



THE
LAW SOCIETY
OF HONG KONG
香港律師會

Employment Related Responsibilities of NGO Boards

非政府機構董事會與僱傭相關的責任

Walter Lee 李日華律師

Chairperson, Employment Law Committee, The Law Society of Hong Kong

香港律師會 僱傭法委員會主席

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Part 1: Our approach and scope

一、研討會的理念和範圍

Employees are the greatest asset of an organization

員工是任何機構最重要的資產

In many NGOs, personnel cost represents the single largest expense. Good governance helps NGOs to treat their staff fairly, consistently and in compliance with the law and best practices. It also helps to align human resources management practices with the NGO's mission and values.

員工薪酬在不少機構中均佔總支出的最大份額。良好的管治有助機構公平對待員工、守法及合規，也令人力資源管理配合機構的使命和理念。

Our approach: proactive, not reactive

理念：主動、非被動

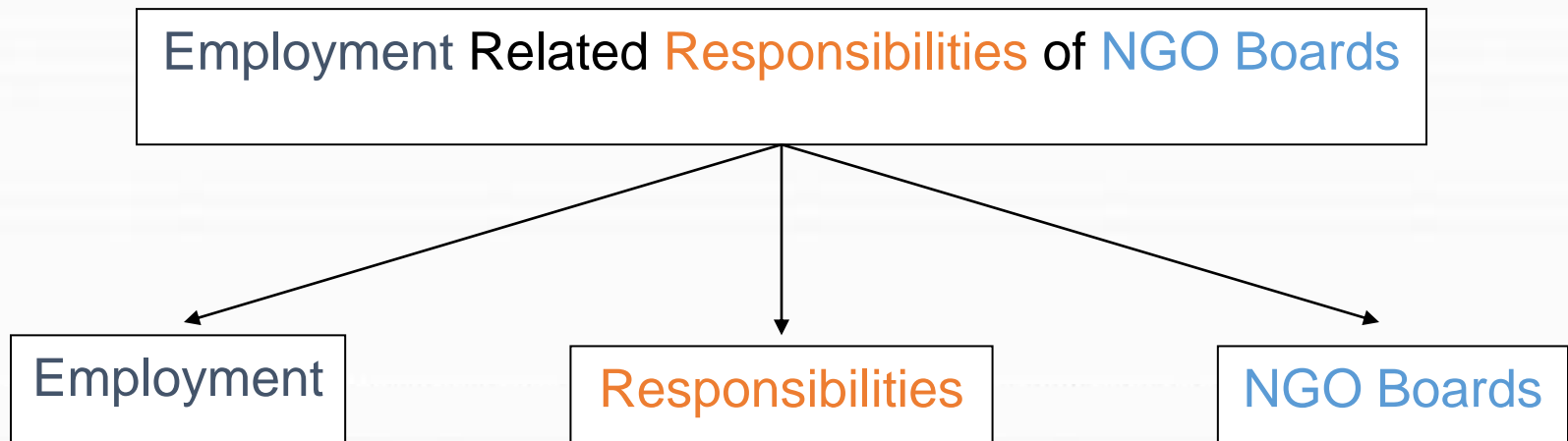
From a governance perspective, what are the proactive measures that NGO board should adopt to protect the NGO and its directors from potential risks arising from HR related matters?

從管治角度，非政府機構的董事會應採取甚麼積極的措施，保障機構及董事免受人力資源管理帶來的風險？



Scope of the Seminar

研討會的範圍



Scope of the Seminar (cont'd)

研討會的範圍 (續)

1. Employment: What is “employment law” in a broad sense?

僱傭：僱傭法的範圍？

2. Responsibilities: What types of responsibilities?

責任：責任的類型？

3. NGO Boards: focus on incorporated NGOs (but about 3/4th of all tax-exempt charities*), but the principles are generally applicable to most others

董事會：本研討會集中討論以公司成立的非政府機構（約佔所有豁免繳稅慈善機構的四份三*），但一般原則應適用於大部份其他機構

*Source: Director of Audit's report, April 2017, Ch 1

Part 2: What is “employment law” in a broad sense?

