



Hong Kong Court of Final Appeal Expands Spousal Benefits Rights for Same-Sex Couples

Insights

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Following the conclusion of Pride Month, it seems only fitting to address a relevant outcome in the cross-border context, which also has an impact on global employers and their employee benefits offerings. In, *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue [2019] HKCFA 19*, the Hong Kong Court of Final Appeal (“CFA”) – Hong Kong’s highest court – held that same-sex couples who are legally married overseas, in jurisdictions where same-sex marriage is recognized, such as the U.S. (same-sex marriage is not currently legally recognized in Hong Kong) are entitled to the same spousal employment and tax benefits enjoyed by heterosexual married couples in Hong Kong.

By way of background, in 2014, Applicant Angus Leung Chun Kwong, an employee of the Hong Kong government for nearly two decades, lawfully married his same-sex partner in New Zealand. Thereafter, Applicant filed suit when Hong Kong’s Civil Service Bureau refused to grant spousal medical and dental benefits to his husband, based on the conclusion that same-sex marriage simply was not recognized under Hong Kong law. Applicant also claimed against Hong Kong’s Inland Revenue Department (“IRD”) when it refused to recognize Applicant’s spousal relationship for tax purposes. Applicant’s claims were undergirded by the argument that his employer and the IRD unlawfully discriminated against him based on his sexual orientation, which he further alleged violated his constitutional rights (note that sexual orientation is not a recognized protected class in Hong Kong). In response, the government argued, among other things, that the differential (i.e., adverse) treatment was justified because the government had a legitimate goal of protecting the institution of traditional marriage. In turn, the CFA accepted that the institution of traditional marriage was a legitimate concern; however, the CFA further held that there was no “rational connection” between this concern and the denial of Applicant’s employment and tax benefits. In other words, the CFA rejected the notion that the “institution” of heterosexual marriage would somehow be eroded by the provision of spousal employment and tax benefits to same-sex couples. In an interesting twist for HR policy junkies, the CFA also noted that the Civil Service Bureau’s position actually appeared to violate its own equal opportunities employment policy.

Based on the foregoing, and while same-sex marriage remains technically unrecognized under Hong Kong law, if a same-sex couple is married outside of Hong Kong, they should be entitled to spousal benefits within Hong Kong. In this respect, businesses with employees in Hong Kong would be well-advised to review their applicable benefits plans and employment policies, to ensure

compliance with the CFA's holdings.

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