

A summary of the law relating to termination of employment contracts in Hong Kong

10 October 2018 | LC Lawyers LLP | **Jacky Chan**

EMPLOYMENT PRACTICE *Termination by Notice*



In Hong Kong, either party to a contract of employment may only lawfully terminate the contract of employment upon giving notice or payment in lieu of notice to the other party, unless there are sufficient grounds to justify a summary dismissal.

Once the employment relationship comes to an end the employer must ensure that all terminal payments under the Employment Ordinance (EO) are made to the employee not later than 7 days following the date of termination. Depending on the circumstances surrounding the dismissal, the following statutory payments will be made to an employee:

- accrued wages for work performed up to the date of termination;
- any payment in lieu of notice where a dismissal has been made without due notice;
- accrued end of year payment;
- accrued pro rata end of year payment (where the employee leaves employment completing only part of a bonus year provided that the employee has worked from more than 3 months in the payment period, excluding any probationary period);
- accrued outstanding holiday pay;
- accrued but untaken annual leave pay; annual leave which has been accrued in a completed annual leave year, or accrued under common leave year, but which the employee has not taken;
- pro rata unaccrued annual leave pay (annual leave which relates to the uncompleted current leave year in which the employee's employment is terminated and for which annual leave has not yet accrued provided that employee has worked for more than 3 months in the leave year);
- any sickness allowance due to the employee;
- any maternity leave pay due to the employee;
- one month's wages as compensation for termination while on maternity leave;

■ severance payment; and

■ long service payment.

- The amount of severance payable is calculated by reference to a statutory formula which incorporates length of service and the employee's wage, subject to a cap. For employees paid on a monthly basis, the formula is two-thirds of an employee's last full wages or two-thirds of HK\$22,500, whichever amount is LESS, multiplied by the number of years of continuous service.

The following formula applies to the calculation of both severance payment and long service payment:

Monthly-paid employee

(last month wages X 2/3) X reckonable years of service

- Service of an incomplete year should be calculated on a pro rata basis and an employee may also elect to use his average wages in the last 12 months for the calculation. The sum should not exceed 2/3 of HK\$22,500 (i.e., HK\$15,000).

Please see below for further details:-

Calculation of severance payment

Entitlement	Severance Payment	Long Service Payment
Qualifying period of employment	not less than 24 months under a continuous contract	not less than 5 years under a continuous contract
Conditions / Requirements	The employee is dismissed by reason of redundancy	The employee is dismissed but (i) he is not summarily dismissed due to his serious misconduct (ii) his dismissal is not by reason of redundancy
	Employment contract of a fixed term expires without being renewed by reason of redundancy	Employment contract of a fixed term expires without being renewed
	The employee is laid off	The employee dies, resigns on ground of ill health, aged 65 or above, resigns on ground of old age

MPF Contributions

- Employees and employers who are covered by the MPF System are each required to make regular mandatory contributions calculated at 5% of the employee's relevant income to an MPF scheme, subject to the minimum and maximum relevant income levels. For a monthly-paid employee, the minimum and maximum relevant income levels are \$7,100 and \$30,000 respectively.

Monthly Relevant Income	Amount of Mandatory Contributions Payable by Employer	Amount of Mandatory Contributions Payable by Employee
Less than HK\$7,100	Relevant income x 5%	No contributions required
HK\$7,100 to \$30,000	Relevant income x 5%	Relevant income x 5%
More than HK\$30,000	HK\$1,500	HK\$1,500

Set off for gratuities and occupational retirement scheme benefits

- Under the EO, your employees may be entitled to Long Service Payment (LSP) or Severance Payment (SP) and, as an employer, you can offset the LSP/SP paid to your employees with the accrued benefits derived from the employer's contributions (MPF).
- The Chief Executive of the Hong Kong Special Administrative Region Carrie Lam Cheng Yuet-ngor's cabinet on 2 October 2018 approved a proposal that drastically increases the subsidy the government offers to employers to stop them from tapping into staff pension funds. The government has tabled a proposal to the Executive Council to offer about [HK\\$29 billion \(US\\$3.7 billion\)](#) to employers over 25 years instead of the HK\$17.2 billion (US\$2.2 billion) over 12 years under its previous proposal. The move came amid the government's attempts to scrap the [controversial offsetting mechanism](#) for the Mandatory Provident Fund (MPF) - the city's pension scheme in which employers are allowed to offset their staff's long service and severance payments with their employers' contribution to employees' MPF accounts.

