

# Redundancy in Hong Kong – An employee’s guide to the legal and practical considerations

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In this article, we will consider an employee’s rights in the event that they are told that their role is being made redundant. We will also examine the consequences of receiving notice of redundancy, offers of alternative employment and/or separation agreements, as well as claims an employee may commence against their employer as a result of their cessation of employment.

## **Rights and duties of an employee**

The employee broadly retains the same statutory rights and entitlements during their notice period. This means that even though an employee has been told their role will be made redundant, employees still have the right to demand that their wages be paid on time, and that statutory holiday, sick leave and paternity leave be taken in the usual way. In addition, during the notice period, employees remain entitled to protection from discriminatory treatment from their employer.

However, certain contractual entitlements, such as the right to a discretionary bonus, are usually extinguished on receipt of notice of termination. The exception to this is where redundancy was not the true reason for termination but instead the employee was selected for redundancy to avoid the employee being eligible for a contractual entitlement/payment. For this reason, employees should seek independent legal advice to understand their contractual rights and entitlements on being notified of their redundancy.

## **Statutory severance pay and re-engagement**

An employee will generally be entitled to a statutory severance payment from their employer, provided that the employee has been employed under a continuous contract for a minimum period of two years and has not resigned or been summarily dismissed prior to termination.

Statutory severance pay is the statutory minimum payment that must be made to an employee and is calculated as two-thirds of the employee's monthly wage or two-thirds of HK\$22,500, whichever is less, for each year of service. The statutory severance payment is subject to a cap of HK\$390,000.

Where the employer offers to renew the employment contract or re-engage the employee under a new contract and the employee unreasonably refuses this offer, the employee will not be eligible for statutory severance payment. What amounts to an "unreasonable" refusal of an offer will be considered on a case by case basis – in particular, Courts will take into account whether the offer of employment was suitable in relation to the employee and whether the offer was on no less favourable terms.

### Separation agreements

Often on termination, employers and employees will try to agree the terms of departure in a separation agreement. Typically, an employee will receive an enhanced termination payment and, in exchange, they will release and waive any potential claims they have against the employer.

Unlike other jurisdictions, employers and employees have free rein to agree the terms of a separation agreement. Usually, the separation agreement would contain a mixture of financial and non-financial terms including:

- **Terminal payments:** This includes all payments (both statutory and contractual) due to the employee on termination including salary, commission, sick leave pay, as well as any accrued but untaken annual leave entitlement.
- **Ex-gratia payments:** This is usually structured as compensatory payment for loss of employment, without recognising any legal liability. An ex-gratia payment is more generous than the employee's statutory and contractual entitlements and is intended to provide financial assistance to the employee and mitigate against the loss caused by the cessation of employment.
- **Confidentiality:** Most separation agreements will include a confidentiality obligation which restricts the employee from disclosing the terms and/or the existence of the separation agreement.
- **Post-termination restrictions:** These restrictions seek to prevent an employee from working for a competitor or from soliciting the employer's customers, clients or employees for a prescribed period of time after the cessation of their employment. However, it should be noted that these restrictions are only enforceable if they don't go further than is reasonably necessary to protect the legitimate interests of the employer.

- **Non-derogatory obligation:** For reputational purposes, it is common for employers and/or the employee to agree to an undertaking not to make any negative or disparaging comments about the other party.
- **Reference:** Often employers and employees may agree the terms of a reference to third parties. Unless agreed, employers have no legal obligation to provide a reference, but where one is provided, it must be accurate. The best way of discharging this obligation is to agree the terms of the reference.

Once a separation agreement has been signed, the employee has generally waived their rights to bring proceedings against the employer. It is therefore important that, prior to doing so, employees seek independent legal advice on their rights and entitlements.

### Potential claims

Depending on the circumstances of the termination, typical claims commenced by an employee against an employer may include one or more of the following:

#### Discrimination

This is where an employee has been selected for redundancy due to a protected characteristic. In Hong Kong, protected characteristics include gender, pregnancy, family status, disability and race.

For instance, if an employee was selected for redundancy because the employee was partially blind, then the person selecting the employee for redundancy (as well as the employer) may be liable to a disability discrimination claim.

Where an employee has succeeded in a discrimination claim, the Court will award it damages including damages for injury to feelings, loss of past and future earnings and benefits, and punitive damages.

#### Unreasonable dismissal

This is where the reason given for the termination (i.e. redundancy) was not in fact the true reason for the dismissal and there was no "valid reason" as defined in the Employment Ordinance (i.e. conduct, capability or qualification, illegality or other substantial reason) for the employee's termination.

In order to bring a claim for unreasonable termination, the employee must have been employed by the employer for over 24 months under a continuous contract.

Where an employee succeeds in a claim for unreasonable dismissal, a Tribunal or Court may make an Order for

reinstatement or re-engagement and/or award of terminal payments (capped at HK\$150,000).

### Unlawful termination

The Employment Ordinance sets out a number of situations where it would be unlawful to terminate an employee on the grounds of redundancy. These include when an employee:

- has suffered a work-related injury entitling them to compensation under the Employees’ Compensation Ordinance (Cap.282) (unless consent of the Commissioner for Labour has been obtained);
- is undertaking jury service;
- is absent from work on sick leave and is in receipt of sickness allowance, other than where summary dismissal is justified; and
- is taking accrued statutory annual leave; or has given notice of her pregnancy to the employer, where the employee is on a continuous contract of employment and has completed the first 12 weeks of her probationary period.

As with unreasonable termination, an employee who has been unlawfully terminated may seek remedies including reinstatement or re-engagement, or an award of terminal payments. In addition, the employer (as well as its officers) may be liable to criminal prosecution for acting in contravention of the Employment Ordinance.

### Conclusion

The rights of an employer to make an employee redundant is not unfettered and an employee may challenge the legality of the redundancy decision. Where an employee is unclear of their rights and obligations, or requires assistance with the negotiation of a separation agreement, they should seek independent legal advice. Stay tuned for our next and final article in this series where we will discuss the termination payments which are due to employees on redundancy.

Please do not hesitate to contact our Partner and Head of the Employment Practice in Hong Kong, Andrea Randall ([andrea.randall@rpc.com.hk](mailto:andrea.randall@rpc.com.hk) / +852 2216 7208), for any employment law related queries you may have.

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