Benchmarking Talent for a Sustainable Future

Employment Law Uncovered:

Critical Knowledge for HR Professionals

Tuesday, 27 August 2024

4:30 – 5:30 p.m.

HKIB

The Hong Kong Institute of Bankers

香港銀行學會

About the speaker

Michael Szeto
Partner

Principal Areas of Practice

- Litigation & Dispute Resolution
- Arbitration & Mediation
- Complex Commercial Disputes
- Company & Shareholder Disputes
- Corporate Fraud
- Criminal Litigation
- Debt Recovery
- Employment, Privacy & Discrimination
- Regulatory Enforcement & Compliance

Today's Talk

1. Managing Employees Lawfully
2. Anti-discrimination Policies and Practices
3. Record Retention Guidelines and Privacy Considerations

1. Managing Employees Lawfully

1.1 Contractual Bonus vs Discretionary Bonus

1.2 Duty of Fidelity and Fiduciary Duties

1.3 Duty of Confidentiality During and Post Employment

1.4 Restraint of Trade Clauses, Restrictive Covenants and Non-Competition Clauses

1. Managing Employees Lawfully

1.1 Contractual Bonus vs Discretionary Bonus

Is bonus, share option or performance incentive scheme **contractual** or **discretionary**?

Even if the bonus scheme is described as “discretionary”, is it to be measured or assessed against some objective criteria or targets?

1. Managing Employees Lawfully

Case 1: Wong Huey Lan v Colgate-Palmolive (HK) Ltd. [2002] HKCU 296

Facts:

1. The claimant employee (**Employee**) was employed by the defendant employer (**Employer**) from August 1996 to June 2000.

2. After she was laid off, dispute arose as to her entitlement under the employer's Local Employees Incentive Plan (**LEIP**).

3. The Employee commenced proceedings in the Labour Tribunal. The Presiding Officer decided in the Employee's favour and awarded her the sum of HK$15,857.

4. The Employer appealed.

1. Managing Employees Lawfully

Case 1: Wong Huey Lan v Colgate-Palmolive (HK) Ltd. [2002] HKCU 296

Court of First Instance ("CFI"):

1. The CFI was asked to determine the nature of annual bonuses which was described as "discretionary".

2. Under the bonus scheme, annual bonuses were calculated based on the employees' achievement of operating targets. It was held that the scheme operated by the Employer was **not purely discretionary** since the discretion could only be exercised by the Employer in relation to **clearly objective targets**.

3. Under the bonus scheme, the Employer was liable to pay annual bonuses to its employees when the employee had achieved the objective targets. Thus, even if the annual bonuses were described as "discretionary", it was in fact contractual in nature.

1. Managing Employees Lawfully

Case 1: Wong Huey Lan v Colgate-Palmolive (HK) Ltd. **[2002] HKCU 296**

Deputy High Court Judge Lam (as he was then) at §17:

> "*In the end, despite the able arguments of [D's counsel], I am of the view that* ***the payment under the LEIP could not be regarded as payable only at the discretion of the Respondent.*** *If the Respondent did not set an operating target or set a wholly unrealistic target, that decision could be set aside by the court. If the Respondent did not assess the performance of an employee rationally, properly or in good faith, again that assessment could be challenged and reviewed by the court. Likewise, if the Respondent withdrew the plan without proper basis, that decision would be void. …*"
> (emphasis added)

1. Managing Employees Lawfully

Case 1: Wong Huey Lan v Colgate-Palmolive (HK) Ltd. **[2002] HKCU 296**

> "*Whilst the operation of the plan calls for certain judgment on the part of the Respondent,* ***it does not have an unfettered discretion in the matter****. The Respondent is contractually answerable to the employee with regard to the payment under the plan. It would be more accurate to describe the payment as a contractual benefit, the calculation of which involves some exercise of discretion on the part of the employer, rather than as a discretionary benefit pursuant to a contractual formula.*" (emphasis added)

1. Managing Employees Lawfully

Case 2: Tadjudin Sunny v Bank of America, National Association (unrep., CACV 12/2015, 20 May 2016)

Facts:

1. The Employee was an analyst at Bank of America from 2000 to 2007. Her employment contract provided that either party may terminate the employment by giving the other party one month's notice or by payment in lieu of notice.

2. She was eligible to be considered for a discretionary bonus, **subject to** her being in **employment** with the Bank at the time bonus payments were made. She received bonuses every year until 2006. The Bank terminated her employment by giving one month salary in lieu of notice in August 2007, prior to the bonus payment date. As a result, she received no bonus or pro-rata bonus for that year.

1. Managing Employees Lawfully

Case 2: Tadjudin Sunny v Bank of America, National Association **(unrep., CACV 12/2015, 20 May 2016)**

3. At CFI, the Employee claimed damages for wrongful termination of employment by the Bank with the intention of depriving her from performance bonus in 2007. Her claim was based on the **implied terms of (a) anti-avoidance**, where the Bank should not exercise its right to terminate her employment in order to avoid her from being eligible for bonus; and **(b) mutual trust and confidence**, where the Bank should not act in a manner contrary to this term. The parties disputed the existence of the implied term of anti-avoidance.
4. CFI found in favour of the Employee. The Bank should be aware of the fact that she was eligible the performance bonus in 2007. The Bank dismissed her prior to the bonus payment was acting in **bad faith**.
5. The Bank appealed to the Court of Appeal ("**CA**").

1. Managing Employees Lawfully

Case 2: Tadjudin Sunny v Bank of America, National Association **(unrep., CACV 12/2015, 20 May 2016)**

Held:

1. CA rejected the Bank's submission that there was no scope for **implied term of anti-avoidance in the employment contract** and ruled that Part VIA of the EO does not provide for a comprehensive regime of protection against "unfair" dismissal generally and therefore there was scope to imply additional protections at common law.

2. The Bank failed to exercise the right to terminate the employment contract in good faith. CA upheld CFI's ruling that the Employee's manager dismissed her in bad faith by imposing a performance improvement plan specifically engineered to result in her dismissal.

