LABOUR LAW

勞工法例研討會
最新法庭案例分享 INTAKE 2

Course code: HRLA-S002

TRAINING CONSULTANT: LAWRENCE LI

HR COMMUNITY

勞工法例案例研討會 – 最新法庭案例分享 Intake 2

By

MP HR Community

Trainer: Mr. Lawrence Li

/HRLA-S0022009

目錄

1 疫情中，僱主面對生意大跌但還要承擔僱員薪酬開支。疫情過後，考慮將部分工種外判給自顧人士，可以減少將來疫情再次來臨的負擔。最新的自顧人士與僱員的定義案例 Engagement vs Employment：如在聘用文書部分用詞、報稅表及強積金供款的模式都存在僱傭關係的表徵，法庭可以否定服務提供者是僱員嗎？ 3

1.1 Are Uber Drivers Employee? 3

1.2 What are the statutory minimum entitlements of an employee according to Employment Ordinance (Cap. 57)? 3

1.3 盧平與關智遠，髮剪局之合夥人 & 2 ORS, HCLA 43/2015 4

1.4 高等法院案例：CHAN YEE LING ELAINE v. M/s CHRISTINE M. KOO & IP, SOLICITORS 顧張文菊、葉成慶律師事務所 & NOTARIES, HCLA 6/2018 [2018] HKCFI 2670；Reported in：[2019] 1 HKLRD 344 6

1.5 什麼是 418 僱員？公司可以怎樣善用僱傭條例的 418 定義安排裁員？ 13

1.5.1 Minimum Statutory Entitlements 13

1.5.2 EO：First Schedule Continuous Employment 14

1.5.3 Categories of Service Providers 15

2 從勞資審裁處上訴需要注意什麼？另外；在勞資審裁處敗訴方需要支付勝訴方訟費嗎？ 17

2.1.1 Trial of Labour Disputes in Hong Kong 17

2.1.2 Costs of Litigation in HK 17

2.1.3 Litigation time in HK 17

3 高等法院代通知金訴訟案例：如新僱員在僱傭合約生效日期前通知僱主不上班 18

3.1 Statutory Requirements on Notice and PILON 18

3.2 LAW TING PONG SECONDARY SCHOOL(Respondent) v. CHEN WAI WAH (Appellant), HCLA 22/2018 , [2019] HKCFI 2236 20

4 獎金補充協議(Addendum)的最新案例：在僱傭合約已經生效，僱主與僱員再簽訂獎金補充協議(Addendum)是否有效？ 26

4.1 Elements of contract 26

4.2 胡潔敏 (WU KIT MAN) Claimant v 龍威集團控股有限公司 Respondent (DRAGONWAY GROUP HOLDINGS LIMITED), CACV 170/2017 [2018] HKCA 107 27

1. 疫情中，僱主面對生意大跌但還要承擔僱員薪酬開支。疫情過後，考慮將部分工種外判給自顧人士，可以減少將來疫情再次來臨的負擔。最新的自顧人士與僱員的定義案例 Engagement vs Employment：如在聘用文書部分用詞、報稅表及強積金供款的模式都存在僱傭關係的表徵，法庭可以否定服務提供者是僱員嗎？

1.1 Are Uber Drivers Employee?

- Uber loses right to classify UK drivers as self-employed
- Landmark employment tribunal ruling states firm must also pay drivers national living wage and holiday pay with huge implications for gig economy
- Fri 28 Oct 2016
- Uber's more than 40,000 UK drivers could be affected by the ruling
- Uber drivers are not self-employed and should be paid the "national living wage", a UK employment court has ruled in a landmark case which could affect tens of thousands of workers in the gig economy

1.2 What are the statutory minimum entitlements of an employee according to Employment Ordinance (Cap. 57)?

1.3 盧平 與 關智遠，髮剪局之合夥人 & 2 ORS, HCLA 43/2015

(原本案件編號 ： 勞資審裁處申索 2015 年第 1934 號)

聆訊日期： 2016 年 1 月 7 日
判決書日期：2016 年 3 月 24 日

HEADNOTE：

(1) 在服務行業中，由於節省管理成本，店東與一些人士簽訂分成協定的做法相當普遍，特別是提供一些比較私人一對一的服務，例如，美容師、理髮師、私人健身教練等。這些人士如果與店東簽訂了獲取分成的自僱人士協議，日後可否向店東以僱員身份索償僱傭條例賦予一般僱員的法定權益？

(2) 法庭會以什麼準則判定一些自僱人士協議無效？

Full Judgment：
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=103405&QS=%2B&TP=JU

Case Brief：

三名被告就是髮剪局的合夥人，勞資審裁處於 2015 年 11 月 3 日作出的裁決，裁定申索人盧先生是髮剪局的僱員,並且接納他有關代通知金、有薪年假、有薪假期及疾病津貼的申索，總數為$25,525.08。三名被告就勞資審裁處的裁決,現向高等法院提出上訴申請。

三名被告堅持盧先生是自僱人士，上訴理由有以下八點：

(1) 審判官錯誤地裁定申索人是僱員而並非自僱髮型助理；
(2) 審判官沒有或沒有適當考慮於 2013 年 10 月 20 日由雙方簽訂的書面協議 (「該書面協議」) 並非僱傭合約，而雙方明知該書面協議是自僱性質；
(3) 審判官沒有或沒有適當考慮被告人對申索人的控制程度；
(4) 審判官沒有考慮雙方的合約關係模糊，因而沒有裁定雙方該書面協議所宣稱的理解或意圖決定雙方關係得關鍵因素；
(5) 審判官沒有或沒有適當考慮被告人曾給予申索人以僱傭或自僱形式合作；
(6) 審判官沒有或沒有適當考慮雙方對合作形式的個人看法；
(7) 審判官沒有或沒有適當考慮到髮型行業的固有性質；和
(8) 審判官沒有或沒有適當考慮被告人要求傳召證人的要求。

被告公司強調申索人在一份日期為 2013 年 10 月 20 日書面協議(「該協議」)中，自僱人士身份已被確立。該協議的內容如下：

“ 本人盧平，身份證 XXXXXXX(X)，自 2013 年 10 月 20 日起在油塘鯉魚門廣場 132 號髮剪局任職髮型助理。本人與該公司的抽攏方式支薪，以自僱形式與該公司合作。特此聲明（強積金及保險均屬本人責任） "

高等法院認為勞資審裁處裁定申索人是髮剪局的僱員是有證供基礎的，並指出法庭必須著重事實的實質主體，而不可信靠其表面的形式。如果客觀環境顯示僱主僱員關係確實存在,當事人之間定立的協議也不能推翻這關係。

高等法院認為勞資審裁處是有考慮過該協議的。 根據申索人的證供，儘管他留意到該協議上他被稱作自僱人士，他因為懼怕被解僱，只好簽署該協議 。明顯地,審裁官接納了他的解釋。高等法院認為沒有任何可以詬病的地方。

高等法院也同意審裁官對證供的裁斷：

(1) 申索人在替顧客剪髮時是用髮剪局的工具，被告也同意盧先生為客人洗頭或電髮時，用的全是髮剪局的物料。
(2) 申索人的打卡記錄，每一天都是準時在 10 時前上班,離開時都在晚上 9 時以後。
(3) 申索人要做手術而不能上班，也必先通知被告人。
(4) 申索人在髮剪局工作時，沒有任何權力聘請幫工。
(5) 申索人沒有投資，管理或經營的成本，亦沒有財政風險，也不需花費購買任何工具及物料。

認為以上因素在本案中都是較為重要的因素，有力地指向一個僱傭關係的存在。

高等法院也認為審裁官並沒有忽視到該協議的內容，及被告並沒有為盧先生安排強制性公積金。審裁官亦明白剪髮局以非僱主身份為先生報稅，審裁官認為這一點是可以理解的，因為剪髮局一向一廂情願地認為盧先生是自僱人士。

高等法院最終認為審裁官裁定申索人是髮剪局的僱員是有充分的理由，駁回被告的申請。

訴訟代表：
被告人（上訴人）： 無律師代表 親自應訊

1.4 高等法院案例：CHAN YEE LING ELAINE v. M/s CHRISTINE M. KOO & IP, SOLICITORS 顧張文菊、葉成慶律師事務所 & NOTARIES, HCLA 6/2018 [2018] HKCFI 2670；Reported in：[2019] 1 HKLRD 344.

