

WHAT OBLIGATIONS SHOULD EMPLOYERS FULFIL BEFORE TERMINATING A RELATIONSHIP WITH AN EMPLOYEE?



A press release issued by the Labour Department on 21 November 2022 revealed that a Hong Kong registered company has been prosecuted for failing to meet the requirements of the Employment Ordinance (EO). The company was convicted at Kwun Tong Magistrates' Courts on 21 November and fined HK\$90,000. The company was also ordered to pay an outstanding sum of about HK\$280,000 to the two terminated employees concerned.

The press release also revealed that the company had failed to pay a total of about HK\$260,000 to the two employees in line with the outstanding EO wages and payment in lieu of notice within seven days after terminating their employment contracts, as well as the awarded sum of HK\$280,000, to be paid within 14 days of the date set by the Labour Tribunal.

A representative for the Labour Department said: "This ruling will disseminate a strong message to all employers that they have to pay wages to employees within the statutory time limit stipulated in the EO, as well as the sums awarded by the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board (MECAB). The Labour Department will not tolerate these offences and will spare no effort in enforcing the law and safeguarding employees' statutory rights."

In accordance with the EO, the termination payment that must be made to an employee when terminating their employment or when their contract ends usually includes the following:

- outstanding wages;
- payment in lieu of notice (if any);
- payment in lieu of any annual leave not taken, and any pro-rated annual leave pay for the current leave year;
- any outstanding end-of-year payment, and a pro-rated end-of-year payment for the current payment period or annual bonus;
- long service payment or severance payment (if appropriate); and
- any other payments due under the employment contract, such as gratuities or compensation for termination.

The employer must make the full termination payment (except for any severance payment) to the employee as soon as practicable, but no later than seven days after the date of terminating their employment or the date the contract ends.

The employer must make the severance payment within two months of receiving notice from the employee that they want to claim a severance payment.

If the employer does not pay the employee within the time limit mentioned above, the employer must pay interest on the outstanding wages. In addition, under the EO, the Labour

Tribunal and the MECAB may order an employer to pay an employee specific entitlements (such as wages, an end-of-year payment, maternity pay, paternity pay, a severance payment, a long service payment, sickness allowance, holiday pay, or a termination payment). If the employer fails to pay the award within 14 days of the date it is due and they do not have a 'reasonable excuse', the employer can be prosecuted and, if convicted, fined up to HK\$350,000 and imprisoned for up to three years.

Importantly, employers should also be aware that under the EO, an employee may claim for compensation for unreasonable and unlawful dismissal. This has been the case since October 2018, when the Employment (Amendment) (No.2) Ordinance 2018 regarding reinstatement or re-engagement orders for unreasonable and unlawful dismissal came into force. According to the EO amendment, if an employee was unreasonably and unlawfully dismissed on or after 19 October 2018 and that employee makes a claim for reinstatement or re-engagement, the Labour Tribunal may order the employer to reinstate or re-engage the employee. There is no need to secure the employer's agreement.

What is 'unreasonable' and 'unlawful' dismissal?

According to the EO amendment, dismissal is 'unreasonable' when an employee is dismissed for anything other than a valid reason set out in the EO; it is 'unlawful' when it is also in contravention of the law. For more details, see Table 1.

Table 1: Definition of unreasonable dismissal and unlawful dismissal

<p>Unreasonable dismissal - Dismissal other than for the following valid reasons</p> <ul style="list-style-type: none"> • The conduct of the employee • The capability or qualifications of the employee for performing their work • Redundancy or other genuine operational requirements of the business • Statutory requirements (ie when it would be against the law to allow an employee to continue to work in their original position or to continue with the original terms of their employment contract) • Other substantial reasons 	<p>and</p>	<p>Unlawful dismissal - Dismissal that is against the law</p> <ul style="list-style-type: none"> • During pregnancy or maternity leave • During paid sick leave • After a work-related injury and before compensation is determined, settled or paid under the Employees' Compensation Ordinance • Because the employee is exercising their trade union rights • Because the employee is giving evidence for the enforcement of relevant labour legislation • Because the employee has done or has been called to do jury service • On the grounds of gender, marital status, pregnancy, family status, race or disability
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An order of reinstatement or re-engagement requires the employer to treat (or re-engage) the employee in all aspects as if the employee had not been dismissed, either in a role and on terms comparable to the employee's original terms of employment or in another suitable role.

Even if the Labour Tribunal does not make an order for reinstatement or re-engagement, the tribunal may still order the employer to make a payment to the employee as follows:

- An award of terminal payments as considered fair and appropriate by the Labour Tribunal
- An award of compensation up to **HK\$150,000**.