1. Managing Employees Lawfully

***Case 2: Tadjudin Sunny v Bank of America, National Association* (unrep., CACV 12/2015, 20 May 2016)**

3. The following five conditions must be satisfied before a term can be implied into a contract:

   (a) it must be reasonable and equitable;

   (b) it must be necessary to give business efficacy to the contract, so that no terms will be implied if the contract is effective without it;

   (c) it must be so obvious that "it goes without saying";

   (d) it must be capable of clear expression; and

   (e) it must not contradict any express term of the contract.

1. Managing Employees Lawfully

***Case 2: Tadjudin Sunny v Bank of America, National Association* (unrep., CACV 12/2015, 20 May 2016)**

4. The Employee was employed in a department that operated in a highly competitive environment in relation to both business and talents. The express purpose of the performance bonus was to compete for business and talents, which was of particular relevance to the employees working for the Bank.

5. The performance bonus attracted and retained talents, which also gave employees the motivation to perform so as to maximize the Bank's profits and in return the employees who achieved more would be rewarded a higher bonus and recognition. It formed a major part of the remuneration of employees working in the Employee's department and **she had the right to be eligible for the bonus programme**, which constituted an important benefit for her and an integral part of her remuneration package.

1. Managing Employees Lawfully

***Case 2: Tadjudin Sunny v Bank of America, National Association* (unrep., CACV 12/2015, 20 May 2016)**

6. The anti-avoidance provision was **necessary** in order to give effect to the **common and reasonable expectation** of both the Bank and the Employee that the Bank could not exercise the power of termination in order to avoid the Employee being eligible for the performance bonus.

7. If there was no anti-avoidance term, the Employee's contractual right for the performance bonus would become illusory and could be easily taken away by the employer by exercising the right of termination.

1. Managing Employees Lawfully

Takeaway 1

- Employers and employees are subject to the implied term of mutual trust and confidence under all employment contracts. They must act in good faith towards each other.

- "Anti-avoidance" term is implied in employment contract at common law. Employers cannot dismiss employees in bad faith for the purpose of depriving them of a benefit.

- Whilst employers are entitled to dismiss an employee without cause in accordance with the contract, but (the CA, citing ***Wallace v United Grain Growers Ltd***, noted that) employers should be "*honest with the employee and refrain from untruthful, unfair or insensitive conduct*".

1. Managing Employees Lawfully

1.2 Duty of Fidelity and Fiduciary Duties

- All employees owe duty of fidelity to their employers.
- All directors owe fiduciary duties to their companies.
- What about senior executives or employees who are not directors of their employer companies? Do they owe fiduciary duties to their employers?

1. Managing Employees Lawfully

What is Duty of Fidelity?

Duty of fidelity (and sometimes referred to as "duty of good faith" or "duty of loyalty") is **implied** in all contracts of employment by the common law.

Broadly includes:

- duty not to compete with the employer; and
- duty of confidentiality.

1. Managing Employees Lawfully

What is Fiduciary Duty

A fiduciary relationship is a relationship of **trust and confidence**.

A fiduciary owes a another person (beneficiary) fiduciary duties and is bound by (1) **no-conflict rule** and (2) **no-profit rule**.

Fiduciary duties generally include:

- duty to act in good faith;
- duty to avoid conflict of interests, that is, between his personal interest and the company/beneficiary's interest;
- duty not to make secret profits; and
- duty to exercise powers for proper purposes.

1. Managing Employees Lawfully

Who are fiduciaries?

- Directors

- Whether an employee owes fiduciary duties to his employer depends on the circumstances, the employee's role and responsibilities:
  - In general, an employee may owe fiduciary duties to his employer in relation to the parts of his job where the employer has minimal control over the employee's actions and decisions, and relies on the employee to make such decisions in the employer's best interest.

1. Managing Employees Lawfully

***Case 3: HMM (Hong Kong) Ltd v Ma Chun Kit* [2022] HKCFI 1153**

When assessing whether an employee owes fiduciary duty to an employer, the CFI in ***HMM*** followed the principles set out in ***Leader Screws Manufacturing Company Limited v Huang Shunkui*** [2021] HKCFI 141, at paras 46 to 49:

1. An employment relationship, in itself, does not attach fiduciary duties.

1. Managing Employees Lawfully

***Case 3: HMM (Hong Kong) Ltd v Ma Chun Kit* [2022] HKCFI 1153**

2. Fiduciary duties are likely to attach to an employment relationship where one person is in a relationship with another that gives rise to a **legitimate expectation**, which equity will recognize, that the fiduciary will not utilize his or her personal position in such a way which is adverse to the principal's interests. That expectation is assessed **objectively**, so it is not necessary for the principal to subjectively harbour the expectation, nor for the person alleged to be a fiduciary to subjectively consider himself to be undertaking fiduciary duties.
3. Much depends on the **employee's role and function**.
4. An employee **entrusted** with the **company's money** and diverts company money to his own benefit, is likely to owe fiduciary duties in relation to the money, even if he is a junior employee.

1. Managing Employees Lawfully

***Case 3: HMM (Hong Kong) Ltd v Ma Chun Kit* [2022] HKCFI 1153**

In ***HMM***, the CFI confirmed that:

> "*While an employment relationship does not automatically import fiduciary relations, a* ***senior employee*** *or* ***manager****, depending on his role and function, can be held to owe fiduciary duties to the employer when carrying out those duties. Where an employee is* ***entrusted with the company's money and diverts it for his own benefit****, he would likely be in breach of the fiduciary relations.*" (emphasis added)

1. Managing Employees Lawfully

Why is it important to distinguish whether an employee was in breach of a contractual duty as opposed to a fiduciary duty?

- Breach of a contractual duty (under his employment contract):

  → damages

- Breach of a fiduciary duty:

  → an account of profits made by the employee (not assessed by reference to the loss suffered by the employer but the employee's gains from breach of fiduciary duty)

1. Managing Employees Lawfully

***Case 4: South China Media Ltd & Ors v Kwok Yee Ning & Ors* [2018] HKDC 194**

Facts:

1. Plaintiffs were a holding company and its two subsidiaries. They claimed against Ms. Kwok (**Employee**), a former employee, for breach of (1) contract (a letter of undertaking where the Employee agreed not to solicit any customer for a period of 12 months from the termination of her employment) and (2) fiduciary duties.

