would, with all respect, take the view that it would be in the best interests of justice if the basic salary is paid to the employee during the period that the application is under consideration."

It was held that the condition precedent to making an application under section 2(1) (b) and thereafter receiving a decision under section 2(2), is for the employer to pay all wages inclusive of allowances until the time the application is made to the Commissioner. The Court observed that:

"In the circumstances, this Court is of the view that in the present application, even though the 6th Respondent did not pay the allowances after the application was made, the decision of the 2nd Respondent to proceed with the inquiry is neither illegal nor irrational."

In the course of its judgment, the Court of Appeal also observed that there were two significant features in section 2(2) of the Act that demonstrated the rationale for the reasoning that what was required was the payment of wages and allowances until the date of the application – namely:

a) the time period within which the inquiry must be concluded (and order made) – i.e. originally 3 months, subsequently reduced to 2 months by section 11 of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act no. 13 of 2003; and
b) the "absolute discretion" granted to the Commissioner by section 2(2)(b) to grant or refuse his approval and by section 2(2)(e) to decide the terms – including those as to payment of gratuity or compensation - subject to which such approval.

Continued on Next Page

As regards a) the Court noted that the legislature, while protecting the interests of the employee by the introduction of the Act, had also been mindful to protect the interests of the employer by requiring the conclusion of inquiry within the stipulated time. While observing that, (as previously held by the Supreme Court), the failure to conclude inquiry within the prescribed time would not vitiate the order, "it is in the best interests of both parties that a decision is made either way within the shortest possible period of time so that the employer does not have to incur loss by continuing payment of salary for a period of more than three months and the employee does not have to suffer loss by receiving only his basic salary for a period beyond three months"; [as stated above, the period had been reduced to two months].

As regards b) the Court observed that in view of the absolute discretion granted to the Commissioner, if he were to refuse to grant approval, he could order reinstatement with an appropriate order on the allowances and other payments that were due to the employee during the pendency of the inquiry, while if he were to grant approval, "the terms and conditions on which such approval is to be granted including the payment of compensation for loss of employment and the payment of allowances and other payments that were due to the Petitioner during the period the said application was pending, can be decided by the Commissioner."

Concluding its judgment, the Court reiterated that the continuation of the inquiry into the application for approval to terminate the services of the Petitioner and making a determination thereon was not illegal and dismissed the application of the Petitioner.

This judgment would constitute authority for the proposition that the non-payment of allowances, (such as those relevant to this case), during the pendency of an inquiry into an application for approval to terminate the services of an employee would not constitute a termination of the employee's services and/or render the continuation of an inquiry illegal.

It may also be observed that there was a rational basis for the non-payment of the particular allowances referred to in this case, in that the rationale for the travelling allowance would – largely, if not wholly - be preferable to the need for the employee to travel to work; and the special overtime allowance would be preferable to overtime work – neither of which would arise where the employee did not have to come for work at all.

However, it may be noted that as regards the, (obiter), observations as to whether the employer is bound to pay wages during the pending inquiry, the position is unclear. The reference to the "two significant features in section 2(2) of the Act that demonstrate the rationale for the reasoning that what is required was the payment of wages and allowances until the date of

the application" implies that neither wages (salary) nor allowances need be paid thereafter, during inquiry into the application. On the other hand, the observation that:

> "it is in the best interests of both parties that a decision is made either way within the shortest possible period of time so that the employer does not have to incur loss by continuing payment of salary for a period of more than three months and the employee does not have to suffer loss by receiving only his basic salary for a period beyond three months" implies that salary must continue to be paid.

The latter would seem to be more acceptable, in that non-payment of salary would constitute a fundamental breach of the contract of employment – giving rise to a constructive termination.

It is also noted that the Court, in observing that the matter of compensation, (and the quantum thereof), for loss of employment was to be decided by the Commissioner "in his absolute discretion", did not advert to section 6D of the Act – brought in by the Termination of Employment of Workmen (Special

Continued on Next Page

SRI LANKA

7 MAY

2019

Provisions) Act no.12 of 2003 – which provides that:

> "Any sum of money to be paid as compensation to a workman on a decision or order made by the Commissioner under this Act, shall be computed in accordance with such formula as shall be determined by the Commissioner, in consultation with the Minister, by Order published in the Gazette.";

[The order being the one published in Gazette Extraordinary no. 1384/07 of March 15, 2005, in terms of which inter alia the maximum compensation that could be awarded is Rs. 1,250,000].