二、僱傭法包括甚麼？

Employment law in a broad sense

廣義的僱傭法包括：

- Contractual relationship between employers and employees as governed by Employment Ordinance
《僱傭條例》下的僱傭合約關係
- Occupational safety and health (Occupational Safety and Health Ordinance and Factories and Industrial Undertakings Ordinance)
職業安全及健康 (《職業安全及健康條例》與《工廠及工業經營條例》)
- No-fault, non-contributory compensation system for work injuries (Employees' Compensation Ordinance)
不論過失、毋須供款的工傷補償制度 (《僱員補償條例》)
- Discrimination (gender, race, disability, family status, anti-union discrimination)
歧視 (性別、種族、殘疾、家庭崗位、防止歧視職工會)
- Personal data protection
個人資料保障
- Pension, MPF, tax and related matters
退休金、強積金及相關事宜

Employee or independent contractor: Why important?

僱員或自僱者？有何重要？

HKSAR v. Chow Kin Cheung (HCMA 248/2012) 13 September 2012

Police saw A (a shop owner) walked along the street, followed by B pushing his trolley behind. They entered the shop, owned by A. A pointed to the wooden cabinet. B put it onto his trolley. They both headed to a refuse collection depot where the wooden cabinet was eventually unloaded. A gave B \$60. B was a person not lawfully employable in Hong Kong. A was arrested by police.

警察見到甲（店主）在街上，乙推著手推車緊隨其後，一起走進甲的商店，甲指著木箱，乙把木箱放在手推車，兩人一起推到垃圾站棄置。甲付乙六十元。乙沒有在香港受僱資格。甲被警方拘捕起訴。

Why important (in the context of NGOs)?

對非政府機構有何重要？

Statutory entitlements, insurance, MPF,
minimum wage, etc.

法例保障、保險、強積金、最低工資 等

Coach? 教練?

Trainer? 訓練員?

Tutor? 導師?

Counsellor? 輔導員?

IT support? 資訊科技支援?

Cleaning? 清潔?

Sheltered workshop trainees? 庇護工場學員?

Internship / work experience student? 實習學員/工作經驗學員?

Student interns/ Work experience students 實習學員/工作經驗學員

Minimum Wage Ordinance does not apply
最低工資條例不適用

Statutory Minimum Wage: Reference Guidelines for Employers and Employees
published by the Labour Department on website

https://www.labour.gov.hk/eng/public/SMW_Reference_Guidelines_Eng_34_5.pdf

法定最低工資：僱主及僱員參考指引：見勞工處網頁

https://www.labour.gov.hk/tc/public/SMW_Reference_Guidelines_TC_34_5.pdf

How to distinguish?

如何分辨？

	<i>Lee Ting Sang v. Chung Chi Keung</i> [1990] 2 WLR 1173	<i>Cheng Yuen v. Royal Hong Kong Golf Club</i> [1997] 2 HKC 426
	a person working as a mason chiseling concrete at a construction site 地盤鑿混凝土的泥水匠	golf caddie 高爾夫球球僮
HK High Court /District Court 香港高等法院/區域法院	Independent contractor 自僱	Employee 僱員
Hong Kong Court of Appeal 香港上訴法庭	Independent contractor 自僱	Independent contractor 自僱
Privy Council 英國樞密院	Employee 僱員	(4:1) independent contractor (4對1) 自僱

How to distinguish—A practical tip

分辨方法的小提示

Extent of control 受監督的程度

Prospect of profit return and risk of loss 賺取收入和風險的預期

Integral part of organization 融入機構的程度

Mutual obligation to work and to provide work 工作和給予工作的互相責任

Provision of equipment 提供工具

Tax, MPF and insurance 稅務、強積金和勞工保險

Freedom to delegate work or hire workers 請助手的自由

... and so on 等等

Part 3: What types of Responsibilities?