2. The Employee was employed by P2 (**Employer**), a management service company and P1's subsidiary, as the "advertising director". She was primarily responsible for the advertising business of a magazine called Whiz-Kids Express Weekly (**Magazine**) published by P3, also P1's subsidiary.

1. Managing Employees Lawfully

***Case 4: South China Media Ltd & Ors v Kwok Yee Ning & Ors* [2018] HKDC 194**

3. D4 was the Employee's husband ("**Husband**"). D2 and D3 were companies controlled by the Husband. He was the manager of D2, and the founder and a former director of D3.
4. Ps alleged that the Employee breached her fiduciary duties by:
   (1) allowing unauthorized use of the logo and name of the Magazine in various promotional materials free-of-charge;
   (2) diverting Ps' business opportunities away to D2; and
   (3) soliciting the business of Ps' customers after termination of her employment in breach of a non-solicitation clause in a letter of undertaking.
5. Ps also sued D2, D3 and the Husband on the grounds that they had dishonestly assisted the Employee in breaching her fiduciary duties and unlawfully procured her in breaching the letter of undertaking.

1. Managing Employees Lawfully

***Case 4: South China Media Ltd & Ors v Kwok Yee Ning & Ors* [2018] HKDC 194**

Held:

1. Although the Employee was **not** formally appointed as a company director of any of the plaintiffs, she was a ***de facto* director** of P3 at all material times prior to her resignation by reason of her role and responsibilities she performed for P3. The Employee (a) held the title of "advertising director" and presented herself to clients as P3's "advertising director"; and (b) had the authority to negotiate and enter into contracts on behalf of P3.

2. Even if the Employee was not a *de facto* director, she had undertaken to act in P3's interests which would give rise to a **relationship of trust and confidence**. She was therefore a **fiduciary** of P3 and as such **owed fiduciary duties** to P3.

1. Managing Employees Lawfully

***Case 4: South China Media Ltd & Ors v Kwok Yee Ning & Ors* [2018] HKDC 194**

3. There was overwhelming evidence against the Employee that she had breached her fiduciary duties owed to P3. For example, the Employee diverted P3's business opportunities to D2.

4. The Employee acted in breach of her fiduciary duties owned to P3 in that she:

   (1) failed to act with single-minded loyalty to P3, and failed to act in good faith;

   (2) acted for the benefit of a third person without the informed consent of her principal, P3; and

   (3) placed herself in a position of conflict, since her duty to act in the best interest of P3 conflicted with her interest in the Husband and D2.

1. Managing Employees Lawfully

***Case 4: South China Media Ltd & Ors v Kwok Yee Ning & Ors* [2018] HKDC 194**

5. The Husband and D2 had acted dishonestly in assisting the Employee in breaching her fiduciary duties.
6. The Court found that:
   (a) the Employee was in breach of the non-solicitation clause in the letter of taking; and
   (b) the Husband and D2 were guilty of procuring the Employee's breach of the non-solicitation clause.
7. The Court ruled in favour of the plaintiffs awarded equitable compensation and damages to the plaintiffs for their loss of business opportunities and profits.

1. Managing Employees Lawfully

Takeaway 2

- An employment relationship does not automatically give rise to fiduciary relations.
- Senior officers, who are not formally appointed as a director, may be considered as a fiduciary once they are handed key responsibilities and/or assume certain authorities of a director that would give rise to a relationship of trust and confidence.
- Fiduciary duties are likely to attach to an employment relationship where there is a legitimate expectation that the employee will not use his position that adversely affects the employer's interest.

1. Managing Employees Lawfully

Takeaway 2

- This expectation is to be assessed objectively and much depends on the employee's role and function.
- It is necessary for employer to look at what senior officers have actually done to consider whether they have assumed the role and responsibilities of a director.
- Employers may claim against senior employees on the basis of breach of fiduciary duties regardless of:
  - whether there is any express term in their employment contracts stating that they owe such duties; or
  - whether they honestly believe that they were not acting in the capacities of directors.

1. Managing Employees Lawfully

Takeaway 2

- An employee may owe fiduciary duties to the employer in relation to parts of his job, where the employer has minimal control over his actions and decisions, and has to rely on the employee to make decisions in the employer's best interest. This is particularly the case where an employee is entrusted with company's money and diverts company money to his own benefit.
- Remedies available for a breach of contractual duty by an employee (for example, breach of employment contract or duty of fidelity) are different from a breach of fiduciary duties.

1. Managing Employees Lawfully

Takeaway 2

- Generally, an employer will only be able claim damages (i.e. monetary compensation) that they have suffered from employee's breach of contractual duties. However, if the employee concerned owes fiduciary duties to the employer and has breached such duties, the employer may claim equitable relief and for account of profits made from such breaches. In other words, the employers will have the options of not just going after the loss he suffered but the employee's gains from breach of fiduciary duties.

1. Managing Employees Lawfully

1.3 Duty of Confidentiality During and Post Employment

During Employment: Duty of fidelity

- The employee is under an implied duty of fidelity during the term of the employment contract. The extent of the duty varies according to the nature of the employment contract.
- A general implied term not to misuse confidential information belonging to the employer during employment.
- During employment, the employee's duty of confidentiality attaches to all kinds of information learned in the course of employment, except for information that is trivial or in the public domain.

1. Managing Employees Lawfully

1.3 Duty of Confidentiality During and Post Employment

Post Employment

After the employment ends, the only information capable of being protected by express or implied restriction is information that is a **trade secret** or **its equivalent**.

1. Managing Employees Lawfully

Information gained during employment

Under common law, information gained by an employee in the course of his employment may be categorised into three classes, namely:

1. information which is so easily accessible to the public that an employee is at liberty to impart it to anyone during his employment and afterwards;

2. confidential information which he cannot use or disclose during his employment without breaching his duty of fidelity to his employer, but which, in the absence of any restrictive covenant, he is at liberty to use post-employment; and

3. specific trade secrets which he is not entitled to use either during or after his employment.