本案例是專業人士如律師受聘於（engaged）律師事務所，他們是僱員還是自僱人士呢？

- This is the AP's application pursuant to section 32 of the Labour Tribunal Ordinance (Cap 25) for leave to appeal against the decision ("the Decision") of the PO ("the PO") dismissing the AP's claim against the D for various payments which the AP claimed the D had failed to pay upon the termination of her working relationship with the D
- The AP is a solicitor. The D is a firm of solicitors. Between 17 January 2011 and 30 July 2011, the AP was engaged by the D as a solicitor. I used the word **"engaged"** neutrally. The **exact nature of that engagement is the central issue** in this application before me
- On 7 September 2011, the AP filed a claim against the D before the Labour Tribunal for inter alia
  (i) outstanding commissions
  (ii) payment in lieu of notice and
  (iii) payment in lieu of annual leave
- The trial took place on 27 and 28 February 2018. The AP gave evidence. For the D, Ms Christine Koo and Mr Albert Tang were called as witnesses. They were both partners of the D.
- ...the PO dismissed the AP's claim and ordered her to **pay costs in the sum of HK$61,778**.
- The PO handed down her Reasons on 2 March 2018. It is a detailed document, comprising 24 pages with 76 paragraphs. Its structure and effects may be summarized as follows:
  - At §2 to §5, ...background of the claim. ...at §3 that it was the D's case that the AP was not engaged as an employee but was engaged to provide service in her capacity as self-employed person.
  - At §5, ..two issues involved, namely (1) whether the D was the AP's employer, and (2) if so, whether the D was liable to the AP for any payment
  - ..at §11, she stated her view on the AP's credibility as a witness. She stated that.

「綜觀陳小姐整體的作供表現，她都有信口開河、誇張失實、選擇性作供自相矛盾的情況。陳小姐每當作供時被發現出現前言不對後語的情況，都會以她誤解或他人誤解作為掩飾。例子如下.....10 examples.

- At §12, ..found the evidence of Ms Koo and Mr Tang comparatively more believable and reliable...
- The PO ..concentrated upon the issue as to whether the D was the AP's employer...At §37, she in particular cited **Poon Chau Nam v Yim Siu Cheung trading as Yat Cheung Air Conditioning & Electric Co [2007] 1 HKLRD 951**...set out the 8 criteria on the existence or otherwise of an employer/employee relationship, namely:

  (1) the degree of control exercised by the employer;

  (2) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

  (3) whether the worker was properly regarded as part of the employer's organisation;

  (4) whether the worker was carrying on business on his own account or carrying on the business of the employer;

  (5) the provision of equipment;

  (6) the incidence of tax and national insurance;

  (7) the parties' own view of their relationship; and,

  (8) the traditional structure of the trade or profession concerned and the arrangements within it.
- Having analyzed the evidence and considered the law, the PO concluded at §71 that:

「本席認為文 件上, 例如委任信的**部份用詞**、**報稅表**及**強積金供款**的模式都**是雙方存在僱傭關係的表徵**, 但是當細膩查證雙方的行為及表現時, 本席認為席前有充分的證據顯示陳小姐是以自僱人士或正確來說是 **contract for service** 的方式替律師事務所工作。」

- On 9 March 2018, the AP applied to review that Decision. That application was refused on 17 May 2018...
- On 26 March 2018, the AP filed her Form 14 for **leave to appeal on point of law**. ...amended on 14 June 2018. The main grounds may be summarized as follows:

  (a) the PO erred in holding that the AP was engaged at the material times by the D as an independent contractor rather than an employee;

  (b) the PO had "committed" certain "breaches of her statutory duty to investigate and/or conduct adequate inquiry into the practice and rules governing the solicitors' profession";

  (c) the PO erred in law in holding that the P bore her own financial risk because, inter alia, she chose to accept or turn down new cases and negotiated her own rates; and

  (d) the PO's finding that the AP was an independent contractor was, for those and other reasons, irrational perverse and/or one which no reasonable tribunal would have reached.

- The AP was represented by Mr Chiu. He identified the sole issue in the proceedings below and in this appeal as being this, namely whether the AP was an employee or an independent contractor providing services during the material period. He submitted that:

  " ... it is at least arguable that the [PO] erred in arriving at the determination that P was not D's employee but an independent contractor...arrived at this determination without regard to relevant factors and/or without evidence, and/or that the [PO] failed to discharge the statutory duty to investigate and such failure has given rise to injustice, in that a fair and proper determination of P's claim cannot be attained." (§4)

  ...the focus of ...was on those grounds relating to the traditional structure of the solicitors' profession, and on what he submitted to be:

  " ..the confirmation by the Law Society of Hong Kong ('Law Society') of P's stance in these proceedings ...

  He concluded on this focal point of his submissions at §34 that:

  " ...the structure of the solicitors' profession does not permit arrangements involving independent contractors working as solicitors in law firms..."

- ...I raised with Mr Chiu, by way of illustration, the Solicitors (Group Practice) Rules, Cap 159X. Rule 2(2) and (3) thereof provide that:

  " (2) In these Rules, reference to a solicitor who practises within a group practice is a reference to a solicitor who practises—

  (a) as a member of a group practice;

  (b) as a principal of a member firm of a group practice; or

  (c) as an employee of or consultant to a member of a group practice.

  (3) For the purposes of these Rules, a solicitor is a consultant to another solicitor or to a firm if he agrees to undertake for remuneration work that forms part of the practice of the other solicitor or of the firm, other than in the capacity of—

  (a) an employee of the other solicitor or of the firm; or

  (b) a solicitor practising on his own account or in partnership."

  ...clearly contemplate the existence of a class of solicitors who "undertake for remuneration work that forms part of the practice of the other solicitor or of the firm, other than in the capacity of an employee of the other solicitor or of the firm". Mr Chiu's submission that the structure of the solicitors' profession does not permit arrangements involving independent contractors working as solicitors in law firms is clearly inconsistent with that. ... adjourned the hearing to 11 July 2018 and allowed Mr Chiu liberty to carry out further research and file further submissions on that topic

- ...Mr Chiu filed a supplemental set of submissions. Having made reference to the Solicitors (Group Practice) Rules, Mr Chui made the following concession at §3, that:

  " With the guidance of the Court, P accepts that there exists a category of consultants in the appropriate context (such as in group practices) where these solicitors are neither a solicitor practising on his own account or in partnership, or as an employee of the other solicitor or of the firm."