SRI LANKA

7 JUN

2019

Lanka Banku Sevaka Sangamaya [Ceylon Bank Employees' Union] (on behalf of E.A. Sugathapala) vs. People's Bank – Supreme Court Appeal 69/2011.

Decided on 7th June 2019

At the time material to this case, the employee on behalf of whom the application was made was an Assistant Manager of the Respondent Bank.

He was found to have granted Temporary Overdrafts (TODs) far above authorised limits during a period of 11 months, when he was functioning as Acting Manager of the Bank's branch in Kalpitiya. At an independent inquiry which was held subsequently, he was found guilty of having acted in violation of the Bank's circulars and of having "brought risk to its financial situation" and his services were terminated, whereupon he made an application for relief to the Labour Tribunal – which, after inquiry, held that the termination had been unjustified and awarded relief in a sum of Rs. 1,581,178 (One Million Five Hundred and Eighty One Thousand One Hundred and Seventy Eight) being the equivalent of the salary he would have earned during the period of non-employment.

The Bank appealed to the Provincial High Court, which set aside the order of the Tribunal and the Union then preferred this appeal to the Supreme Court – which had granted it (special) leave to appeal on the following questions -

1. Has the High Court misdirected itself in regard to the burden of proof in the circumstances of this case? and
2. Did the High Court err in its conclusion that the Labour Tribunal had failed to properly evaluate the evidence placed before it?

In reviewing the evidence and the order of the Tribunal, the Supreme Court found that:

a) the employee had an approval limit of Rs.100,000 for TODs and they were to be for thirty days. Any exceeding of the limits could only be done with the approval of his superiors, in very exceptional circumstances, where qualifying requisites had not been satisfied.
b) The employee had far exceeded the limits and the monies had not been recovered within the stipulated 30 days. More than 30 million rupees had been granted and these were not recovered for more than 10 months.
c) The employee had also not obtained adequate sureties and some of the surety assets had been overvalued by him.
d) The employee's defence was that approval had been obtained from the higher officials of the Bank and that the relevant documents were available at the Bank; but none of them had been produced at the inquiry or at the Labour Tribunal.
e) Although the employee's contention was that the money could be recovered from the borrowers, according to the Respondent (Bank) in most of the cases, it was not and the matters were referred to the mediation board. Some were referred for filing of cases for recovery.

In considering the order of the Tribunal, the Supreme Court noted that the Tribunal had placed a burden on the Bank to prove its case beyond reasonable doubt. He had also "completely relied on the provisions of the

Continued on Next Page

LOOKING BACK

SRI LANKA

7 JUN 2019

Evidence Ordinance" despite the fact that section 36(4) of the Industrial Disputes Act provided that (inter alia) a Labour Tribunal shall not be bound by any of the provisions of the Ordinance.
[N.B. - no reference was made to the later Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act no. 13 of 2003 – section 9 of which goes further, to state "The provisions of the Evidence Ordinance shall not apply to the conduct of proceedings under this Act].

The Supreme Court affirmed that the Labour Tribunal "should not set a standard of proof of any fact at a standard of beyond reasonable doubt" and that the High Court had rightly held that the Tribunal had erred in requiring the Bank to establish its case on that standard. Accordingly, the Supreme Court went on to hold that the High Court had not misdirected in regard to the burden of proof in this case.
As regards the second question of law on which leave to appeal had been granted, the Supreme Court further held that the High Court had not erred in its conclusion that the Tribunal had failed to, (properly), evaluate the evidence placed before it. It was held that, on the other hand, the High Court itself had properly done so.

In view of the above findings of the Supreme Court, the appeal of the Union was dismissed and the decision of the Provincial High Court affirmed.

The decision is of some significance since firstly, it reaffirms the principle that proof of any fact in a Labour Tribunal need not be beyond reasonable doubt – and therefore, by necessary implication, that proof on a balance of probability would suffice; secondly, that, (while, in the first instance, it is within the province of a Labour Tribunal to evaluate the evidence placed before it), it is competent for the High Court in appeal to determine whether the Tribunal has properly done so; and, thirdly, since it endorses the fact that a Labour Tribunal should not be hidebound by the provisions of the Evidence Ordinance.