1. Managing Employees Lawfully

What information is an ex-employee not entitled to use post employment?

Faccenda Chicken Ltd v Fowler [1987] 1 Ch 117 was another case where the plaintiff did not have the protection of any restrictive covenant. The claim was again based on breach of confidence.

The judgment of the English Court of Appeal highlighted the difference between (1) the **duty of fidelity** owed by an employee whilst the employment subsisted and (2) the duty of **implied duty of confidence** owed by an ex-employee to his former employer.

On the facts of the case, it was held that the sales information and information relating to prices were not trade secret subject to protection under the latter duty.

1. Managing Employees Lawfully

What information is an ex-employee not entitled to use post employment?

Faccenda Chicken

> "*It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets, though the secrecy of some information may be only short-lived.*"

1. Managing Employees Lawfully

What information is an ex-employee not entitled to use post employment?

The English Court of Appeal identified the following factors as being relevant to determine whether the information could be protected:

1. the nature of the employment;
2. the nature of the information itself;
3. whether the employer impressed on the employee the confidentiality of the information; and
4. whether the information can be easily isolated from other information that the employee is free to use or disclose.

1. Managing Employees Lawfully

What information is an ex-employee not entitled to use post employment?

In ***Lansing Linde Ltd v Kerr*** [1991] 1 All ER 418, Staughton LJ regarded it as a problem of defining what are trade secrets and His Lordship's preferred view was:

> "*It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to* ***some confidential information*** *which would not ordinarily be called a trade secret.*" (emphasis added)

1. Managing Employees Lawfully

What information is an ex-employee not entitled to use post employment?

In ***Lansing Linde***, Butler-Sloss LJ said,

> "*Finally, I wish to make a brief comment whether the information known to the respondent was capable of being treated as 'trade secrets'. The starting point is Herbert Morris. But we have moved into the age of multinational businesses and worldwide business interests. Information may be held by very senior executives which, in the hands of competitors, might cause significant harm to the companies employing them.* ***'Trade secrets'*** *has, in my view, to be interpreted in the* ***wider context of highly confidential information of a non-technical or non-scientific nature****, which may come within the ambit of information the employer is entitled to have protected,* ***albeit for a limited period****.*" (emphasis added)

1. Managing Employees Lawfully

What is trade secret or its equivalent?

A **trade secret** or **its equivalent** must be information:

1. used in a trade or business;
2. is confidential, i.e. not already in the public domain;
3. can be easily isolated from other information that the employee is free to use so that any man of average intelligence and honesty would think it is improper to use the information at the disposal of his new employer;
4. which, if disclosed to a competitor, would be liable to cause real or significant harm to the owner; and
5. which the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication or otherwise impress upon the employee the confidentiality of the information.

1. Managing Employees Lawfully

***Case 5: Kuoni Travel (China) Ltd v Kelly Frances Richards & Ors* (HCA 1265/2006, 28 September 2006)**

Facts:

1. P had been carrying on travel business. The four Ds were P's former employees.

2. Subsequent to the termination of their employment with P, Ds joined a competitor.

3. P discovered Ds' breaches of duty involving misuse of client data which resulted in P's business and clients being diverted.

4. The client data were essential and contained clients' names, their contact particulars and information of the travel products that clients had purchased.

1. Managing Employees Lawfully

***Case 5: Kuoni Travel (China) Ltd v Kelly Frances Richards & Ors* (HCA 1265/2006, 28 September 2006)**

Held:

1. The client data were used in P's trade or business.
2. If the client data were disclosed to a competitor, it would cause P real or significant harm.
3. P had impressed upon Ds the confidential nature of the client data and the very serious attitude which the P attach to preserving their confidentiality:
   (a) the client data were stored in P's computer network which may be accessed by Ds with the use of a password; and
   (b) P issued a Personnel Manual to each of the Ds, which provided that "*all data are considered confidential unless otherwise stated*", set out a code of conduct regarding access to the computer network and use of the data stored therein, and emphasized the importance of security, confidentiality, that the data may only be used for P's purpose and may not be used for the employee's personal gain.

1. Managing Employees Lawfully

***Case 5: Kuoni Travel (China) Ltd v Kelly Frances Richards & Ors* (HCA 1265/2006, 28 September 2006)**

4. The client data were clearly and readily separable from the employee's general knowledge or information acquired in the course of his employment, which he is free to use or disclose after the employment ceases.

   (a) The client data were stored in the P's computer network which Ds accessed occasionally for the purpose of their work.

   (b) Unless Ds deliberately memorized the client data relating to some particular clients or downloaded the data from the computer network, they would easily have forgotten about the information.

   (c) Clearly, the information was separable from the bulk of information or experience which Ds were free to use after the termination of their employment with P.

1. Managing Employees Lawfully

***Case 5: Kuoni Travel (China) Ltd v Kelly Frances Richards & Ors* (HCA 1265/2006, 28 September 2006)**

5. In the light of the security system used by P to protect its data and the provisions in the Personnel Manual, a man of average intelligence and honesty would think it improper to use the client data at the disposal of his new employer.

6. It is clear that P had limited the dissemination of the client data and had impressed upon its employees the confidentiality of the client data.

7. The client data were trade secrets or equivalents of trade secrets, in respect of which P was entitled to protection.

1. Managing Employees Lawfully

Takeaway 3

- Duty of confidentiality during employment and post employment are very different.
- Use restrictive covenants to protect confidential information against former employees.
- Only trade secret or its equivalent may be protected by post employment duty of confidentiality.

1. Managing Employees Lawfully

1.4 Restraint of Trade Clauses, Restrictive Covenants and Non-Compete Clauses

The relevant legal principles as to the enforceability of post-employment restraints in Hong Kong are set out in the judgment of The Honourable Mr. Justice Lam[1] (as he was then) in ***Natuzzi SpA v De Coro Ltd*** (unreported, HCA 4166/2003, [2006] HKEC 1077).

The Honourable Mr. Justice Johnson Lam Man-hon is a Permanent Judge of the Hong Kong Court of Final Appeal. He was appointed on 30 July 2021.