  He then drew to my attention two further matters:

  (a) Wong Sui Kwan v Cheong Pui Fan DCCJ 4987/2004 (unreported, 27 October 2006):

  ...P was the founder and later a consultant of a firm of solicitors...status in, and relationship with, that firm were in issue...at §15 of his Judgment that:

  " Senior Counsel Mr. Ambrose Ho for the P submitted that in Hong Kong quite a number of law firms have consultants. Many of them are neither employees nor partners. According to Mr. Ho S.C., the practice of consultants attaching themselves to certain law firms to carry out their businesses, serve their own clients using those firms' resources and split the income is indeed very commonplace in Hong Kong. Both the law firms and the consultants can be mutually benefited from such arrangements. Many consultants are consultants to more than one firm. A list comprising names of over 60 of such consultants/partners having the so-called 'multiple roles' is also exhibited. Since the distinguishing features of a fiduciary are the obligations of loyalty and fidelity, if consultants are held to owe fiduciary duties to the law firm and are restrained from taking away their clients or their clients' business from those firms, there will be very serious adverse repercussions in the whole market places."

  ...accepted by the learned **Deputy District Judge, as he observed at §195 of his Judgment that the P was neither a partner nor an employee of the D.**

  ...the case subsequently came before the Courtof Appeal (CACV 145/2007). BUT, The matters set out above did not form the subject matter of any appeal.

  ...The Professional Conduct of Lawyers in Hong Kong by Wilkinson & Sandor, the learned authors at paragraphs 1655 – 1680 state that:

  " Many consultants are employed by Hong Kong firms of solicitors. They may be partners or employees of the firm, although many are neither partners nor employees. They are often employed to bring in clients to the law firm in return for receiving a commission on the work brought in. It is common for consultants to serve more than one law firm."

- Notwithstanding the above, it remained Mr Chiu's submissions on behalf of the P that the fundamental error of the PO was that she failed to discharge her statutory duty to investigate

into, failed to take into account and accordingly wholly disregarded, the professional codes of conduct and statutes governing solicitors' practice

- At the end of that hearing, I reserved my ruling
- On 23 July 2018, the AP, through her solicitors, wrote a letter to my clerk...for my consideration two emails exchanged between her and Mr Wilkinson...after the last hearing on 11 July 2018 before me. ..AP postulated certain scenarios for Mr Wilkinson and sought his view on the same. **She elicited a one-line answer from him.** :

  " Whilst our client accepts there is a judicial decision (albeit in the District Court) which seems to suggest that there is a category of consultants who might work as non-employees of a firm, the email correspondence suggests equally that the position is not clear cut."
- **I will not receive such additional evidence**...s.35 of Cap 25..on an appeal ..the Court of First Instance has no power to receive further evidence.
- ..principles were summarized by B Chu J at paragraph 16 of her Judgment in Mak Wai Man v Richfield Realty Limited HCLA 28/2015 (unreported, 30 October 2015), that:

  " (1) Under s.32 of the LTO, a party may only apply for leave to appeal on the ground that the award of the Tribunal is erroneous on point of law or outside its jurisdiction;

  (2) The threshold onus of an application for leave is to show that the intended appeal has arguable grounds;

  (3) Apart from errors of law, leave will also be granted if the Tribunal's determination (a) was made without regard to relevant factors, (b) was made without evidence, or (c) there was failure to discharge the statutory duty to investigate and such failure has given rise to injustice, in that a fair and proper determination of the claim cannot be attained."
- On the ground of "failure to discharge the statutory duty to investigate"..Au J has observed in Wai Mei Lai Stella v Viya Pramita HCLA 3/2010 (unreported, 28 June 2011) at §16:

  " ... it is trite that not every failure to investigate a relevant matter will give rise to an appeal. The appellate court has to be satisfied that the subject matter of the complaint must not only be relevant but be of such a nature that the lack of investigation will give rise to injustice, in that, a fair and proper determination of the claim cannot be attained".
- PO correctly cited and considered the law relevant to the determination of an employment relationship at §§32 – 39. At §37 she in particular cited and relied on Poon Chau Nam. She correctly set out the 8 criteria relevant to the determination as to whether an employment relationship exists.
- In Poon Chau Nam, Ribeiro PJ observed at paragraph 18 that:

  " The modern approach to the question whether one person is another's employee is therefore to examine all the features of their relationship against the background of the

indicia developed in the abovementioned case-law with a view to deciding whether, **as a matter of overall impression**, the relationship is one of employment, bearing in mind the purpose for which the question is asked. It involves a nuanced and not a mechanical approach ....”

His Lordship further observed at paragraph 22 that:

“ It is ‘firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court.’”

- After the PO had considered the law, the determination of the case became primarily a matter of consideration and evaluation by her of the facts as guided by the applicable legal principles. It was a question of fact. She concluded at §71 of the Reasons that:

  「.....但是當細膩查證雙方的行為及表現時，本席認為席前有充分的證據顯示陳小姐是以自僱人士或正確來說是 contract for service 的方式替律師事務所工作。」

- When submissions were first made...the main plank of the AP’s case for leave as put by Mr Chiu on her behalf was that the structure of the solicitors’ profession does not permit arrangements involving independent contractors working as solicitors in law firms. ...However, in the light of the Solicitors (Group Practice) Rules and the authorities which Mr Chiu has subsequently found and helpfully placed before me, that plank is in my view not arguable. Mr Chiu himself no longer seeks to argue that.

- Mr Chiu then submitted that the PO had failed to discharge her statutory duty to investigate into, failed to take into account and accordingly wholly disregarded, the professional codes of conduct and statutes governing solicitors’ practice. I do not accept that. **The PO had considered the correspondence between the AP and the Law Society, which the AP placed before her.** She made her finding at §11(3), that all the Law Society did was to refer the AP to the relevant principles of the Hong Kong Solicitors’ Guide to Professional Conduct. She found that the AP was unable to place before her any evidence, for example Law Society Circular, to support the AP’s case (§52). She further accepted Ms Koo’s evidence to the contrary effect, that:

  「顧女士則指出事務律師的行業一直有不少律師是以自僱人士身份參與律師的工作，而大家都是以拆賬的方式獲得收入。本席相信及接納顧女士的解釋，現今的事務律師行存在一批自顧人士執業。」 (§53)

In my view, the PO has sufficiently discharged her duty in that regard.

- Mr Chiu further argued that on the question of financial risk, the PO has applied the wrong test. The PO only considered that aspect of the case briefly in one paragraph at §50. She has not elaborated on her detailed consideration. It is not apparent on the face of her Reasons that she has misdirected herself on law.
- ...what are left with the Grounds are a barrage of what are in my view challenges of a factual nature disguised as alleged failure on the PO's part to carry out her duty to investigate....matters like
  - the commission-based arrangement between the AP and the D,
  - the D's explanation on the way certain Employer's Returns were filed with the IRD,
  - the AP's attitude to superiors, her choice to turn down new cases, her ability to negotiate her fees, etc. Those were factual matters which the PO considered in the context of the criteria which she had identified. ..it is arguable that the AP has suffered any injustice, or that a fair and proper determination of the claim has not been attained. I am not satisfied that any of the other Grounds are arguable. ...reject the Ground that the Decision was irrational or perverse.
- For the reasons set out above, I refuse to grant leave to the AP to appeal against the Decision and dismiss her application for the same.

