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The Employment Ordinance in Hong Kong affords both employers and employees the unique opportunity to “buy out” their notice period with a payment of wages in lieu. In the finance industry, it is common for employees’ compensation to comprise a mixture of base salary and a bonus, often weighted towards the latter. Where an employee wishes to buy out his or her notice period, should he or she include in the calculation of such payment in lieu any bonuses he or she had previously received, as part of the “wages”?

On 17 January 2019, Madam Justice Mimmie Chan handed down an interlocutory decision in an employment dispute between Quantex Capital Markets Limited and five of its former employees. In this case, the five employees resigned en masse to join a competitor of Quantex and made a payment in lieu of wages, calculated with reference to their base salary but without factoring in the quarterly bonuses they had received. Quantex applied to the Court for determination of a point of law, being whether the definition of “wages” under the Employment Ordinance and in the relevant employment contracts included the quarterly bonuses paid to the employees for the purposes of calculating a payment in lieu of notice.

Quantex sought to rely on a wealth of established authorities that bonuses, despite being stated to be discretionary, are in fact a contractual entitlement and that employers must exercise their discretion reasonably and in good faith, in a manner which is not irrational or perverse. The employees, on the other hand, relied on the definition of “wages” in the Employment Ordinance which specifically excludes “any commission which is of a gratuitous nature or which is payable only at the discretion of the employer, and any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer.”

The Judge found that such a question is not clear-cut and cannot be determined on a summary basis; factual evidence was required to be adduced on the nature of the quarterly bonus payments, how they were calculated in practice and what the bonus pool was comprised of. While recognising the authorities relied on by Quantex, she observed that they “are not direct authorities on the issue of whether the bonuses which are the subject of the discretion form “wages” of the employee, within the meaning of section 7 of the Ordinance. To decide the latter question, the Court has to construe the relevant contractual provision, to see whether the bonus in question comes within the statutory inclusion of “all remuneration, earnings, allowances....commission,...however designated or calculated, and outside the exception set out in section 2(1) of the Ordinance.”

Should the case proceed to trial, which side will ultimately prevail will depend on how the Court construes the relevant contractual provisions in this particular case. In the meantime, situations where the ordinance is invoked by either employers or employees to buy out notice periods where the employment contract provides for the payment of bonuses will continue to be fact sensitive and legal advice should be sought in each case on the method of calculation.

Your Key Contacts



Richard Keady

Partner, Hong Kong

D +852 2533 3663

richard.keady@dentons.com



Jenny Zhuang

Of Counsel, Hong Kong

D +852 2533 3660

jenny.zhuang@dentons.com