1. Managing Employees Lawfully

Case 6: Natuzzi SpA v De Coro Ltd (unreported, HCA 4166/2003, [2006] HKEC 1077)

CFI:

1. No employer is entitled to make use of a restrictive covenant to protect himself against **competition *per se***. A covenant against competition *per se* is **not reasonable** and accordingly **void**.

2. An employer is not entitled to prevent his ex-employee from using the skill and knowledge in his trade or profession which he learnt in the course of his employment. Nor is he entitled to prevent his ex-employee from using in the service of some person other than the employer the general knowledge the employee has acquired of the employer's scheme of organization and methods of business.

1. Managing Employees Lawfully

Case 6: Natuzzi SpA v De Coro Ltd (unreported, HCA 4166/2003, [2006] HKEC 1077)

3. An employer is entitled to make use of a restrictive covenant to protect his interests in his trade secrets and in his trade connections. However, the restrictive covenant, to be valid, must afford **no more than adequate protection** to the party in whose favour it is imposed. It must be reasonable not only in reference to the **interests of the parties concerned**, it must also be reasonable in reference to the **interests of the public**.
4. The onus of proving the reasonableness of the restriction rests on the party who seeks to enforce the restriction. The more onerous the restriction, the heavier the weight of the onus.

1. Managing Employees Lawfully

Restraint of Trade Clauses, Restrictive Covenants and Non-Compete Clauses

- The courts will refuse to enforce such terms where they are excessive in terms of duration, scope or geographical restriction. The courts will assess each case on its own facts and circumstances.

- Court will consider the following factors:

  - nature of the employer's business and nature of the market;
  - duration of the restraint;
  - geographical extent of the restraint;
  - nature and extent of the activities restrained;
  - the employee's position and seniority within the employer's business; and
  - the nature of the employee's relationships with clients and customers.

1. Managing Employees Lawfully

Case 7: Midland Business Management Ltd & Anor v Lo Man Kui (No 2)
[2011] 2 HKLRD 667
Facts:

1. D was an employee of Midland Business Management (P1) and was seconded to work at Midland Realty (P2), a real estate agency. Prior to leaving his employment, D was an assistant sales director in charge of certain real estate agency branches targeting wealthy home owners, including the Peak, Repulse Bay, Deep Water Bay and Bel-Air.

2. After leaving Midland Realty, D joined Centaline Property Agency, a competitor of Midland Realty. Within less than 2 months since D's resignation, 7 Midland Realty estate agents responsible for handling properties in the areas D was in charge resigned and joined Centaline.

1. Managing Employees Lawfully

Case 7: Midland Business Management Ltd & Anor v Lo Man Kui (No 2)
[2011] 2 HKLRD 667

3. The plaintiffs applied for an interlocutory injunction against D to enforce a non-solicitation clause in D's employment contract.

4. The non-solicitation clause in issue

> "*For a period of 6 months immediately following the termination of this Agreement for whatever reasons, the Employee shall not approach and solicit* ***any other current employee*** *of the Company and/or any member of the Midland Group to join him or other persons in any business undertaking or estate agency in which the Employee is interested or concerned whether in the capacity as a director, partner, principal, owner, shareholder, consultant, agent, sub-agent, servant, employee or otherwise.*" (emphasis added)

1. Managing Employees Lawfully

Case 7: Midland Business Management Ltd & Anor v Lo Man Kui (No 2)
[2011] 2 HKLRD 667
CFI:

1. The court declined to grant an interlocutory injunction to enforce a non-solicitation clause which extends to all the plaintiffs' staff, regardless of their importance, and to employees who had joined the plaintiffs after the defendant had already left his employment.

2. The natural meaning of "any other current employee" in the context of the clause refers to employees of Midland Realty when D approaches or solicits them. In relation to the kind of employee identified, there was no express qualification as to the subject of approach or solicitation other than being a current employee.

1. Managing Employees Lawfully

Case 7: Midland Business Management Ltd & Anor v Lo Man Kui (No 2)
[2011] 2 HKLRD 667

3. Those who join in any business undertaking of estate agency can serve different functions and there are administrative staff working for the Midland Realty who are neither estate agents nor sales persons that would be included in the meaning of "current employee".

4. Midland Realty was unable to explain what legitimate interest they had in preventing non estate agent employees from being solicited and an indiscriminant anti-poaching restraint cannot be justified.

1. Managing Employees Lawfully

Case 7: Midland Business Management Ltd & Anor v Lo Man Kui (No 2)
[2011] 2 HKLRD 667
Will the court redraft the non-solicitation clause to make it enforceable for the employer?

In the ***Midland*** case, CFI said "No" and cited Chitty on Contracts 30th Edn Vol. 1 para. 16-105:

> "*The court will **not imply a term** in order to save a covenant restraining an employee's post-employment conduct. **Nor will the court re-write** a covenant in restraint of trade where the contract provides that the covenant, if unenforceable, should be rewritten with such minimum amendment as renders it enforceable.*" (emphasis added)

1. Managing Employees Lawfully

Takeaway 4

- A restrictive covenant may be enforceable if the employer (who has the burden of proof) can establish that it serves to protect (1) its legitimate interest (e.g. qualification as to subject of approach or solicitation other than being a "current employee"); and (2) it is reasonably necessary in the circumstances (e.g. with sufficient restriction/limitation in the nature and extent of the activities restrained).

- The employer has the burden to prove what kind of legitimate business interest it has that the restrictive covenant seeks to protect, and justify the scope of the restraint.

1. Managing Employees Lawfully

Takeaway 4

- Restrictive covenants should be tailor-made to the particular employee or class of employees.
- In drafting a restrictive covenant, narrower is often better.
- Express qualification to the subject of the clause should be added.
- The court will not “fix” an unenforceable restrictive covenant.

2. Anti-discrimination Policies and Practices

The four anti-discrimination ordinances

- Sex Discrimination Ordinance (Cap. 480) ("**SDO**");
- Disability Discrimination Ordinance (Cap. 487) ("**DDO**");
- Family Status Discrimination Ordinance (Cap. 527) ("**FSDO**"); and
- Race Discrimination Ordinance (Cap. 602) ("**RDO**").