1.5 什麼是 418 僱員？公司可以怎樣善用僱傭條例的 418 定義安排裁員？

1.5.1 Minimum Statutory Entitlements

a) Part IIA End of Year Payment

11B. Application of Part IIA

(1) ...this Part shall apply to an employee employed under a continuous contract if an end of year payment is payable by the employer to that employee by virtue of a term or condition (whether written or oral, express or implied) of the contract of employment.

b) Part III Maternity Protection

12. Maternity leave

(1) A female employee employed under a continuous contract immediately before taking any leave under this Part ...

c) Part IIIA Paternity Leave

15E. Entitlement to paternity leave

(b) he has been employed under a continuous contract immediately before taking leave; and

d) Part IV Rest Days

17. Grant of rest days

(1) Subject to the provisions of this Part, every employee who has been employed by the same employer under a continuous contract shall be granted not less than 1 rest day in every period of 7 days.

e) Part VA Severance Payments

31B. General provisions as to right to severance payment

(1) Where an employee who has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date

f) Part VB Long Service Payments

31R. General provisions as to employee's right to long service payment

(1) Where an employee who has been employed under a continuous contract—

(a) for not less than 5 years of service at the relevant date

g) Part VIA Employment Protection

32A. Employee's entitlement to employment protection

(1) An employee may be granted remedies against his employer under this Part—

(a) where he has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date and he is dismissed by the employer ...

h) Part VII Sickness Allowance

33. Sickness allowance

(1) An employee who has been employed by his employer under a continuous contract for a period of 1 month or more immediately preceding a sickness day shall be paid by his employer sickness allowance in accordance with this section and section 35.

i) Part VIII Holidays with Pay

s.40 Payment of holiday pay

...an employee who has been employed by his employer under a continuous contract for a period of 3 months immediately preceding a statutory holiday shall....

j) Part VIIIA Annual Leave with Pay

s.41AA. Annual leave (1) Subject to this Part, every employee who has been in employment under a continuous contract for not less than 12 months shall, in respect of each leave year, be entitled to paid leave (in this Part referred to as annual leave) calculated in accordance with subsection (2).

1.5.2 EO: First Schedule Continuous Employment

2. Subject to the following provisions, where at any time an employee has been employed under a contract of employment during the period of 4 or more weeks next preceding such time he shall be deemed to have been in continuous employment during that period.

3. (1) For the purposes of paragraph 2, no week shall count unless the employee has worked for 18 hours or more in that week, and in determining whether he has worked in any hour the provisions of sub-paragraph (2) shall apply.

1.5.3 Categories of Service Providers

CAT 1: SELF EMPLOYED SERVICE PROVIDERS

EO – Salary Protection (s.63C) (s.63B)

EO – Holidays Pay

EO – Year of Service (Part VA & Part VB

EO – Protection on discrimination against Union Membership and Activities (s.21B & s.21C)

EO – Employment Protection (Part VIA, s.32A….)

ECO

MPFO

CAT 2: NON-418 EMPLOYEES

EO – Salary Protection (s.63C) (s.63B)

EO – Holidays Pay

EO – Year of Service (Part VA & Part VB

EO – Protection on discrimination against Union Membership and Activities (s.21B & s.21C)

EO – Employment Protection (Part VIA, s.32A….)

ECO

MPFO

CAT 3: 418 EMPLOYEES WITHOUT YEAR OF SERVICE

EO – Salary Protection (s.63C) (s.63B)

EO – Holidays Pay

EO – Year of Service (Part VA & Part VB

EO – Protection on discrimination against Union Membership and Activities (s.21B & s.21C)

EO – Employment Protection (Part VIA, s.32A….)

ECO

MPFO

WONG MAN SUM P(Respondent) v WONDERLAND SEA FOOD RESTAURANT O/B LONG YIELD CO. LTD D (Appellant), CACV 241/2005

(ON APPEAL FROM HCLA NO. 133 OF 2002)

- The respondent was employed on an employment contract dated 20 March 1999 for the term of about 18 months, commencing on 1 April 1999 and ending on 15 October 2000 ("the 1st Contract"). Clause 2 of the 1st Contract stipulated that:

  " As from the second month, the Contract shall be deemed to be an 18-month Contract. " (第二個月起本合約將被視為 18 個月合約。) (page 106).

- The respondent also signed a " declaration of resignation " (「離職聲明書」) on 5 October 2000, resigning his employment on 15 October 2000.

- The respondent was re-employed by another employment contract dated 1 November 2000 ("the 2nd Contract"). Clause 2 of the 2nd Contract is the same as that of the 1st Contract. (page 108)
- The respondent was summarily dismissed on 8 September 2001.
- Labour Tribunal: awarded $12,565.80 as severance payment.
- The decision was affirmed by Yam J.
- CA allowed the appeal

CAT 4: 418 EMPLOYEES

EO – Salary Protection (s.63C) (s.63B)

EO – Holidays Pay

EO – Year of Service (Part VA & Part VB

EO – Protection on discrimination against Union Membership and Activities (s.21B & s.21C)

EO – Employment Protection (Part VIA, s.32A....)

ECO

MPFO

2. 從勞資審裁處上訴需要注意什麼？另外；在勞資審裁處敗訴方需要支付勝訴方訟費嗎？

Trial Court & Appellate Court

Trial of Facts vs Trial of Law

Could we deduct late charges from staff ?

2.1.1 Trial of Labour Disputes in Hong Kong

2.1.2 Costs of Litigation in HK

http://orientaldaily.on.cc/cnt/news/20170520/00176_030.html

2.1.3 Litigation time in HK

http://orientaldaily.on.cc/cnt/news/20170520/00176_042.html

Please draw:

3. 高等法院代通知金訴訟案例：如新僱員在僱傭合約生效日期前通知僱主不上班

例如，Offer of Appointment 是 7 月簽訂，訂明僱傭合約生效日期為 9 月，僱員在 8 月通知僱主不上班，僱員需要付代通知金嗎？僱主追討僱員代通知金需要注意什麼？僱員可否以僱傭合約上的代通知金為懲罰性條款而非“ 算定損害賠償 " (liquidate damage)為由，向法庭申請該代通知金條款無效？

3.1 Statutory Requirements on Notice and PILON

s.6, EO 以通知終止合約的情況

(1) 除第(2)、(2A)、(2B)、(3)及(3A)款、第 15 及 33 條另有規定外，僱傭合約的任何一方均可隨時以口頭或書面通知對方其終止合約的意向而終止該合約。

(2) 終止僱傭合約所需的通知期如下 ——

(a) 如該合約是憑藉第 5 條當作為期 1 個月並可按月續期的合約，又無訂明終止合約所需的通知期，則通知期不得少於 1 個月；（由 1971 年第 44 號第 2 條修訂）

(b) 如該合約是憑藉第 5 條當作為期 1 個月並可按月續期的合約，而其中訂明終止合約所需的通知期，則通知期為議定的期限，但不得少於 7 天；（由 1971 年第 44 號第 2 條增補）

(c) 如屬其他情況，則通知期為議定的期限，但如屬連續性合約者，則不得少於 7 天。

(2A) 在不損害第 41D 條的規定下，僱員根據第 41AA 條有權享有的年假，不得計算在第(2)款所訂終止僱傭合約所需的通知期內。（由 1984 年第 48 號第 4 條增補。由 1990 年第 53 號第 5 條修訂）