三、責任的類型

Different types of responsibilities 各類型的責任

1. Vicarious liability – borne by the NGO as an entity and as an employer

轉承責任：由機構以作僱主身份負責

2. Duty of care – both as an entity and as an individual board member

謹慎責任：機構整體負責，但個別董事也須承擔

3. Fiduciary duty – borne by each individual board member (loyalty? obedience?)

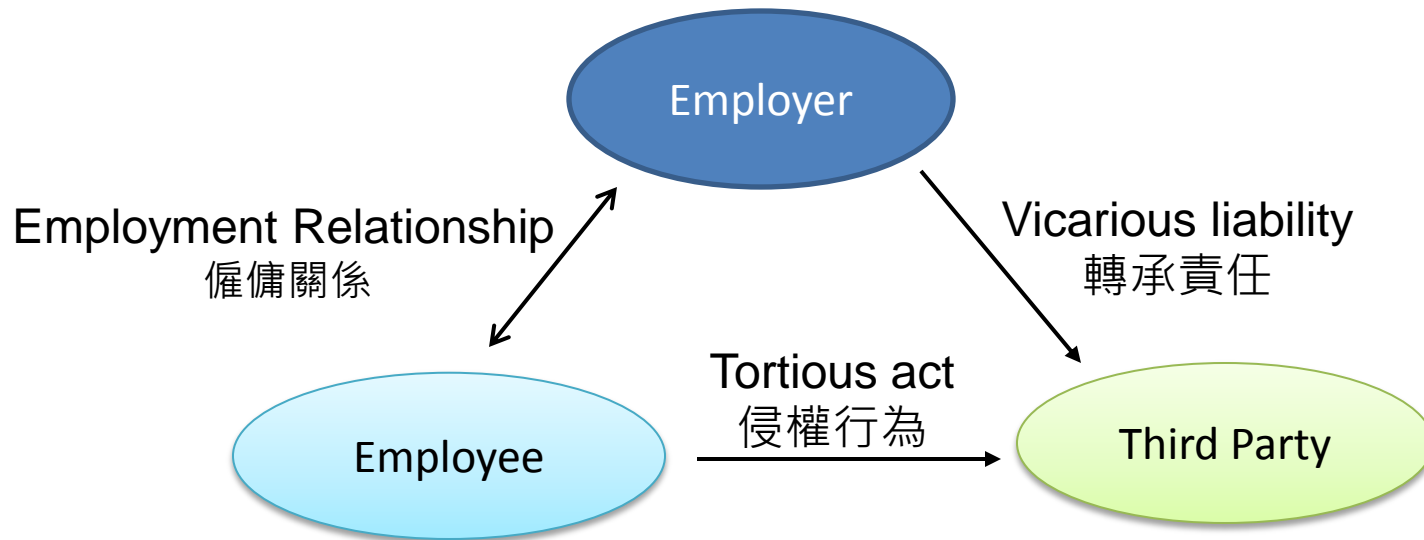
受信責任：由個別董事承擔（忠誠？遵從？）

Solution: Directors and Officers (D&O) Liability Insurance?

解決方案：董事責任保險？



Vicarious Liability (轉承責任)



Employers are liable for the loss or damages of third parties caused by the tort committed by employees (eg. negligence) in the course of employment.

僱主須為其僱員在執勤期間的侵權行為 (例如：疏忽) 引致第三者受到損害或損失而負責。

Fiduciary duty : what is its legal nature?

董事會受信責任的法律本質

You could never have truly understood fiduciary duty without knowing the historical background of equity and the law of trusts.

除非你知道衡平法和信託法的歷史背景，否則你難以完全明白何謂受信責任。

The law of fiduciary duty can be found in case law only.