These ordinances prohibit discrimination against a person on the grounds of **sex**, **marital status**, **pregnancy**, **disability**, **family status**, and **race**. These ordinances are applicable in different areas, including employment.

2. Anti-discrimination Policies and Practices

Sex Discrimination Ordinance

- SDO prohibits discrimination on the ground of:
  - Sex
  - Marital Status (i.e. state of being single, married, separated, divorced or widowed)
  - Pregnancy
- Applies equally to men and women
- Currently does not cover discrimination on the basis of sexual orientation

2. Anti-discrimination Policies and Practices

Disability Discrimination Ordinance

DDO prohibits discrimination on the ground of:

- A person's disability
- Disability of an associate (e.g. spouse, relative, person living together on genuine domestic basis) of that person

2. Anti-discrimination Policies and Practices

Family Status Discrimination Ordinance

- Family status means the “status of having responsibility for the care of an immediate family member”

- Immediate family member means a person who is related to the person by blood, marriage, adoption or affinity

2. Anti-discrimination Policies and Practices

Race Discrimination Ordinance

RDO prohibits discrimination on the ground of:

- A person's race
- Race of an associate (e.g. spouse, relative, person living together on genuine domestic basis) of that person

2. Anti-discrimination Policies and Practices

DEIB

- Traditionally "DEI" has been the focus for an inclusive workplace
- **D**iversity – presence of differences
- **E**quity – fair treatment and equal opportunities
- **I**nclusion – creating a welcoming environment
- The new letter "**B**" – **B**elonging means creating an environment where everyone feels deeply valued and an integral to the organization

2. Anti-discrimination Policies and Practices

Where are we now?

- The four anti-discrimination ordinances currently do not cover some other common discriminatory grounds, for example:
    - sexual orientation discrimination
    - age discrimination
- The Equal Opportunities Commission ("**EOC**") has issued guidelines on eliminating discrimination on the basis of sexual orientation discrimination and age discrimination but they are not legally binding.

2. Anti-discrimination Policies and Practices

Where are we now?

- The RDO does not provide any protections from discrimination on grounds of nationality, citizenship or residency status.
    - e.g. discrimination against “mainlanders” is unlikely to amount to racial discrimination as they are not a different race but only of a different residency status.

2. Anti-discrimination Policies and Practices

Where are we now?

- The United Nation Convention on the Rights of People with Disabilities (applicable to Hong Kong) requires all member states to provide reasonable accommodation to people with disabilities.

- Currently no legal duty to provide accommodation for people with disabilities (e.g. facilities for access to premises).

2. Anti-discrimination Policies and Practices

Direct discrimination

Two-part test:

(1) The **"Comparator"** question: Whether the discriminator has treated the complainant less favourably than the discriminator treats or would treat others?

(2) The **"Causation"** question: Whether the less favourable treatment was on a prohibited ground?

M v Secretary for Justice [2009] 2 HKLRD 298

2. Anti-discrimination Policies and Practices

Indirect discrimination

Indirect sex occurs when a condition or requirement, which is not justifiable, is applied to everyone but in practice adversely affects persons of a particular sex or marital status, those who are pregnant, those who are breastfeeding, disability, family status, or race.

2. Anti-discrimination Policies and Practices

Victimisation

Victimisation occurs where a person treats another person less favourably on the basis of any of the following reasons:

(1) because that the person has brought proceedings under the anti-discrimination ordinances;

(2) because the person has given evidence or information in connection with discrimination proceedings;

(3) because the victimised person has otherwise done anything under or by reference to one of the anti-discrimination ordinances; and/or

(4) the victimised person has alleged that the discriminator or any other person has committed discrimination.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

Facts:

1. Around the time the Claimant informed her then employer of her pregnancy, the employer company allegedly made threatening remarks to pressure her to resign.

2. The employer also made work burdensome for her by re-posting her to another working location and installing a “clock-in” machine for all employees.

3. She then had a miscarriage and required an operation and allegedly asked her colleague to inform the employer company of it.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

4. Shortly after the Claimant resumed work, the company gave her one month's notice of termination of employment allegedly due to her poor performance.

5. The employer company refused to give severance payment or proof of employment to the Claimant because she had filed complaints to the EOC.

6. The Claimant brought proceedings against the employer company on the ground of (1) sex discrimination, (2) disability discrimination, and (3) victimization.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

Court's Decision under (1) sex discrimination:

- The employer company's threatening remarks and exerting pressure on the pregnant Claimant to resign amounted to treating her less favourably than someone who was not pregnant.
- The termination of the Claimant's employment on the ground of her pregnancy was unlawful.
- Installing a "clock-in" machine was not unlawful discrimination because other employees also had to clock-in. No evidence showing that the Claimant faced more difficulty in meeting the clock-in requirement.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

Court's Decision under (1) sex discrimination:

- Requesting the Claimant to work at another location was not supported by evidence as less favourable treatment.
- The employer company's various enquires about the Claimant's pregnancy was not unlawful discrimination because the concerns were legitimate and understandable.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

Court's Decision under (2) disability discrimination:

- The Claimant's miscarriage and the physical ailments subsequent to her surgery was a "disability" within the Disability Discrimination Ordinance's broad definition of "disability".

- However, the employer company was not liable for disability discrimination because there was no evidence showing the employer was aware of the Claimant's disability.

2. Anti-discrimination Policies and Practices

***Case 8: Tsun Sau Ching v Cheung Hung Aluminum Decoration Engineering Company Limited* [2020] 2 HKC 146**

Court's Decision under (3) victimization:

- The employer company's refusal to give the Claimant severance payments and proof of employment because of her complaints to the EOC was unlawful discrimination by way of victimization.

2. Anti-discrimination Policies and Practices

Vicarious liability of employers

> "*Anything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.*"

* It may be SDO, DDO, FSDO or RDO

2. Anti-discrimination Policies and Practices

Vicarious liability of employers

- Employer liable for any discrimination act committed by its employee
- Only needs to prove the discrimination act took place in the course of employment
- The knowledge or approval of employer is irrelevant
- It is unlawful for a person who is a **workplace participant** to harass another person who is also a workplace participant at a workplace of them both.