(2B) 女性僱員根據第 12 條有權享有的產假，不得計算在第(2)款所訂終止僱傭合約所需的通知期內。(由 1987 年第 55 號第 2 條增補)

(3) 凡在書面或口頭僱傭合約內明示議定該僱傭屬試用性質，合約又無訂明終止合約所需的通知期，則合約可按以下方式終止 ——（由 1971 年第 44 號第 2 條修訂）

(a) 任何一方可在該僱傭的首個月內隨時終止該合約，無須給予通知或代通知金；

(b) 任何一方可在該僱傭的首個月之後，隨時給予對方不少於 7 天的通知而終止該合約。（由 1984 年第 48 號第 4 條修訂）

(3A) 凡在書面或口頭僱傭合約內明示議定該僱傭屬試用性質，合約並訂明終止合約所需的通知期，則合約可按以下方式終止 ——

(a) 即使合約已訂明通知期，任何一方仍可在該僱傭的首個月內隨時終止該合約，無須給予通知或代通知金；

(b) 任何一方可在該僱傭的首個月之後，隨時按議定的通知期給予對方通知而終止該合約，但通知期不得少於 7 天。（由 1984 年第 48 號第 4 條增補）

(4) 就本條而言，月（month)指由發出終止僱傭合約通知之日起計，或由僱傭開始之日起計(視屬何情況而定)，至下個月份同一日的前一日終結時的一段期間，如下個月份並無同一日，或如發出通知或僱傭開始之日為一個月的最後一日，則至下個月份最後一日終結時的一段期間。

s.7., EO 以代通知金終止合約的情況

(1) 就第(1A)、(1B)及(1C)款而言，工資（wages)包括僱主就一個以下日子支付的款項 ——

(a) 僱員放取的產假、侍產假、休息日、病假日、假日或年假；（由 2014 年第 21 號第 4 條修訂）

(b) 僱員在僱主同意下放取的假期；

(c) 僱員不獲僱主提供工作的正常工作日；

(d) 僱員因暫時喪失工作能力而缺勤的日子，而根據《僱員補償條例》(第 282 章)第 10 條僱員是會就該日子獲付補償的。（由 2007 年第 7 號第 3 條代替）

(1A) 除第 15 及 33 條另有規定外 ——

(a) 凡根據第 6 條終止僱傭合約所需的通知期為一段以日或星期為單位的期間，則該合約的任何一方如同意付給對方一筆將在該期間內通常須付給僱員工資的日數乘以下列款額所得的款項，即可無須給予通知而隨時終止該合約 ——

(i) 僱員在緊接終止合約的一方給予對方終止合約通知的日期(通知日期)之前的 12 個月期間內所賺取的工資的每日平均款額；或

(ii) 如僱員在緊接通知日期之前受僱於有關僱主一段短於 12 個月的期間，則僱員在該段較短的期間內所賺取的工資的每日平均款額；或

(b) 凡根據第 6 條終止僱傭合約所需的通知期為一段以月為單位的期間，則該合約的任何一方如同意付給對方一筆將所需月數乘以下列款額所得的款項，即可無須給予通知而隨時終止該合約 ——

(i) 僱員在緊接通知日期之前的 12 個月期間內所賺取的工資的每月平均款額；或

(ii) 如僱員在緊接通知日期之前受僱於有關僱主一段短於 12 個月的期間，則僱員在該段較短的期間內所賺取的工資的每月平均款額。（由 2007 年第 7 號第 3 條增補）

(1B) 在計算僱員在該 12 個月或較短的期間內所賺取的工資的每日平均款額或每月平均款額時 ——

(a) 僱員在當中由於 ——

(i) 放取任何產假、侍產假、休息日、病假日、假日或年假；（由 2014 年第 21 號第 4 條修訂）

(ii) 在僱主同意下放取任何假期；

(iii) 在任何正常工作日不獲其僱主提供工作；或

(iv) 暫時喪失工作能力以致缺勤，而就此僱員根據《僱員補償條例》(第 282 章)第 10 條會獲付補償，因而未獲付給工資或全部工資的期間；以及
(b) 就(a)段提述的期間付給僱員的任何工資，
均不計算在內。（由 2007 年第 7 號第 3 條增補）

(1C) 為免生疑問，如僱員就第(1)款指明的某個日子獲付給的工資的數額，僅是僱員在正常工作日所賺取的數額的一個分數，則該工資以及該日子須按照第(1B)款不予計算在內。（由 2007 年第 7 號第 3 條增補）

(1D) 儘管有第(1A)款的規定，如因任何理由以該款規定的方式計算僱員所賺取的工資的每日平均款額或每月平均款額並不切實可行，則可參考受僱於同一僱主從事同樣工作的人在緊接通知日期之前的 12 個月期間內所賺取的工資或(如無上述的人)受僱於同一地區的同一行業或職業從事同樣工作的人在緊接通知日期之前的 12 個月期間內所賺取的工資計算該款額。（由 2007 年第 7 號第 3 條增補）

(2) 僱傭合約的任何一方，在按照第 6 條給予適當通知後，如同意付給對方第(1)款所提述款項的一部分，而該部分的款額是就合約終止時至通知期應屆滿的期間按比例計算的，則可隨時終止該合約。（由 1971 年第 44 號第 3 條修訂）
(3) (由 2007 年第 7 號第 3 條廢除)
(4) 就本條而言，即使本條例其他條文另有規定，工資（wages)一詞 ——
(a) 包括屬固定性質的超時工作薪酬或在緊接終止僱傭生效前 12 個月(如不適用的話，則以較短的僱傭期間為準)期間內每月平均款額相等於或超過該僱員在同一段期間內的每月平均工資的 20%的超時工作薪酬；
(b) 除按(a)段規定外，須當作不包括超時工作薪酬。（由 1997 年第 74 號第 4 條代替）

3.2 LAW TING PONG SECONDARY SCHOOL(Respondent) v. CHEN WAI WAH (Appellant), HCLA 22/2018 , [2019] HKCFI 2236

- This is the appellant's appeal against the decision ..on 24 September 2018 whereby the appellant was ordered to pay the respondent HK$139,593.20 as **payment in lieu of notice** in breach of the employment contract between the appellant and the respondent ("Teacher Employment Contract").
- Leave to Appeal was granted by this court on 16 November 2018 on the following grounds:

(1) The PO erred in applying the legal principles related to interpretation of contractual terms (審裁官錯誤地應用詮釋合約條款的法律原則) ("First Ground of Appeal"); and
(2) The PO failed to adequately deal with the appellant's submissions at trial that the term

relied on by the respondent should be regarded as a penalty clause instead of a liquidated damages clause (審裁官沒有充分處理上訴人在原審時提出，答辯人申索所依賴的合約條款，在法律上應被理解為合約的懲罰性條款，而非算定損害賠償) ("Second Ground of Appeal").

- The material facts of this case are not in dispute:
  1. the appellant and the respondent that on 17 July 2017, the respondent gave the following documents to the appellant: –
     (1) The Offer of Appointment as Teacher, Law Ting Pong Secondary School dated 17 July 2017 (**"Offer of Appointment"**);
     (2) The **Conditions of Service for Teachers** in Law Ting Pong Secondary School ("Conditions of Service"); and
     (3) The **Letter of Acceptance** to be completed by the teacher ("Letter of Acceptance")
  2. on 17 July 2017, the appellant signed on **the Conditions of Service** and **Letter of Acceptance**.