有關受信責任的法律內容只能在案例法中找到。

The grossly simplified historical background of fiduciary duty 受信責任的粗略歷史背景

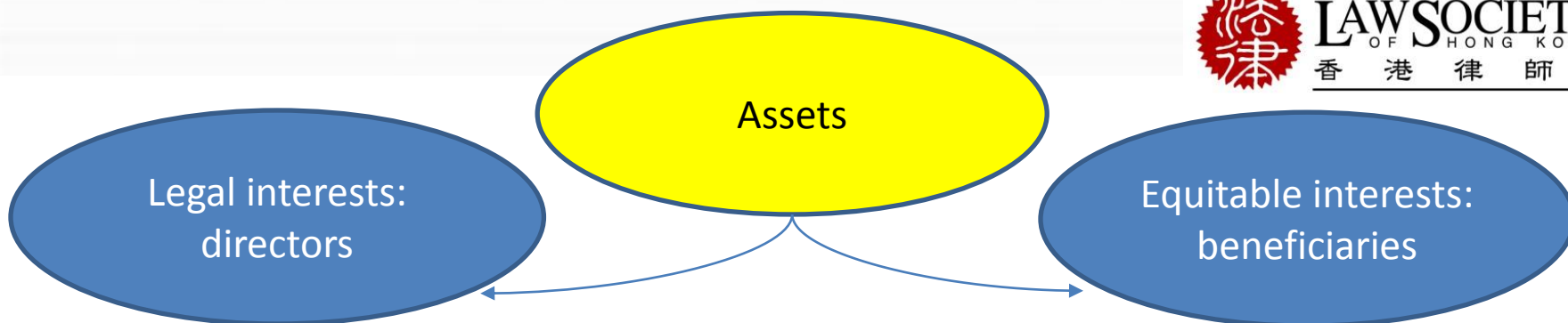
- In Medieval England, before landowners went to war, for their family members' benefit they transferred land to friends as “owners”. When they returned from war years later, some friends wrongfully occupied the land or kept the income for their own use. 中世紀英格蘭，地主要離家打仗前，會把土地轉讓給朋友為「擁有人」，好讓他們為自己的家人打理土地。他們打仗後回家，發現朋友吞佔土地收入，甚至佔用土地。
- The landowners' right was not recognised by the common law court. They (or after they died, their family members) petitioned to the Chancellor, who recognized that their friends should not take advantage of the original landowners. The Chancellor granted relief to them on the ground of fairness—later “equity”. 普通法法院根本不承認原地主的權益，受屈的地主（或家人，如地主已戰死）只能向國王大臣求助，大臣認為地主的朋友「佔人平宜」的行為不當，因此以公平（後稱「衡平法」）原則要求朋友補償給原地主。
- Their friends owed a duty (later “fiduciary duty”) to the landowners' family members. 上述的朋友對原地主的家人負起責任（後來演變成「受信責任」）。

Features of fiduciary duty 受信責任的特點

Compare the “landowners friends” above and directors in modern world:

試比較上述「地主的朋友」和現今的董事：

- “Landowners’ friends” (also directors) should not gain personal benefit from the arrangement. They should keep the trust assets separate from their own. There should be no conflict of interest or self-dealing.
「地主的朋友」（正如董事）不可利用這種安排謀取個人利益，並要把受託的資產與自己的財產分開處理。不可有利益衝突。不可「自我交易」。
- “Landowners’ family members” (also aggrieved beneficiaries) may trace and recover misapplied assets from any third party (except against bona fide purchaser for value without notice)
「地主的家人」（正如受屈的受益人）可向任何第三方追索被不當挪用的財產（除非該第三方真誠付出有值代價，而且事前毫不知情）。



What is so special about this concept? 此法律概念有何特別？

- Distinction between legal interests and equitable interests—there is no such concept in European civil law or Chinese law. 「一物二權」：歐洲大陸法和中國大陸法沒有這個概念。
- With such concept under the English law system, fiduciary duty is a natural consequence, so is tracing remedy which is available to **beneficiaries**. 由於這個英格蘭法下的概念，受信責任可算是自然而生的結果，受益人的追索權也是。



Fiduciary duty: examples

受信責任：例子

- No conflict of interest 不可有利益衝突
- No self-dealing 不可自我交易
- Acting in good faith for NGO's benefit 真誠為機構利益行事
- Abstain from discussion/voting if necessary 如有需要放棄討論/投票
- Do not use one's position for personal benefit 不利用身份謀取個人利益
- Full and frank disclosure 完全誠實披露
- Duty of confidence 保密責任

