

Employment Law & Practice in China, Andreas Lauffs [Hong Kong, Sweet & Maxwell Asia, 2008, lxxii + 427 pp, hardback, HK\$3500, US\$499] ISBN 978 962 661 325 2

This book is timely, following quickly on the heels of major statutory employment law reforms in China taking effect in 2008.¹ These reforms have proved controversial, attracting widespread criticism, principally from the employers' side, contending that the reforms go too far and that the higher employment standards required by the reforms will be costly and will cause manufacturers to be priced out of the Chinese labour market.² Other criticisms have focused on the generality of the new laws, and the uncertainty as to their effect and application, problems exacerbated by the delay in the issuing of implementing regulations.³ Yet other observers have tried to read a wider meaning into the reforms, as somehow portending new and radical pro-labour policy directions for the China of the future.

A work of this nature cannot and does not purport to address these larger issues. As Dr Lauffs points out, the basic structure and substance of Chinese employment law has been in place for some time and was not repealed by the new laws, which build on the original framework. Hence, this book is important for presenting a picture of employment law in China, as it has developed, and as it currently stands. It does so in clear and concise language, and systematically, according to the major issues one would expect to find in an employment law textbook. The reforms are treated, not as a separate topic but, appropriately, in the context of the particular employment law issue under consideration.

The book will be of particular interest to employers, human resource managers and their legal advisers, as it includes a number of aspects not normally found in a standard employment law textbook, which are of particular relevance to management. In fact, the book's emphasis is less on employee remedies and rights than it is on employer obligations and pitfalls. In that sense the book is more an employer's manual, as suggested not only by occasional clues dropped by the author ("fixed-term contracts are preferable to open-term contracts because it is very difficult for an employer to unilaterally terminate an [open-term] contract"), but by the inclusion of chapters on representative offices, recruitment, mergers and acquisitions, and the like, all relevant in their way, but of greater interest to employers, human resource practitioners and employment law practitioners. Moreover,

¹ Employment Contract Law (1 January 2008); Employment Promotion Law (1 January 2008); and Employment Dispute Resolution Law (1 May 2008).

² See, D. Tsang, "Labour Law Hurting Manufacturers", *South China Morning Post*, 28 May 2008.

³ These were not released until September 2008, too late for consideration in Lauffs' book.

special emphasis is placed on foreign-invested companies and the peculiar issues arising – a useful perspective given that much of the intended readership of an English language employment law text is likely to be foreign-owned companies and their advisers.

The book begins with a succinct and understandable chapter on law-making in the PRC, providing a useful introduction to the historical and political background to PRC employment law and the transition from the “iron rice bowl” to the labour contract system first introduced in 1995, a main feature of which was the requirement of signed written contracts for full-time employees. The labour contract system signaled a move toward a more market-oriented approach to employment that continues to this day.

Chapter two, concerning representative offices, will be of interest to foreign enterprises operating in China. Many foreign enterprises may choose to operate as a foreign-investment enterprise, either with or without a Chinese partner, but for those who choose otherwise the representative office is the minimum presence that the foreign entity must have. Although such an enterprise may hire non-Chinese citizens directly through its overseas parent company, Chinese citizens working for the representative office can only be hired through a labour service company. This chapter provides a useful analysis of the status of representative offices, the restrictions under which they operate, and importantly, the restrictions on employment of Chinese citizens.

Recruitment is an important issue to employers everywhere, but especially so in China given the increasingly competitive market, a shortage of qualified professionals in the rapidly expanding economy, and what the author explains as the peculiar difficulties, given the narrow statutory scope for dismissal, of managing out poor employees. For this reason, affiliates of multinational enterprises may prefer to hire foreign nationals abroad and second them to the PRC subsidiary, a procedure permitted under PRC law, but with pitfalls, which are explained in some detail in chapter three. This chapter outlines recruitment channels and procedures, including the recruitment of Chinese workers to work overseas, the recruitment of overseas workers in China, and compares the various options open to employers. It also contains an important section on the Beijing and Shanghai rules regarding the recruitment of domestic migrant workers, and the *hukou* (household registrations) system that allows some non-residents to work but continues to impose employment restrictions.