The Respondent's Case

- ...stemmed from the **Letter of Acceptance**. In particular, the first and second paragraphs of the Letter of Acceptance provide that: –
  " I accept the appointment offered in your letter dated 17th July 2017 in accordance with the attached **Conditions of Service for Teachers** in Law Ting Pong Secondary School.
  I also understand that once I accept this contract, **the conditions of the new contract will come to immediate effect e.g. I need to give three months' notice to terminate my employment with the school.**" (Emphasis supplied)
- upon signing the **Letter of Acceptance on 17 July 2017, the Teacher Employment Contract** came into immediate effect
- **as part of the Teacher Employment Contract, the "Termination of Appointment and Period of Notice" clause ("Termination Clause") contained in the Conditions of Service should be applicable.** To terminate the Teacher Employment Contract, the appellant could: –

(1) Give the respondent three months' notice in writing;
(2) Make a payment equal to the amount of three months' salary in lieu of notice; or
(3) A combination of the notices and an undertaking to pay wages in lieu of notice to satisfy the three months' notice period.

- By failing to observe the Termination Clause after the commencement of the Teacher Employment Contract on 17 July 2017, the respondent was entitled to claim the payment in lieu of notice in the sum of HK$139,593.20.

The Appellant's Case

- ..the appellant's employment would not commence until 1 September 2017.
- ..even if the Teacher Employment Contract did come to immediate effect from 17 July 2017 by virtue of paragraph 2 of the Letter of Acceptance, the Termination Clause should be regarded as **a penalty clause** and should not be enforceable
- ..an estimate made by the appellant of the loss caused by his unavailability to take up the employment by the respondent would only be HK$16,853.

- The PO was of the view that the Teacher Employment Contract was constituted by reading together provisions of the Offer of Appointment, the Conditions of Service and the Letter of Acceptance
  - Jumbo King Ltd v Faithful Properties Ltd & Ors [1999] 3 HKLRD 757, 773F-774A, the PO explained that it could be ascertained from a reasonable person's perspective that:
    (1) By signing the Letter of Acceptance containing a paragraph stating that the Teacher Employment Contract would come into immediate effect, the appellant should have understood and have agreed to be bound by such a paragraph; and
    (2) As such, there was a consensus between the appellant and respondent that the Termination Clause would become effective immediately.
- ...the appellant agreed with the principles discussed by the Court of Final Appeal in Jumbo King Ltd, ...submitted that the PO failed to properly consider, inter alia, the following questions before applying Jumbo King Ltd to interpret the terms of the Teacher Employment Contract:-
  (1) What were the terms of employment offered by the respondent?
  (2) What were the terms of offer accepted by the appellant (and leading to the formation of the Teacher Employment Contract)?
  (3) What was the function of the Letter of Acceptance in relation to the Teacher Employment Contract?

Question 1 - Terms of Employment offered by the Respondent

- The **textbook definition of an "offer"** was recently adopted by the English Court of Appeal in JLT Specialty Limited v James Craven [2018] EWCA Civ 2487. When deciding whether the employer was making an offer through a letter...

The definition of an offer discussed in JLT Specialty Limited, highlights 2 features of an offer.

(1) There must be an expression of willingness to contract by the offeror; and

(2) Such a willingness to contract is subject to specified terms.

- Looking at the Offer of Appointment in the present case, the respondent's willingness to contract with appellant was clearly stated in the first paragraph: –

  "The Incorporated Management Committee of Law Ting Pong Secondary School ("LTPSS") hereby offers you an appointment as a Teacher in the school."

- As to the terms specified in the offer, it was stated in the second paragraph of the Offer of Appointment that: –

  "If you wish to accept this offer of appointment in the above school under the conditions set out in the attached Conditions of Service for Teachers in Law Ting Pong Secondary School, please sign both copies of the Letter of Acceptance; and both copies of the Conditions of Service for teachers in Law Ting Pong Secondary School and return one copy of each document to me direct or through the Principal. The second copy is for your retention." (Emphasis in bold supplied)

- It is clear that the offer made by the respondent in relation to the **Teacher Employment Contract was on the terms set out in the Conditions of Service but not the Letter of Acceptance**

- To decide whether to accept or decline such an offer, a person would have to read the Offer of Appointment in conjunction with the Conditions of Service to ascertain what terms would be agreed between the offeror and the offeree.

- ...the Conditions of Service, **there was no provision in the Conditions of Service specifically referring to the Letter of Acceptance.**

- I agree with the appellant's submission that if it were the wish of the respondent that the employment under the Teacher Employment Contract should come into immediate effect, the respondent could have put such a term in the Offer of Appointment or the Conditions of Service so that the attention of the offeree could be drawn

- As correctly submitted by the appellant, the offer made by the respondent in relation to the Teacher Employment Contract was only subject to terms of the Conditions of Service. In particular, the period of employment under the Teacher Employment Contract was expressly stated as: "From 1st September 2017 to 31st August 2018".

Question 2 – Acceptance of Respondent's Offer by the Appellant

- It is trite law that an acceptance by the offeree has to "mirror" the offer made by the offeror. In Day Morris Associates v Voyce and Anor [2003] EWCA Civ 189 at paragraph 35, the English Court of Appeal described an acceptance as follows: –

  "A contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer."
- Applying this to the present case: –

  (1) As held above, any terms purportedly set out in the Letter of Acceptance could not have formed part of the offer made by the respondent.

  (2) What the appellant could (and which he did) accept was an offer with terms subject to the Conditions of Service only, as proposed by the respondent in the Offer of Appointment.

  (3) If the appellant purported to accept the terms stated in the Letter of Acceptance in addition to the offer made by the respondent in the Offer of Appointment, this could not have been an acceptance according to the rule discussed in Day Morris Associates, ibid.

Question 3 – Function of the Letter of Acceptance

- The function of the Letter of Acceptance can be ascertained from the second paragraph of the Offer of Appointment set out …To accept the offer made by the respondent, the appellant would have to: –

  (1) Sign both copies of the Letter of Acceptance; and

  (2) Sign both copies of the Conditions of Service.
- Therefore, I agree the appellant's act of signing the Letter of Acceptance was simply to comply with the prescribed mode of acceptance stated in the Offer of Appointment. **It would be inappropriate to go a step further and to hold that the terms contained in the Letter of Acceptance constitute part of the offer made by the respondent.**
- Based on the above analysis, I hold that: –

(1) Any alleged terms stated in the Letter of Acceptance should not be considered to form part of the Teacher Employment Contract because such terms were not included in the offer made by the respondent at the outset;

(2) It follows that the acceptance of offer by the appellant, in the manner prescribed by the Offer of Appointment, could not have included any terms purportedly stated in the Letter of Acceptance; and

(3) By reading the Offer of Appointment, it is clear that the Letter of Acceptance merely served as a document to be signed by the appellant to complete the acceptance process, instead of

adding further terms to the offer made by the respondent.

