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Temporary lay-off

Case presentation

Mrs LIU was recruited in February 2016 by Company A as Financial Director. In January 2018, Company A laid off Mrs LIU temporarily, while continuing to pay her full contractual salary during the months of January and February 2018. As of March 2018, her salary was reduced by 70 % of the Beijing minimal wage. (For reference, the Beijing minimum wage currently amounts to 2 200 RMB Yuan).

Thinking that the temporary lay-off measures enforced by Company A were not justified because, even though some work stations were shut, Company A had continued to operate without interruption, Mrs LIU, notified Company A of the termination of her employment contract on the basis of article 38 of *PRC Employment Contract Law*. This gives to employees the possibility of terminating their employment contract if their employers fail to pay the correct amount of their wages within the agreed deadlines.

Following the termination of her employment contract, Mrs LIU took Company A to court, notably to ask for:

- The shortfall of salary payment and various allowances: seniority, transport, phone, etc... for the period of March to June 2018; and
- A redundancy payment related to the termination of her employment contract due to the employer's liability.

The judge's ruling

- Regarding the shortfall of salary payment

The judge based his ruling upon *article 27 of the Provisions of Beijing Municipality on the Payment of Salaries*, published by the people's government of Beijing on 23rd November 2007 which includes the following principles:

- When the closure or suspension of activities of a company do not result from the actions of employees, employer must, during the first cycle of salary payments, settle employees' wages as if they had worked as usual.
- As of the next cycle of salary payments, employer must settle wages according to the work actually done and on the basis of the new payment rate agreed by both parties, specifying that salaries must not be lower than the local minimum wage.

- If employees have not worked, then employer must pay them a cost-of-living allowance which must not be lower than 70% of the city minimum wage.

The judge ruled that the temporary lay-off measures were justified since four out of the five work stations of Company A had shutdown. In view of this, Company A was entitled to pay a reduced salary to Mrs LIU. In addition, the amount paid to Mrs LIU complied with (or even, for the second month was higher than) the legal provisions specified by the article 27 quoted above.

In conclusion, the shortfall payment request of Mrs LIU was rejected by the court.

- Regarding the redundancy payment

As the judge confirmed the validity of the temporary lay-off measures and the legality of the reduced salary paid to Mrs LIU, the reason given by Mrs LIU to terminate her employment contract (non-payment of her contractual salary), understandably, was not followed by the judge who rejected her request.

Comments from DS

The principles guiding the definition of salary paid to employees during temporary lay-off periods are set at national level under article 12 of the *Interim Provisions on Salary Payments* published by the former Ministry of Labour on 6th December 1994, and can be summarized as follows:

- During the first cycle of salary payments: normal contractual salary payments apply;
- As of the second cycle of salary payments: salary payments must not be lower than the local minimum wage if employees have been working.

Many local authorities have published more specific local regulations on the basis of these national principles, but consistently with normal wages during the first cycle of salary payments, and then reduced ones as of the second cycle of salary payments. Main differences focus on the calculation methods of reduced salaries: application of local minimum wage, possibility of paying a cost-of-living allowance lower than the local minimum wage, employees part of social contribution and housing fund included or not in the payment to employees, etc.

Thus, as part of setting up a temporary lay-off plan, it is essential to check the requirements of the local regulations regarding the calculation of salary payments to employees.

However, the vast majority of regulations are silent about the practical arrangements necessary to set up and apply such a plan.

Temporary lay-off and COVID -19

Following the outbreak of COVID-19 currently hitting China, numerous companies have had to cease all or part of their activities, and in some cases the announced resumption of activities can be a gradual process, therefore it could prompt some companies to implement temporary lay-off measures in order to reduce fixed costs.

The Ministry of Human Resources and Social Security published on 7th February 2020 a document entitled « *Opinions about the stabilisation of work relations during the prevention and control*

period of the COVID-19 outbreak in order to encourage companies to resume activity and production ». These opinions anticipate at paragraph IV of point 3, the possibility for companies facing difficulties to negotiate lower wages with their employees throughout the shutdown of activities or production while specifying that according to the applicable regulations, during the first cycle of salary payments, wages remain unchanged but as from the second cycle of salary, payment of a cost-of-living allowance is feasible.

Therefore these opinions confirm the possibilities for companies affected by COVID-19 to implement the temporary lay-off measures, but unlike national laws and regulations, they encourage companies to negotiate them with their employees.

What happens if the negotiations fail? Are companies still allowed to set up a temporary lay-off plan? We think that, even if companies do not succeed in getting their employees to agree the plan, as this decision should be taken by internal company management, it can be legally implemented.

However, in view of the current specific situation, we advise our clients wishing to set up a temporary lay-off plan to watch out for the following points:

- Check the content and the requirements of local regulations, notably regarding minimum wage;
- Create and keep a complete file justifying the need for a temporary lay-off plan;
- Only introduce temporary lay-off measures once you have exhausted all other measures to reduce fixed costs;
- Use a democratic process when setting up a temporary lay-off plan, in accordance with the procedures which must be followed to adopt internal company rules, namely: communicating about the proposed plan to all employees, discussing it with them and listening to their suggestions, publishing the final version of the plan.

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