

# Arbitration prevails over Labour Tribunal in employee dispute



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## Background

An ex-employee, MAK, initiated legal proceedings against LA alleging that he had not received a discretionary bonus from LA in 2019 and LA had violated the terms of the employment. MAK claimed that he should be awarded the vesting and redemption of unvested deferred share units for the years 2016, 2017 and 2018 which were awarded under various bonus letters.

MAK filed his claims with the Labour Tribunal, the jurisdiction of which was objected by LA. LA asserted that the dispute should be handled by an arbitral tribunal. The Labour Tribunal ordered the dispute to be transferred to the Court of First Instance and LA applied for the proceedings to be stayed pending arbitration.

## Findings

- **Jurisdiction**

Hong Kong's Labour Tribunal has jurisdiction by default on employment issues involving sums of money. However the law in Hong Kong allows arbitration if: i) there are no reasons for not doing so; and ii) if the party interested in arbitration is willing to ensure a fair arbitration process.

The court ruled that the 2019 discretionary bonus claims by MAK were claims for money, while the deferred share units claimed by MAK were not. The discretionary bonus claim was within the Labour Tribunal's jurisdiction, while the redemption of deferred share units was not. As a further consideration, the court deemed it essential that the discretionary bonus was to be calculated in connection with MAK's claim for the deferred share units.

- **Existence of arbitration agreement**

The terms of employment between MAK and LA had confusing language regarding dispute resolution. While the employment agreement mentioned the jurisdiction for disputes to be the courts and tribunals of Hong Kong, the 2016 bonus letter made no mention of any dispute resolution clause. Further, the 2017 and 2018 bonus letters stated that all disputes arising out of the agreement should be referred to a sole arbitrator appointed by LA. MAK had signed the 2017 bonus letter but not the 2018 one.

MAK argued that the arbitration clause within the 2017 bonus letter could not be applicable as it granted LA the power to appoint a sole arbitrator. The court clarified that it is bound by the law to refer the parties to arbitration once a prima facie case of an arbitration clause is established. The court also stated that an arbitrator is bound by the law to act impartially.

The court extended the application of the arbitration clause to the 2016 and 2018 bonus letters as well by applying the principle of *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 (where it was held that a provision of one contract may extend to another contract based on their connections). The subject matter and the language of all 3 bonus letters were essentially the same and had been executed for the employee's rights to the share units. Even though the 2018 letter had not been countersigned, the existence of the arbitration agreement was there in writing.

- **Residual claims**

The court affirmed that MAK's claims to the 2019 discretionary bonus was pursuant to the employment agreement and thus under the jurisdiction of the court. However, the discretionary bonus claim was clearly connected to the deferred share units claim and the interests of parties could be better served by that claim being brought into arbitration as well. It also stated that having the residual claim before the arbitral tribunal would reduce the risk of any inconsistent findings. The court ultimately ordered a stay of the residual claims until the arbitral tribunal of the deferred share units claim was determined.

## **Analysis**

Employers should take heed and ensure that their preferred dispute resolution procedure is consistently and clearly set out in their documents.

The decision demonstrates the pro-arbitration stance of the Hong Kong courts. The court went so far as to order a stay on residual claims even though such claims were expressly under its own jurisdiction.

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