- Further and in any event, the second paragraph of the Letter of Acceptance merely stated that "... I need to give three months' notice to terminate my employment with the school" (emphasis supplied). Under the Conditions of Service, clearly the "employment" of the appellant by the respondent did not commence until 1 September 2017
- **For the reasons stated above, I am of the view that the appellant's employment would not commence until 1 September 2017, and the appellant was not liable to make any payment in lieu of notice by backing out on 22 August 2017.**

Second Ground of Appeal

- In view of my finding on the First Ground of Appeal, it is not necessary and I do not propose to discuss or consider the Second Ground of Appeal.

Conclusion

- ...allow the appellant's appeal. Accordingly, I set aside the order of the PO made on 24 September 2018 and dismiss the respondent's claim against the appellant
- ...order that the costs of the appeal be paid by the respondent to the appellant, such costs are to be taxed if not agreed.

4. 獎金補充協議(Addendum)的最新案例：在僱傭合約已經生效，僱主與僱員再簽訂獎金補充協議(Addendum)是否有效？

上訴庭案例：胡潔敏 (WU KIT MAN) Claimant v 龍威集團控股有限公司 Respondent (DRAGONWAY GROUP HOLDINGS LIMITED), CACV 170/2017 [2018] HKCA 107。在該案例中僱主與僱員在僱傭合約生效之後一段時間簽訂了補充獎金 HK$1,500,000 及 HK$300,000。僱員之後被僱主解僱，勞資審裁處判定僱員可根據補充協定得到 HK$300,000 的獎金。僱主上訴到高等法院，高等法院推翻勞資審裁處的決定，僱員上訴到上訴庭，到底上訴庭的看法有如何？

4.1 Elements of contract

a) Offer

- An offer must be communicated before it can be accepted
- An offer of employment will usually be made in writing following an interview
- Subsequent negotiation on terms may be followed by a revised written offer
- Offer many be conditional: may be subject to conditions: the passing of a medical examination, the conduct of reference checks, granting of a work visa

b) Acceptance

- An offer may be accepted at any time before it lapses or before it is withdrawn by the employer
- Acceptance of offer must be in accordance with the terms of the offer

c) Considerations

- In a contract of employment **consideration from the employer** will be in the form of payment of wages and provision of benefits to employee
- An **employee's consideration** will be provision of labour or personal services
- In Lui Lin Kam v Nice Creation Development Ltd CA case, Justice Tang JA at para 30 quote Sir Christopher Slade in Clark v Oxfordshire Health Authority,

  "'There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill.' There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service...."

4.2 胡潔敏 (WU KIT MAN) Claimant v 龍威集團控股有限公司 Respondent (DRAGONWAY GROUP HOLDINGS LIMITED), CACV 170/2017 [2018] HKCA 107

- This is an appeal from the judgment of Au-Yeung J in HCLA 15 of 2016 on 2 June 2017. By that judgment, the learned judge allowed an appeal from the Labour Tribunal in LBTC 459 of 2016. By an award made on 24 June 2016, the PO of the Tribunal found in favour of the Claimant in respect of (amongst other claims) a claim of $350,000 for bonus
- The contract of employment (in the form of a Letter of Appointment) was made on 12 May 2015. There was no provision for such bonus in that Letter of Appointment though there is a provision for discretionary bonus payable in January "provided that [the Claimant is] still employed by the [Respondent] on the payment date and that [she has] not tendered [her] resignation before the payment date". The amount and payment of that discretionary bonus is at the discretion of the Respondent to be determined by the Respondent's and her performance (see Clause 5.2)
- On 19 October 2015, the Respondent issued an addendum to the Letter of Appointment ["the Addendum"] and it provides as follows:

" The Company and Wu Kit Man, Athena hereby agree to record certain amendments to the terms and conditions of the previously executed Letter of Appointment dated 12 May 2015 ("Letter of Appointment") which have taken effect from 15 October 2015 ("Effective Date"):

1. A cash bonus of HKD1,500,000 will be offered to you as soon as possible after completion of the IPO of the Company or its holding company on or before 31 December 2016. If the Company or its holding company ceased the listing plan or you leave the Company for whatever reason before 31 December 2016, a cash bonus· of HKD350,000 will be offered to you within 10 days after the cessation or termination and in any event no later than 31 December 2016. If you leave the Company by your own reason, you· will hand over your listing work to the Company.

Save as the above, all other terms and conditions of the Letter of Appointment remain in full force and effect.

Please signify your agreement and confirmation of the above terms and conditions by signing and returning to us this letter no later than 19 October 2015."

- The employment of the Claimant was terminated by the Respondent on 21 December 2015
- The PO held that the Addendum was valid and binding and thus made the award in favour of the Claimant

- On appeal, Au-Yeung J reversed the decision of the PO on the basis that the Addendum was not supported by consideration. Though lack of consideration was not specifically raised by the Respondent before the PO (there was no legal representation in the Labour Tribunal), the judge took the view that the PO should consider the question (as part of his duty to inquire[1] under Section 20(3) of the Labour Tribunal Ordinance) since the Respondent alleged that the director concerned was pressurized into signing Addendum, thereby questioning the legal validity of the same[2].
- From that judgment, the Claimant sought leave to appeal on the following grounds on the basis that they involve a point of law of general public importance:

  " 1.就修訂書是否在法律上有效力而言，原訟法官在 2016 年 6 月 2 日的判案書的第 26 段指出「修訂檔只是加入兩個給予胡女士現金分紅的條件，而胡女士的僱傭合約所有條款依舊 明顯地修訂文件僅對胡女士有利，沒有可見的代價」；在第 27 段更指出「該修訂檔僅為空泛承諾 (mere nudum pactum)，在法律上沒有效力」。這蘊藏一個錯誤的假設；履行合約原有的責任並不能在任何情況下構成有效的合約代價；亦忽略了考慮被告人是否有從修訂檔得到「實際得益」(practical benefits)(見 Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, 11B-15H)。

  2. 這衍生以下對公眾有普遍重要性的法律問題：

  1) 就修訂僱傭合約而言，若員工純粹履行或承諾履行原有的僱傭合約下既定的責任，這是否不能在任何情況下構成支持更改僱傭合約 (以致增加員工所得到的花紅或酬金等) 的有效合約代價；抑或，合約代價存在與否視乎情況，而法庭需要考慮的因素包括：

  i. 僱主是否從中得到「實際得益」(practical benefits)(見 Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, 11B-15H；GEC Plessey Telecommunications [1993] IRLR 383, 第 118-119 段)；

  ii. 僱員是否放棄了原本可以解約的權利 (Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd [2011] 1 HKLRD 10, 第 48-56 段) ？
- At the conclusion of the hearing of this appeal, we allowed the appeal and set aside the order of the judge. We further remitted the question of consideration supporting the Addendum to the Tribunal for retrial and determination. We also ordered each party to bear her or its own costs in the appeal before us and the costs of the appeal before the judge
- The judge had considered if the case should be remitted back to the Tribunal and decided it served no useful purpose: see paragraph 45 of the judgment. However, she came to that view without considering the points now raised. Even if the point of law relied upon by Mr Wong is a good one, we are handicapped in the assessment of whether the Respondent had obtained a real benefit or obviated a disbenefit in practice in making the Addendum. **In an appeal from a decision of the Court of First Instance in a Labour Tribunal appeal, it is not the function of the Court of Appeal to undertake the task of evaluation of**

facts, particularly when we cannot be sure if all the facts have been properly canvassed before the Tribunal had the relevant issues been brought to the attention of the PO.