There are no significant policy, legal or case developments within the employment space during 2019 Q3.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

TAIWAN

23 JAN 2019

Amending the types of occupations defined under Article 36, Paragraph 4 of the Labor Standards Act

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-3-Zi-1080130098
Issue date: January 23, 2019

After negotiations between the Ministry of Labor and representatives from the relevant industries and sectors, while it is recognized that having passenger transport (i.e., tour bus) drivers work on national holidays, labor day and other holidays designated by the central competent authority according to the traffic mitigation plans made by the Ministry of Transportation and Communications represent a very important facet of public convenience, their personal health as well as road safety are both important concerns as well. As such, considering the public convenience as well as the health and welfare of the drivers, it is proposed to include those drivers under Article 36, Paragraph 4 of the Labor Standards Act for flexible adjustments of mandatory days off during any 7-day period on the "time specific" exceptional occasion. However, such day-off shifting and adjustments should comply with the following rules:

1. Driver may not be made to work for more than nine consecutive days.
2. Driver may not be made to remain on duty for more than 11 hours per day for more than three consecutive days.
3. Maximum driving time of 10 hours per day.
4. For every two continuous days on duty, there shall be a continuous 10-hour or more break period.

TAIWAN

31 JAN 2019

The Ministry of Labor's interpretation regarding the determination of "Negotiation Eligibility" requirements under Article 6 of the Collective Agreement Act and relevant laws and regulations in case of a union of dispatched workers requesting to engage in collective bargaining with the dispatch company according to the Collective Agreement Act.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Guan-2-Zi-1080125196
Issue date: January 31, 2019

In the event a collective bargaining request is made by a dispatch workers' union to a dispatch company by which the dispatched union member workers are employed where the negotiation proposal clearly states that it is applicable only to those dispatched union member workers "serving at the same employer that they were dispatched to", then as long as the number of member-workers exceed at least 1/2 of the total number of workers dispatched by the dispatch company to that same employer, then the union shall be considered a labourer-side party that is "qualified to engage in collective bargaining" under Article 6, Paragraph 3 of the Collective Agreement Act. However, the above does not apply if the dispatch business has dispatched less than 20 workers to the same employer.

Since the "same employer" shall be defined according to the parties in the dispatch contract, when the regional labor authorities are engaged in assisting the two sides in determining the qualification for collective bargaining, it should have the dispatch company provide the relevant dispatch service contract for use as a basis to determine the said qualifications.

TAIWAN
21 FEB
2019

The "justifiable reasons" proviso in Article 22 of the Act of Gender Equality in Employment shall be determined on a case-by-case basis. If a worker is personally raising two or more children of less than 3 years of age and is requesting unpaid child care leave from his/her employer, such circumstance shall be considered as a "justifiable reason" under the proviso in Article 22 of the Act of Gender Equality in Employment.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-4-Zi-1080130174
Issue date: February 21, 2019

Since it is provided as a proviso (i.e., an exceptional circumstance to the general rule) in Article 22 of the Act of Gender Equality in Employment that a worker may still request unpaid child care leave even if he or she has a spouse that is not in employment if there are justifiable reasons, the matter should be decided on a case-by-case basis.

In the current case, in consideration that it may be difficult for a single parent to take care of two or more children under the age of 3, as well as the general policy of encouraging parental involvement in child development, if the worker is requesting unpaid child care leave for taking care of two or more children under the age of 3 from his/her employer, it shall be deemed as a "justifiable reason" under the Article 22 proviso.

TAIWAN
4 MAR
2019

The Ministry of Labor's interpretation of how the Labor Standards Act and other relevant regulations apply for wage payments to workers under the Labor Standards Act Article 84-1 who work on the election/removal days for the president, vice-president, and all types of public officials as well as the referendum day.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-2-Zi-1080130118
Issue date: March 4, 2019

In general, for workers under the Labor Standards Act Article 84-1, on the election/ removal days for the president, vice president and all types of public officials as well as the referendum day ("election days" in general), Article 37 of the Labor Standards Act stipulates them as a leave day, and every worker who has the right to vote and is obliged to work on that day shall have paid leave (for 24 consecutive hours from 12 am to 12 pm); those that did not have to work on that day do not get an extra day of leave. Once an employer has obtained consent for the worker to work on election day, the employer shall provide wages commensurate with the hours worked pursuant to Article 39 of the Labor Standards Act, while also taking care to avoid interfering with the worker going to the polls to vote. The employer shall pay the worker at a rate double the regular rate for work performed during "regular hours" (i.e., the hours the worker would have worked) on the election day, as well as overtime pursuant to Article 24, Paragraph 1 of the Labor Standards Act stipulates that if the worker performs work outside such "regular hours". Lastly, since the right to vote may only be exercised on election day, election day is different in nature from all other national holidays or days off, and it is not possible to shift around that day off with other working days in the same way as other holidays of the year.