If the employer does not reinstate or re-engage the employee as required by the Labour Tribunal's order, the employer will have to pay the employee a further sum amounting to **three times the employee's average monthly salary**. This sum is capped at **HK\$72,500** and must be paid on top of the other

monetary remedies ordered by the Labour Tribunal.

The eight relevant statutory entitlements are: holiday pay; annual leave pay; sickness allowance and related provisions; maternity pay and related provisions; paternity pay; end-of-year payments; payment in lieu of notice; and a further sum for failing to comply with an order to reinstate or re-engage the employee due to unreasonable and unlawful dismissal. To calculate these payment amounts, the *revised mode of calculation of relevant statutory entitlements* is applied to work out the average salary earned by an employee in the 12-month period leading up to the specified dates, as stipulated by the E(A)O 2007 (if an employee was employed for less than 12 months, the calculation is based on the shorter period). If an employee has been wrongfully dismissed, additional items are included in the calculation with respect to three relevant statutory entitlements (see Table 2).

Table 2

Statutory entitlement	Additional item included when calculating the 12-month average salary in the case of wrongful dismissal
<ul style="list-style-type: none"> • Sickness allowance 	<ul style="list-style-type: none"> • A further sum equivalent to seven days' wages as compensation payable by an employer for wrongfully dismissing an employee on sick leave
<ul style="list-style-type: none"> • Maternity pay 	<ul style="list-style-type: none"> • A further sum equivalent to one month's wages as compensation payable by an employer for wrongfully dismissing an employee on maternity leave
<ul style="list-style-type: none"> • Further sum for non-compliance with an order of reinstatement or re-engagement for unreasonable and unlawful dismissal 	<ul style="list-style-type: none"> • Three times the employee's average monthly salary (capped at HK\$72,500) on top of the monetary remedies payable to the employee as ordered by the Labour Tribunal



The court case mentioned in this article, and its relevant penalty clause, serve as a prominent example of how important it is to comply with the statutory requirements of the EO when terminating a relationship with an employee. Any conviction for violation of the statutory requirements of

the EO could result in not only a financial loss but also damage to a company's reputation.

Table 3 lists the key points to consider when terminating an employment relationship with an employee:

Table 3: Key points to consider upon termination

Key point	Do / Don't	Comments
Correctly calculate wages and statutory entitlements in the termination payment to an employee, based on the requirements specified in the EO	✓	Use the revised method of calculating the eight relevant statutory entitlements on the basis of the average salary earned by the employee in the 12-month period leading up to the specified dates, as stipulated by the E(A)O 2007. If an employee has been employed for less than 12 months, the calculation is based on the actual period of employment.
Make the payment to the employee as soon as possible, but no later than seven days after their employment contract ends	✓	
Pay the employee any sums awarded by the Labour Tribunal or MECAB within 14 days of the date set	✓	
Don't terminate an employee by summary dismissal without a valid reason set out in the EO	✗	An employer may summarily dismiss an employee without notice or payment in lieu of notice if the employee: <ol style="list-style-type: none"> 1. deliberately disobeys a lawful and reasonable order; 2. is guilty of misconduct; 3. is guilty of fraud or dishonesty; or 4. habitually neglects their duties.
Strictly adhere to the terms and procedures specified in company policy, employee handbooks and employment contracts when dealing with misconduct, disciplinary or performance issues that may trigger a summary dismissal	✓	Make sure you follow the relevant procedures when taking disciplinary action, including: Serve verbal and written warnings to the employee concerned ↓ Allow a period of time for the employee to improve ↓ <u>If no improvement, serve notice of termination to the employee</u> Investigate and seriously consider all the surrounding factors as well as the employee's clarifications on the issues observed ↓ Seek professional and legal advice before concluding that summary dismissal is appropriate.
Don't dismiss an employee in contravention of the EO's restrictions on terminating an employment contract	✗	An employer must not dismiss an employee: <ol style="list-style-type: none"> 1. who has been confirmed pregnant; 2. who is on paid sick leave; 3. because they have given evidence or information in a proceeding or inquiry related to enforcing the EO, a work accident or a breach of work safety law; 4. because of being a member of (or active in) a trade union; 5. who is injured at work before entering into an agreement with the employee on employer's compensation or before a certificate of assessment has been issued.

We believe that the Labour Department will continue to introduce amendments and reforms to enhance employment protection and employee benefits. It is therefore important for employers and employees alike to keep abreast of the changes in the Employment Ordinance, as these will influence their actions in various ways.

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