- Turning now to the point of law relied upon by Mr Wong, counsel submitted that in the context of employment, **the non-exercise of an employee of the right to terminate the contract of employment could be good consideration for variation of the terms of employment** notwithstanding that it can be said that thereafter the employee was only performing the same obligation under the pre-existing contract
- Counsel derived such proposition from Lee v GEC Plessey Telecommunications [1993] IRLR 383 and Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd [2011] 1 HKLRD 10, which in turn were based upon the development of the law on consideration in Williams v Roffey Brothers & Nicholls (Contractors) Ltd [1991] 1 QB 1.
- The principle of law one can derive from the judgment of Glidewell LJ in Williams v Roffey Brothers & Nicholls (Contractors) Ltd, supra, at p.15H to16A was set out by His Lordship in these propositions,

  " ... the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding."
- Russell LJ gave a judgment to the like effect at p.19D to E,

  " **A gratuitous promise, pure and simple, remains unenforceable unless given under seal.** But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration."
- Hence, whilst we can accept in many instances one can take it as a starting point that an employee may give consideration for a variation of terms of employment in his favour by continuing with the employment, the court must still have regard to the overall circumstances of the case to see if it is justified in drawing the conclusion that the continuance in employment did provide a real benefit to the employer which can provide consideration for the variation

- On the facts of the present case, there are matters which should be more thoroughly investigated. The Addendum was executed in October 2015 and the Claimant's employment was terminated in December 2015. According to the witness for the Respondent, the work for procuring the listing of the Respondent had run into difficulties in October 2015 and it was found out that the Claimant was not familiar with listing work. She also said the company was dissatisfied with the job performance of the Claimant. Against such background, the question of consideration is not that straightforward as in those cases relied upon by Mr Wong
- at the same time, we cannot accept the submission of Mr Choy on behalf of the Respondent that the judge had effectively made a finding that no real benefit could have been enured to the Respondent at paragraphs 27 to 29 of the judgment. By reason of the lack of citation of the relevant authorities, the judge did not focus on the issue. Nor do we accept his submission that the Addendum clearly lacks commercial sense. It very much depends on the state of affairs as between the Claimant and the Respondent (as opposed to the situation between Ms Lin and Mr Hui) as at the date when the Addendum was executed, which the PO had not examined closely
- For these reasons, we concluded that the matter should be remitted to the Labour Tribunal for retrial on the question of consideration

免責聲明：

本課堂、講座、活動、節目（總簡稱為“節目”）內容純屬主持人、參與學者、嘉賓及參加者的個人觀點及意見，本節目的目的旨在提供學習資訊給參加者，節目內容、觀點及意見與舉辦單無關。節目參加者、觀眾、聽眾知道及同意節目內容（注一）絕對不構成任何法律意見。舉辦單位、節目主持人、參與學者、嘉賓與參加者、觀眾及聽眾不會因此而構成任何法律關係。節目參加者、觀眾、聽眾同意如參考使用本學習節目的任何內容（注一）必須事先考慮清楚是否適合，如因參考使用本學習節目內容（注一）導致任何法律責任或糾紛均與舉辦機構、節目主持人、參與學者及嘉賓無關。任何法律問題或諮詢，建議參加者、觀眾及聽眾尋求專業及合資格人士協助。

注一：包括節目本身、錄影、影音、藤本、筆記及講義等等

最新課程

請掃瞄 QR Code 查看詳情及報名

HRBP		
網上直播課程	**詳情**	
 **LEGO® SERIOUS PLAY® Methods** **人力資源商業思維工作坊** **HR Business Thinking Workshop** 我們相信，商業思維是對於 HR 事業非常重要的課題，但商業理論又可能會令非業務出身的 HR 感到十分沉悶，甚至令學習事倍功半。因此，我們特意設計了一個以體驗及遊戲化為重心的商業思維工作坊，透過各種遊戲化學習設計，包括使用到「LEGO® SERIOUS PLAY® Methods」等工具，以更富趣味的方式學習生意營運及商業理論，讓您了解人力資源可以如何在業務上，為企業提供真正價值。 **導師簡介** **Dr. Joey Wan**	**直播日期：**	22 & 29/10/2020
	直播時間：	19:00-22:00
	收費：	**PRO HR Member** **HK$2,564.1** **Free Member** **HK$2,699**
	折扣：	- 12/10 前報名可享 9 折優惠 - 2 人或以上同行 9 折

HR 心理學		
網上直播課程	**詳情**	
 **HR 應用心理學證書課程 HR Practical Psychology Certification Course Intake 4** 人力資源管理總離不開「人」，要有效管理「人」，某程度上 HR 需要成為半個心理學家，能夠運用有科學根據的心理學去處理日常問題。事實上，心理學的確可多方面應用於 HR 日常的工作層面，包括招聘、用人、留人、溝通、處理糾紛、離職面談等。 《HR 應用心理學證書課程》為一個由香港心理學協會及 MP HR Community 合辦，專為 HR 從業員而設計的證書課程 **導師簡介** **Dr. Adrian Low 劉英健博士**	**直播日期及時間：**	5 & 12/10/2020 19:00 – 22:00
	重溫日期及時間：	10 & 17/10/2020 10:00 - 13:00
	收費：	**PRO HR Member** **HK$2,564.1** **Free Member** **HK$2,699**
	折扣：	- 31/8 前報名可享$500 折扣 - 30/9 前報名可享 9 折 - 2 人或以上同行 9 折

勞工法例			
網上直播課程		**詳情**	
	**人力資源勞工法例基礎證書課程 Intake 3** **(包括各項與人力資源相關法例最新修訂及最新法庭個案研討)** 認識勞工法例是人力資源從業員的基礎，本勞工法例課程為人力資源從業員而設，涵蓋人力資源從業員必修的《僱傭條例》、《僱員補償條例》、《反歧視條例》、《個人資料(私隱)條例》、《強制性公積金計畫條例》等。由資深僱傭糾紛專家及僱傭法律學家李錫強先生任教，將深入探討各僱傭勞工條例及與人力資源相關之法例，研究過去相關及最新的法庭案例，參加者將能掌握實質的知識，以應用於日後工作上。 **導師簡介** **Mr. Lawrence Li 李錫強先生**	**直播日期及時間：**	31/10 & 7, 14, 21/11/2020 10:00 – 13:00
		重溫日期及時間：	5, 12, 19, 26/11/2020 19:00 – 22:00
		收費：	**PRO HR Member** **HK$3.229.1** **Free Member** **HK$3,399**
		折扣：	- 30/9 前報名可享$500 折扣 - 2 人或以上同行 9 折

其他網上課程


網上講座
HR 60mins+
713薪酬計
算專題


網上講座
節省15%
人力資源
社會事件
法律組合


網上講座
折扣達67折
HR的5個必修
Leading Cases
組合


網上講座
如何處理
員工違法
及欺詐行為？


LIVE
HR 60mins+
如何處理
僱傭歧視
之性騷擾？


網上講座
勞工法例案例研討會
418
的陷阱


網上講座
如何實行
Recruitment
Automation？


網上講座
處理香港
僱傭及工傷
官司商業策略


網上講座
依法應對後疫情
人力資源策略


網上講座
如何制定
專業WFH政策？

即 SCAN

查看 MP HR Community 最新培訓及活動

Learning never exhausts the mind

Leonardo Da Vinci

HR COMMUNITY

www.mashedpatata.com