When the employer has obtained consent from the worker to work on an election day, it shall provide wages per the aforementioned rules; if the worker would like to take make-up leave after work on that day instead of receiving wages, it would be up to the employer and the worker to negotiate the terms of the make-up leave (such as the standards and time-limit of taking the leaves

TAIWAN
4 MAR
2019

as well as how to deal with the untaken hours of leaves) so as to protect the rights of both sides. As such, if an employer unilaterally restricts workers to only be able to choose make-up leave after working on election day, such work rule is not consistent with the Labor Standards Act.

TAIWAN
15 MAY
2019

Presidential Order to amend the Labor Standards Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800049091 Order promulgated on 15 May 2019 announced the amendments to Articles 2 and 9 as well as the new Article 22-1. All changes enter into effect on the day of promulgation.

Key points of the amended provisions:

1. Per the Judicial Yuan Interpretation No.740, the definition of a labor agreement in this Act shall be based on whether the labor providing party is in a "personal servitude" position from the freedom to decide the form of labor service to be provided, as well as whether that party is responsible for the business operation risks and thus "economically dependent". Hence, Paragraph 6 of Article 2 now clearly specifies that a labor agreement refers to an agreement stipulating an employer-employee relationship with master-servant characteristics. (Amending Article 2, Paragraph 6)
2. To provide more clarity to the character of long-term employer-employee relationships entered into between and maintained by dispatched workers and dispatcher entities in this country, as well as prevent the dispatcher entities from avoiding their relevant severance upon termination responsibilities in labor law by entering into fixed-term contracts with the dispatched worker based on the dispatch period, while also taking account of the stable employment of dispatched workers, it is specifically stipulated that the labor agreements entered into between dispatcher entities and dispatched workers shall be considered indefinite-term agreements (Amending Article 9, Paragraph 1)
3. To prevent back pay by dispatcher entities from seriously affecting the livelihood of workers, it is hereby stipulated that when a dispatched worker is owed wages and still fail to receive payment despite having requested the dispatcher entity to provide payment, the entity that the dispatched worker is dispatched to has the responsibility to provide such back pay. As to the duty to provide wages is ultimately the responsibility of the dispatcher entity, it is also stipulated that the dispatched entity may, after paying off the back pay to the worker, require the dispatcher entity to reimburse such amount. Further, to balance the obligation on the dispatched entity to provide back pay and preventing the dispatched entity from being harmed by such a responsibility, Paragraph 2 of this article shall stipulate that in the event of the circumstances in the first paragraph, the dispatched entity may offset such amount from any amount that is due but remains unpaid pursuant to the dispatch agreement. (New Article 22-1)

TAIWAN
15 MAY
2019

Presidential Order to amend the Labor Pension Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800049101 Order promulgated on 15 May 2019 announced the amendments to Articles 4, 7, 8-1, 14, 23, 26 to 29, 33, 34, 41 to 44, 50, 53 and 54, as well as the new Articles 45-1, 53-1, 54-1 and 56-1 to 56-3, while Article 47 is deleted. All changes enter into effect on the day of promulgation.

Key points of the amended provisions:

1. Expand the scope of applicable persons: Foreigners obtaining permanent residence are now included to provide for their post-retirement lives after permanently residing in Taiwan (amending Article 7, Paragraph 1, Subparagraph 4)