Chapter four is of pivotal importance, as it addresses the central topic of the employment relationship and contract. This is very much a developing area, with the 2008 Employment Contract Law building on the 1995 Labour Contract Law and providing improved safeguards for workers and further obligations and restrictions on employers. One feature of the new

law is a bias toward the open-ended contract, a bias designed to achieve greater job security (as explained in chapter 9, the grounds for termination of an open-ended contract are limited under PRC law). Anyone working for the same employer for 10 years or more will be found to be under an open-ended contract, as will a worker whose employment is being renewed following two consecutive fixed term contracts of whatever length. Moreover, where an employer fails to enter into a written contract within one year of the commencement of employment, an open-ended contract will be deemed to exist, triggering increased and probably unintended job security obligations.

This last point leads to another important feature of the new law: the strengthening of the employer's obligation to provide a written contract of employment. The new law requires that for full-time employees, a written contract must be entered into. A failure to do so gives rise to penalties, including the payment of double wages for the period of the breach. The written contract must provide greater detail in the terms of service. A failure to do so also gives rise to penalties. An employment contract must now spell out details such as the job description, term, hours of work, place of work, remuneration, safety provisions, grounds for termination and liabilities for breach. The author explains that even where a written employment contract is not entered into, an arbitration tribunal may nonetheless find a *de facto* employment contract. This raises the thorny distinction, familiar to common law lawyers, between employment and self-employment (independent contracts), also relevant in China. This issue is raised but addressed rather too briefly. It would be interesting to know more about the distinction, the extent to which there is an employer preference, and the extent to which such arrangements are tolerated and indeed exploited within the legal framework.

Chapters six and seven address matters of interest to employees as much as to employers – working hours, leave, holidays and remuneration, including benefits and stock options. There is far too much detail to allow for a meaningful review here, save to say that the coverage is comprehensive, if not encyclopedic, addressing the various types of employment (full-time, part-time, piece-work) and types of remuneration, in its various exotic forms. It is interesting to note how much more attention is paid in China than in Hong Kong to matters such as daily rest breaks (including time off for child-care and medical care), and to the issue of over-time, which is closely regulated. Remuneration regulations are also more detailed, with a statutorily imposed overtime payment regime. Although the principle of equal pay for equal work is accepted, the difficulties of monitoring this are such that the principle is perhaps honoured more in the breach. This is particularly true of migrant workers, a huge body of workers in modern China

who are often the subject of employment discrimination. The issue is addressed briefly in chapter seven and taken up again in later chapters.

Chapter eight is concerned with the important matter of occupational health and safety. This subject is also dealt with in considerable detail, addressing the inspectorate, the employer's legal obligations and applicable penalties, and compensation remedies for injured workers, including some of the technical distinctions regarding what constitutes injury in the course of employment. From media reports one has the impression that occupational safety is an enormous problem and that little progress is being made. Here some further insights and perhaps some statistical analysis to bring out the true nature and scope of the problem would have been appropriate.

An employment relationship can come to an end in different ways, for instance by resignation or by mutual agreement, among others. However, an employer's unilateral termination is typically the one that is most likely to give rise to litigation. The employer's power of unilateral termination was made subject to further restrictions by the Employment Contract Law. Chapter nine sets out the permissible conditions for unilateral termination, only some of which attract severance pay, and the remedies for wrongful termination. The six permitted grounds of termination without severance pay are followed by a series of helpful illustrations based on actual case examples which will help the reader to achieve a better understanding of the various provisions and how they play out in the courts. Unlawful termination gives rise to a remedy of reinstatement (unlike Hong Kong where it is the employer's option), and where reinstatement is not possible, to compensation equivalent to double the amount of statutory severance the employee would have been entitled to if lawfully terminated.

Chapter ten provides a useful overview of the emerging subject of confidentiality and non-competition, including trade secrets. These issues are provided for largely in the Anti-Unfair Competition Law. The Employment Contract Law requires compensation to be paid for the enforceability of non-competition clauses, but does not indicate how much. Rules applying in some of the major cities do stipulate amounts payable, but unfortunately for those in other locales, the compensation issue is unsettled.