Fiduciary duty: to avoid conflict of interest

受信責任：避免利益衝突

Examples: 例：

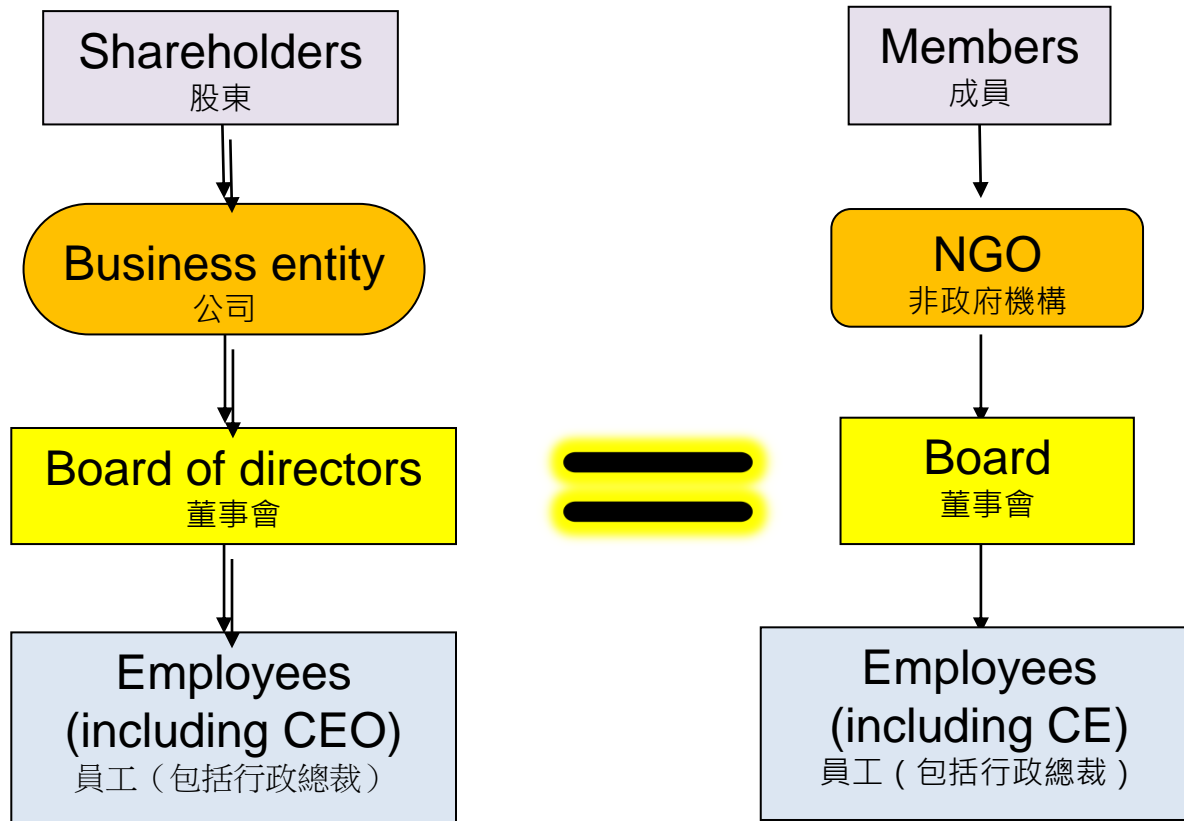
- Code of practice concerning the procurement or tendering process 採購或招標守則
- Recruitment process 招聘過程
- Guidelines on the relevant reporting obligations of the board members on potential conflict 董事潛在利益申報指引

Part 4: What type of NGO?