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LOOKING BACK

TAIWAN
15 MAY
2019

2. Expand the scope of availability for preferential tax treatment on pensions: Individuals running his/her own business, employers who engage in actual labor, and workers who were commissioned to perform may now enjoy preferential tax treatment for portions of income derived from their work that they voluntarily contribute to their pension accounts. (amending Article 14, Paragraph 3)
3. Opening a dedicated account for pension that is protected from seizure: To protect the worker's right to request a one-time payout of his/her pension, they are now afforded the same rights as workers receiving monthly pension payouts and may open up a dedicated pension savings account that is protected from being used as an offset, seized, provided as collateral to secure a debt or as a target for compulsory enforcement. (amending Article 29, Paragraph 2)
4. Extended duration for right by a worker's survivors or designated persons to claim the pension: The right of a worker's survivors or designated persons to claim pension from the pension account is increased from five years to ten years. (amending Article 28, Paragraph 4)
5. Strengthen protections for labor creditors:
   - Business entities who have been fined or ordered to make a late penalty for violations of the Act shall have their names, the names of their owners or principal entity, the name of the responsible person, the date of the sanctions, the provision violated and the sanctioned amounts publicly disclosed.(new Article 53-1)
   - If the business entity fails to pay the pension or late penalty, and its assets are insufficient to cover such payments, its responsible person or representative shall be liable for the payment. (new Article 54-1)
   - Pension and late payments have priority over ordinary debts. (new Article 56-1)
   - The debt release rules, such as the reorganization provisions under the Company Act, the settlement provisions in the Consumer Debt Cleanup Regulations, the bankruptcy provisions in the Bankruptcy Act, shall not apply to labor pensions. (new Article 56-2)
6. Increased penalties: The fine for failure to make the old system (Labor Standards Act-based) pension payments, the severance payments under both the old and the new systems shall be raised from under NT$250,000 to between NT$300,000 and NT$1,500,000. (new Article 45-1)
7. Coordination with Executive Yuan Reorganization: The supervision and administration of the labor pension fund is now handled by the Ministry of Labor, while the Bureau of Labor Funds under the Ministry of Labor is responsible for the investment/management of the fund. (amending Article 4 and Article 33, Paragraph 2)

TAIWAN
23 MAY
2019

Supervisory/administrative personnel whose monthly wages exceed NT$150,000 shall be considered workers defined under Article 84-1 of the Labor Standards Act.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-3-Zi-1080130514
Issue date: 23 May 2019

As the supervisory/administrative personnel who were hired by business units for handling management and administrative affairs at more than NT$150,000 in monthly wages have considerable discretion in their working hours, to ensure that they may negotiate with their employer flexibilities in their working hours and other items so as to keep a smoothly operating employer-employee relationship, those personnel shall be considered as workers defined under Article 84-1 of the Labor Standards Act.

TAIWAN
19 JUN
2019

Presidential Order to amend the Labor Standards Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800060011 Order promulgated on June 19, 2019 announced the amendments to Articles 63 and 78 as well as the new Articles 17-1 and 63-1. All changes enter into effect on the day of promulgation.

Key points:

1. To prevent the dispatch target entity and the dispatch business entity from essentially agreeing to do a "personnel shifting" service, the dispatch target entity could not interview or otherwise select the dispatch employee prior to entering into a dispatch agreement with the dispatch business entity; a violation of this rule will entitle the dispatch employee to require (within 90 days after the start of providing labor services to the dispatch target entity) the dispatch target entity to negotiate and prepare an employment agreement for execution, and the dispatch target entity is to respond within 10 days. To prevent the dispatch target entity from refusing to or fail to timely negotiate with the dispatch employee, an employment agreement will still be considered to have formed on the 11th day even if no consensus was reached, and the labor terms for this dispatch shall serve as the labor terms of the employment agreement. (Article 17-1, Paragraphs 2 and 3)
2. The dispatch business and dispatch target entity may not take retaliatory measures against the dispatch employee for making the above request, and any such measures will be deemed null and void in law (Article 17-1, Paragraphs 4 and 5)
3. To prevent a potential breach of the service term limit in the original employment agreement when the dispatch employee is departing from the dispatch business entity, Paragraph 6 of Article 17-1 protects the dispatch employee's rights upon a contract transfer.
4. To prevent a break in the accrued seniority from a contract transfer, the dispatch employee has a right to request the dispatch business entity to pay severance or pension.
5. For the rights of the dispatch employee to receive compensation for injuries received in an occupational hazard incident, the dispatch business entity and the dispatch target entity are to be jointly liable for such compensation; if another law has already required either entity to compensate the dispatch employee for the same incident, that entity may claim offset (compensation) from the other. If the incident may be attributed to both entities' violation of the relevant occupational safety regulations, both shall be held jointly liable. (Article 63-1)
6. To prevent the above "personnel shifting" practice and the potential discriminatory treatment in retaliation for the direct employment request from the dispatch employee, administrative penalties are set for the dispatch business entity or the dispatch target entity's violations of the provisions in Article 17-1 (Article 78)

TAIWAN
21 JUN
2019

Response regarding questions on the applicability of Article 17-1 of the LSA

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Guan-2-Zi-1080127025
Issue date: June 21, 2019

1. Since Article 17-1 does not contain any special retroactive application language, it is effective starting from the date it entered into effect.