2. Anti-discrimination Policies and Practices

Vicarious liability of employers

"Workplace participant" includes:

- an employee,
- an employer,
- a contract worker,
- the principal of a contract worker,
- commission agent,
- the principal of the commission agent,
- partner in a firm,
- **an intern** and
- a volunteer.

2. Anti-discrimination Policies and Practices

Defence available to employer

"*it shall be a defence for [the employer] to prove that he took such steps as were* ***reasonably practicable*** *to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.*"

2. Anti-discrimination Policies and Practices

Case 9: Alice Li Miu Ling v Hong Kong Polytechnic University **[2013] 3 HKC 221**

Facts:

1. The plaintiff had been employed as an assistant professor of the defendant, Poly U., between 1992 and 1999.

2. Her contract with the defendant was not renewed in 1999.

3. She alleged that she was a victim of sexual harassment by her supervisor, then acting head of department. It was also alleged that her supervisor caused her to lose her employment with the defendant.

2. Anti-discrimination Policies and Practices

Case 9: Alice Li Miu Ling v Hong Kong Polytechnic University **[2013] 3 HKC 221**

4. The plaintiff claimed against the defendant for sexual harassment and victimisation under the SDO.

5. The plaintiff alleged the defendant was in breach of s.46(1), SDO for being the employer of the person who allegedly sexually harassed the plaintiff.

2. Anti-discrimination Policies and Practices

Case 9: Alice Li Miu Ling v Hong Kong Polytechnic University **[2013] 3 HKC 221**

Court's decision:

1. The plaintiff's account of sexual harassment was uncorroborated.

2. No contemporaneous documentary evidence in support of the plaintiff's allegations.

3. Even if the alleged acts did take place, the defendant still had the defence of "due diligence" under section 46(3) if it had taken steps as were reasonably practicable to prevent its employee from sexually harassed.

4. The defendant had indeed taken such reasonably practicable steps.

2. Anti-discrimination Policies and Practices

***Case 9: Alice Li Miu Ling v Hong Kong Polytechnic University* [2013] 3 HKC 221**

5. The defendant had introduced a Code of Ethics against discrimination and harassment.
6. The defendant had also established the staff appeal and grievance procedures outlining the complaint procedure for its staff members.
7. The defendant had therefore implemented steps for resolution of complaint should members of its staff have any grievances or complaints against another staff member.
8. The defendant had set up an inquiry panel upon receiving the plaintiff's complaint.
9. The defendant had taken steps as were reasonably practicable to prevent acts of sexual harassment of its employees in compliance of s.46(3), SDO.

2. Anti-discrimination Policies and Practices

Takeaway 5

In relation to employment, it is unlawful to discriminate against another person:

(1) in the arrangements made for determining who should be offered that employment;

(2) in the terms on which the employer offers the person that employment; or

(3) by refusing or deliberately omitting to offer the person that employment.

2. Anti-discrimination Policies and Practices

Takeaway 5

In relation to employment, it is unlawful to discriminate against another person:

(4) in the way employer affords employee access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford access to them;

(5) in the terms of employment afforded; or

(6) by dismissing, or subjecting the employee to any other detriment.

3. Record Retention Guidelines and Privacy Considerations

Personal Data (Privacy) Ordinance

- The PDPO governs the handling of personal data, encompassing the collection, accuracy, retention, use, security, policies and practices, access and correction of personal data.

- Under the PDPO, there are six DPPs. They ensure that personal data must be collected on a fully-informed basis and in a fair manner, that with due consideration towards minimising the amount of personal data collected.

3. Record Retention Guidelines and Privacy Considerations

Personal Data (Privacy) Ordinance

- After it is collected, the personal data must be processed in a secure manner and should only be kept for as long as necessary for the fulfillment of the purposes of using the data.
- Use of the data should be limited to or related to the original collection purpose.
- Data subjects are given the right to access and make correction to their data.

3. Record Retention Guidelines and Privacy Considerations

Key terms and their definitions under PDPO

Term	Definition
Personal Data	Information that relates to a living individual and can be used to identify that individual. It must also exist in a form which access to or processing of is practicable.
Data Subject	The individual who is the subject of the personal data.
Data User	A person who, either alone or jointly with other persons, controls the collection, holding, processing or use of personal data.
Data Processor	A person who processes personal data on behalf of another person (a data user), instead of for his/her own purpose(s). Data processors are not directly regulated under the PDPO. Instead, data users are required to, by contractual or other means, ensure that their data processors meet the applicable requirements of the PDPO.

3. Record Retention Guidelines and Privacy Considerations

Data Protection Principles

DPP	
1. Collection Purpose & Means	Personal data must only be collected for a lawful and fair way, for purpose directly related to a function or activity of the data user. Data subjects must be informed whether it is obligatory or voluntary to supply the data, the purpose of using their data and the classes of person to whom their data may be transferred. Data collected should be necessary and adequate but not excessive.
2. Accuracy & Retention	Practicable steps must be taken to ensure personal data is accurate and not kept longer than necessary to fulfil the purpose of which it is used.
3. Use	Unless the data subject expressly and voluntarily consents, personal data must be used for the purpose for which it is collected or for a directly related purpose.

3. Record Retention Guidelines and Privacy Considerations

Data Protection Principles

DPP	
4. Security	A data user must take all practicable steps to protect the personal data from unauthorised or accidental access, processing, erasure, loss or use.
5. Openness	A data user must take all practicable steps to make personal data policies and practices known to the public regarding the types of personal data held and the data is used.
6. Data Access & Correction	A data subject must be given access to his personal data and to make corrections where the data is inaccurate.

3. Record Retention Guidelines and Privacy Considerations

Code of Practice on Human Resource Management

- A practical guide to the application of the provisions of the PDPO to employment-related personal data
- Draws on the DPP and applies them to management of personal data in the areas of recruitment, current employment and former employees' matters.
- Non-compliance with the Code of Practice will lead to, among others, **presumption** against the employer in any proceedings involving an alleged breach of the PDPO unless there is evidence that the requirements under the PDPO were actually complied with in a different way.