Statutory grounds for summary dismissal (without notice or payment in lieu of notice)

The EO gives statutory force to the position at common law by giving an employer the right to summarily dismiss an employee in circumstances where the misconduct of the employee is sufficiently serious. Section 9 of the EO provides four grounds on which an employer may terminate a contract **without notice or payment in lieu of notice**:

- Wilfully disobeys a lawful and reasonable order;
- Misconduct herself in a manner in which the conduct is inconsistent with the due and faithful discharge of her duties;
- Is guilty of fraud or dishonesty;
- Is habitually neglectful of her duties; or
- Any other ground on which the employer is entitled to summarily dismiss the employee at com law.

Common Law grounds for summary dismissal (*without notice or payment in lieu of notice*)

Gross Misconduct

The most common ground for summary dismissal arises where the employee has committed an act of gross misconduct. What amounts to gross misconduct is a question fact, which will depend upon the circumstances of each case, the nature of the employment and the nature of the responsibilities and of the tasks being performed, the standards and norms of the industry or profession within which the employment takes place, the terms of the particular contract of employment, and the social condition prevailing at the time of the contract. To this extent previous case law can give some guidance but is of limited value.

In the case of ***Cheung Chi Wah Patrick v Hong Kong Cement Co Ltd [2017] HKCU 2291***, upon the employer's appeal of the Labour Tribunal's decision, the Hong Kong Court of First Instance (CFI) considered whether an employer was entitled to summarily dismiss an employee on the ground that the employee had committed gross misconduct.

Also, when considering whether it was justifiable to summarily dismiss an employee

on the basis of gross misconduct, the employer needed to ascertain why the employee committed such conduct. Without such consideration process, it was difficult to determine objectively whether the employee manifested an intention not to be bound by the employment contract. An employee could only be summarily dismissed if it was clear that he/she manifested such intention by conduct.

The High Court dismissed the appeal and held that if the employer was dismissing an employee summarily on the ground of his misconduct, apart from cases of serious neglect of duty or breach of confidence or incompetence, the employer has to show that the employee has demonstrated an intent not to be bound by the essential terms and conditions of the employment contract or has repudiated the contract. Otherwise, the employer can only terminate the employment contract by giving the necessary notice to quit or wages in lieu of notice and other compensations as the law may require.

Negligent performance of duties

Habitual neglect of the performance of an employee's duties, or a single act of negligence or incompetence of a serious nature, persistent lateness or unauthorized or unjustified absence, insubordination, or wilful disobedience of a lawful and reasonable order have been ground upon which employers have successfully justified summary dismissal.

Other relevant favorable factors for summary dismissal (*without notice or payment in lieu of notice*)

1. **Employer must not allow conduct complained of to continue for too long prior to summary dismissal.** An employee should ensure that the conduct complained of has not been tolerated in the past so as to amount to acquiescence of the behavior. The longer the conduct has been tolerated the less likely the court will be prepared to accept it amounts to misconduct justifying summary dismissal (*WE Cox Toner (International) Ltd v Crook [1981]*)

2. **No warning required prior to summary dismissal.** In general, there is no requirement to give either oral or written warnings as a disciplinary measure prior to proceeding to the summary dismissal of an employee.
3. **No requirement to conduct a disciplinary hearing prior to summary dismissal.** There is no common law or statutory requirement to have a disciplinary hearing prior to a summary dismissal of the employee.

KEY CONTACT



Jacky Chan

Associate

Jacky-CH.Chan@eylaw.com.hk

+852 2675 2167

Contact us

LC Lawyers LLP
Suite 3106,
31/F One Taikoo Place,
979 King's Road,
Quarry Bay, Hong Kong

Tel: (852) 2629 3200

Fax: (852) 2956 1980

https://www.eylaw.com.hk/en_hk

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