Chapter eleven is something of a catch-all chapter, dealing with protections for specific groups (children, women and prison labourers), discrimination (in all its forms, including communicable disease and migrant workers), and privacy. The coverage is quite comprehensive. Non-discrimination laws, the origin of which can be found in the Constitution and ILO Convention 111 (ratified in China but not in Hong Kong) were strengthened in 2008 by the Employment Promotion Law. The author observes that despite these efforts discrimination remains a widespread problem. The issue of migrant workers is taken up at greater length here. The Employ-

ment Promotion Law entitles migrant workers to equal labour rights, and prohibits discrimination against them, but judging from media and NGO reports, discriminatory treatment of migrant workers is an issue that, despite statutory attempts, remains one of China's greatest labour problems.

Individual income tax law is not a subject one would normally expect to find in an employment law text. However, given that much of the readership of an English language text on China's employment law is likely to consist of expatriate employees and their bosses, this chapter is a useful inclusion to assist expatriate workers (at the higher professional echelons, one would assume) and legal advisors of multi-nationals and other entities operating in China. Of particular importance to expatriates will be the rules on length of residence and the source and type of income that will trigger the application of PRC income tax law. These are set out in easy-to-follow tables. Generally speaking, foreigners working in China can be expected to be taxed on their China-sourced income, but not on their world-wide income, unless they have resided in China for five or more consecutive years. The case illustrations, most of which concern foreign professionals working in China, are useful as a means of understanding the operation of the income tax laws.

The subject of trade unions is another controversial topic that requires specialised treatment in the context of China. That is because the basic underlying tenet of a trade union movement as understood internationally – freedom of association – has not been respected in post-1949 China. Although workers' rights are officially embraced in Communist Party ideology, trade unions are closely regulated to the point where there is only one (state-sponsored) trade union federation, the All China Federation of Trade Unions (ACFTU), to which all unions must belong. As the author observes, recent measures taken to strengthen the role of the ACFTU should not be taken as a move toward the recognition of workers' rights so much as an attempt to maintain influence over the economy in the context of the transition to a more open, market-based economic environment. Attempts to install enterprise-level trade unions in foreign-invested companies received somewhat sensationalised media coverage in recent years, but the controversies perhaps underline the need for employers to understand their obligations under PRC law in facilitating the establishment of trade unions. There is ambiguity as to what type of support employers are to offer, given that trade unions have never been the province of employers, and are (as one would expect) described in the Labour Union Law as organisations formed "voluntarily by staff and workers". Despite this dubious context the author offers a helpful explanation of the procedures for the formation of enterprise unions, an explanation that goes some way towards unravelling one of the mysteries of the current China labour scene. The author

then proceeds to explain the process of collective bargaining, which occurs mainly at the enterprise level but increasingly at the regional level. This is an important area for employers given that, under the Collective Contract Provisions effective May 1, 2004, if either party makes a written request for a collective contract, the other party cannot refuse to conduct collective negotiations unless justifiable reasons are provided.

Chapter 14 provides a useful explication of the new Employment Disputes Law, which came into effect in May of 2008. This has been an unhappy aspect of the law, as aggrieved workers seeking to enforce rights have long complained about the cumbersome and time-consuming procedures that stand in the way of dispute resolution, even in a case as straightforward as non-payment of wages. The new law continues the tradition of a multi-stage procedure of consultation, mediation, arbitration and litigation, but attempts to streamline it in places, in particular by extending the time limit for seeking arbitration from 60 days to one year. Consultation and mediation are optional and parties may go directly to arbitration, which is mandatory, and which in practice is the most important stage in the dispute resolution process. According to the author, 70 per cent of all disputes are resolved at the arbitration stage.

The book concludes with a number of helpful resources, including a list of websites relating to PRC law, and the text of the principal labour laws currently in force. These supplement the 60 or more pages of tables of legislation, regulations, and notices, decisions and rules that are placed at the beginning of the book and that serve as an excellent and convenient compendium of the employment-related laws currently in force in China.

As a common law academic and relative neophyte to PRC law, the reviewer found this book to be an excellent introduction to employment law in China. It is much more than a primer, and given its clarity and simplicity of language, its compactness despite the range of issues covered, and the effort made to explain technical terms and concepts unfamiliar to the foreign reader, it is likely to become a favourite of practitioners and an important reference in the field for some years to come.

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