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LOOKING BACK

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2. For the dispatch business entities and the dispatch target entities who were already engaging in the aforementioned "personnel shifting" practice, or dispatch target entities who have refused requests from dispatch employees to negotiate a direct employment agreement, although the ex post facto principle applies, if the dispatch employee wishes to seek a declaratory decision to confirm whether an actual employer-employee relationship with the dispatch target entity existed, the employee may request a court to do so through a civil action, and the court will decide the issue based on the facts. .

TAIWAN
26 JUL
2019

Legislative reasoning behind the prohibition on the dispatch target entity to select specific dispatch employees in advance per Article 17-1 of the LSA and examples of such conduct

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Guan-2-Zi-1080127136
Issue date: July 26, 2019

1. The legislative reasoning in Article 17-1, Paragraph 1 of the LSA prohibiting the dispatch target entity to select specific dispatch employees in advance is because of the "personnel shifting" service that dispatch business entities and dispatch target entities often engage in. Thus, the provision prohibits a dispatch target entity that already had a specific candidate in mind (whether through recruiting or interviewing) from transferring that individual to employment under a dispatch business entity, and then have him/her dispatched back to the dispatch target entity to perform work per the instructions of the dispatch target entity.
2. This also prevents a practice where the dispatch target entity goes to another dispatch business entity and requests that other entity to hire the dispatched employees as the dispatch agreement is expiring.

TAIWAN
19 AUG
2019

Announcement by the Ministry of Labor to increase the minimum wage, effective January 1, 2020

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-2-Zi-1080130910
Issue date: August 19, 2019

1. The hourly minimum wage is adjusted to be NT$158.
2. The monthly minimum wage is adjusted to be NT$23,800.

LOOKING BACK

THAILAND
5 APR
2019

Amendments to the Labour Protection Act

A new act was published in Thailand's Government Gazette on April 5, 2019, which will amend the current Labour Protection Act ("LPA"). The new act will become effective 30 days after publication—i.e. on May 5, 2019.

The key amendments to the LPA are as follows:

- The amount of statutory severance pay for an employee who has worked for at least 20 years has been increased to 400 days at the employee's last wage rate (from 300).
- Employers must grant pregnant employees 98 days' maternity leave, which includes leave taken for pre-natal exams before the delivery date, and holidays that fall during the maternity leave period. The employer must pay up to 45 days' wages during maternity leave.
- Employers must grant employees three days of "necessary business leave" with wages paid.
- If an employer relocates its current workplace to a new establishment, or to another of its existing work locations, the employer must post a conspicuous announcement at the current work place for a continuous period of at least 30 days in advance of the relocation. The announcement must include the details of the new workplace and the timing of the relocation.
- Where a change in employer results in any employees being transferred, those employees must consent to that transfer before it can take effect.
- Employers are required to pay 15 percent interest on money that they owe to employees for:
  - payment of wages in lieu of advance notice;
  - wages, overtime payments, payment for working on holidays, and payments for working overtime on holidays;
  - wages during temporary cessation of the employer's operations; or
  - severance pay and special severance pay.
- Where an employer terminates an indefinite term employment contract without notifying the employee at least one payment cycle in advance, the employer must pay wages in lieu of advance notice to the employee on the termination date.
- Employers must pay wages, overtime payments, payments for working on holidays, and payments for working overtime on holidays, at the same rate for both male and female employees who undertake work of the same type, quality, and quantity.
- Several penalties for employers that fail to comply with the provisions in the LPA have also been amended.

THAILAND
27 MAY
2019

Personal Data Protection Act (2019) ("PDPA")

The PDPA was published in the Government Gazette on 27 May 2019, though most of its operative provisions will not be effective for some months, yet. Employers should watch for forthcoming guidance as regulations are issued.

There are no significant policy, legal or case developments within the employment space during 2019 Q3.

LOOKING BACK

VIETNAM

16 NOV 2018

Decree No. 157/2018/ND-CP

The Decree provided for region-based minimum wage (ranging from VND 3.98 million (US$172) to VND 4.18 million (US$180)) applied for contracted employees as prescribed by the Labor Code 2012 in four different regions in Vietnam. Such rates are the lowest rates used as the basis for any salary arrangement between employers and employees who perform simplest tasks. Any trained employees must be paid at least 7% higher than the above regional minimum wage rates.

This Decree takes effect as from 1 January 2019 and its regulations take effect as from 1 January 2019.

There are no significant policy, legal or case developments within the employment space during 2019 Q3.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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