3. Record Retention Guidelines and Privacy Considerations

Recruitment

- An employer should not solicit personal data from job applicants in a recruitment advertisement that provides no identification of either the employer or the employment agency acting on its behalf.

- Recruitment advertisements that directly ask job applicants to provide their personal data should include a statement, as an integral part of the advertisement, informing applicants about the purposes for which their personal data is to be used.

- Personal data collected from job applicants should be adequate but not excessive, and should be relevant to the purpose of identifying suitable candidates. An employer should not collect copy of HKID of an applicant unless and until the individual has accepted an offer of employment.

3. Record Retention Guidelines and Privacy Considerations

Recruitment

- Information may be compiled about a job applicant e.g. by means of security vetting or integrity checking. Such supplementary information should be collected for the purpose of assessing suitability of potential candidates and data collected should be relevant to the nature of the job.

- Personal data concerning the health condition of a candidate may be collected by means of pre-employment medical examination if it directly relates to the inherent requirements of the job, and employment is conditional upon the fulfillment of the medical examination. However, such data should only be collected after the employer has made a conditional offer of employment.

- Personal data of unsuccessful applicants may be retained for a period of up to two years from the date of rejecting applicants and should then be destroyed.

3. Record Retention Guidelines and Privacy Considerations

Current Employment

- Employer may collect additional personal data for the purpose of employment or to fulfill lawful requirements to regulate affairs of the employer.

- On or before collection of personal data, an employer should provide the employee with a Personal Information Collection Statement pertaining to employment, which should inform the employee about purposes for which the data is to be used, the classes of persons to whom the data may be transferred, the rights of the employee to make data access and correction requests, and the name or job title, and address, of the person to whom the employer can make any such request.

3. Record Retention Guidelines and Privacy Considerations

Current Employment

- Information compiled in the process of disciplinary proceedings, performance appraisal or promotion planning should be used for purposes directly related to the process concerned and should not be disclosed for third party unless such party has legitimate reasons to have access.

- Employer should not disclose employment-related data to a third party without obtaining the employees' express and voluntary consent unless disclosure is for purposes directly related to the employment, or such disclosure is required by law or statutory authorities.

3. Record Retention Guidelines and Privacy Considerations

Current Employment

- When employment-related data is transferred or disclosed to a third party, employer should avoid disclosing of data in excess of what is necessary for the purpose of use by third party.

- Employer who engages a third party organisation to perform its employment-related functions must use contractual or other means to ensure that the data transferred to the third party organisations is not kept longer than is necessary for the purpose for which the data was entrusted and is protected against unauthorised or accidental access, processing, erasure, loss or use.

3. Record Retention Guidelines and Privacy Considerations

Former Employees' Matters

- Personal data of a former employee may be retained for a period of up to seven years from the date the former employee ceases to be employed.
- Data may be retained longer if there is a subsisting reason, or the employer is to fulfil contractual or legal obligations.
- Employer must take all practicable steps to ensure only relevant and necessary information of former employee is retained after the employment relationship ends.

3. Record Retention Guidelines and Privacy Considerations

Former Employees' Matters

- In any public announcement regarding leaving employment by the former employee, the employer should take care not to disclose the HKID number of the former employee concerned. Care should also be taken to ensure that no excessive personal data (e.g. reasons for leaving employment) that third parties have no legitimate concern be disclosed in the announcement.

- Employer should not provide a reference concerning a former employee to a third party without first obtaining the employees' express and voluntary consent unless the employer is satisfied that the third party requesting has obtained the prior consent of the concerned employee.

Q & A

Important Notice:

The law and procedure on this subject are specialised and complicated. This presentation is a general outline for reference and cannot be relied upon as legal advice in any individual case.

Thank you.

ONC Lawyers 柯伍陳律師事務所

Michael Szeto 司徒肇基

Partner 合夥人

LLB (Hons) (榮譽)法學士

solutions • not complications

RANKED IN Chambers ASIA PACIFIC 2020 ONC Lawyers

PROFILES HIGHLY RECOMMENDED 2020

Primerus Member

Direct	直線 (852) 3906 9645
Main	電話 (852) 2810 1212
Mobile	手提 (852) 9683 0032
Fax	傳真 (852) 2804 6311
Email	電郵 michael.szeto@onc.hk
Website	網址 www.onc.hk

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong
香港中環康樂廣場8號交易廣場第三期19樓

Suite 504-43, 5/F, West Tower, Shanghai Centre, No. 1376 Nanjing West Road, Jing An District, Shanghai 200040, China
中國上海市靜安區南京西路1376號上海商城西峰辦公樓504-43室(郵編：200040)

Litigation & Dispute Resolution	**訴訟及調解爭議**
Arbitration & Mediation	仲裁及調解
Corporate Fraud	商業詐騙
Complex Commercial Disputes	複雜商業糾紛
Company & Shareholder Disputes	公司及股東糾紛
Regulatory Enforcement	監管執法
Debt Recovery	債務追討

Employment, Privacy and Discrimination	**僱傭、私隱及歧視**
General Employment Advice	一般僱傭諮詢
Data Protection & Privacy	資料保護及私隱
Discrimination	歧視
Employee Disputes & Litigation	僱傭糾紛及訴訟
Preventive Planning and Training	預防措施及培訓
Senior Executives	高級行政人員
Work & Residence Visas	工作及居留簽證

Areas of Practice	**業務範圍**
Arbitration	仲裁
Banking & Finance	銀行與金融
Capital Markets	資本市場
China Practice	中國業務
Corporate & Commercial	公司及商業
Employment, Privacy and Discrimination	雇傭、私隱及歧視
Insolvency & Restructuring	清盤及重組
Insurance & Personal Injury	保險及人身傷亡
Intellectual Property & Technology	智慧財產權及科技
Real Estate	房地產
Securities, Futures & Funds	證券、期貨及基金
Shipping & Logistics	船務及物流
Trust, Wills & Probate	信託、遺囑及遺產處理
Venture Capital & Private Equity	創業及私募投資