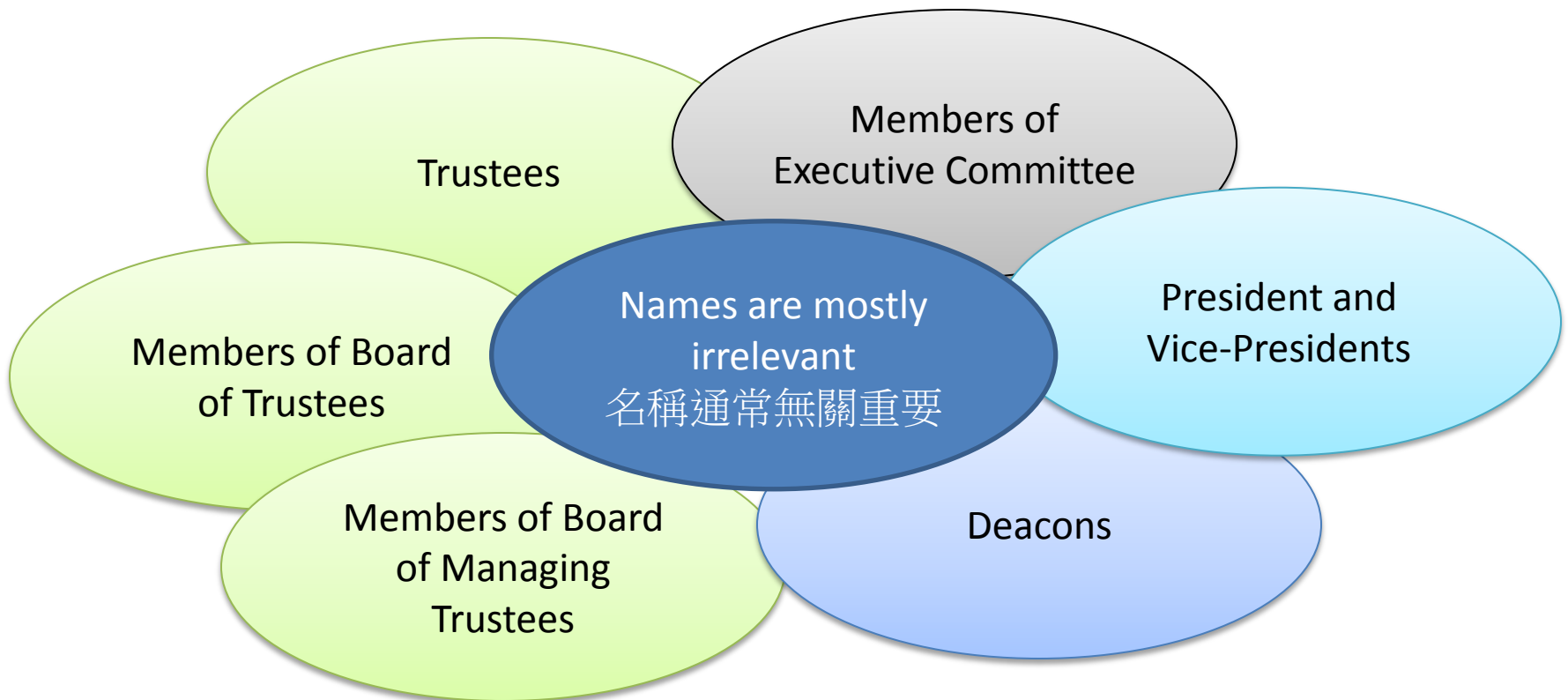
四、甚麼類型的機構？

Compare companies limited by shares and incorporated NGOs:

比較股份有限公司及以公司形式成立的非政府機構：



NGOs formed under the Companies Ordinance or not
根據《公司條例》成立的機構或其他機構



NGO as a company

以公司形式成立的機構

Question: To what extent should the members of the board give responsible directions to the staff (including CEO and those in other positions)?

問：董事會應給予僱員（包括行政總裁及其他職位）什麼程度的指引？

Part 5: What is the role of board members in HR matters?

五、董事會在人力資源管理上扮演什麼角色？

Governance 機構管治	Management 管理
Board 董事會	Chief Executive 行政總裁



What role should the board play in HR matters?

董事會在人力資源管理中應扮演什麼角色？

<p>Specific roles 職責</p>	<p>What role should the board play? “Macro” or “micro”? 董事會應扮演什麼角色？「宏觀」或 「微觀」？</p>
<p>1. Recruitment process 招聘過程</p>	<p>Only Chief Executive? All key staff? 只限行政總裁的招聘？所有關鍵人員 的招聘？</p>
<p>2. Salary 薪酬</p>	<p>Only top management? All senior staff? Salary scale? HR budget for each department / team? 只限高層？或包括所有資深僱員？薪 酬級表？個別部門的人力資源預算？</p>
<p>3. Performance review 表現評估</p>	<p>Only top management? Also including mid-level? 只限高層？或包括中層？</p>

4. Termination 終止僱傭	Only top management? Also including mid-level? 只限高層？或包括中層？
5. Complaints (grievances? unlawful conduct?) 投訴 (申訴？違法行為？)	Only formulating policies and procedures? Also taking part in the process; if so, when? See Parts 9 and 10 below 只負責制定政策和程序？或參與其中；如是，何時？見下文第九和第十部
6. Workplace policies 工作場所政策	See Parts 9 and 10 below 見下文第九和第十部

Question: What should be the division of responsibility between the board and the HR department? Should the board set up a HR Committee?

問：董事會和人力資源部應如何分工？董事會應否成立人力資源委員會？

Leading Your NGO
Corporate Governance (A Reference Guide for NGO Boards)
published by the Social Welfare Department
Appendix 5
Human Resource Policies and Procedures
<https://www.swd.gov.hk/doc/ngo/corp-gov-eng.pdf>

領導你的非政府機構
機構管治 (非政府機構董事會參考指引)
社會福利署網頁
附錄五
人力資源政策及程序
<https://www.swd.gov.hk/doc/ngo/corp-gov-chi.pdf>



Part 6: General issues under the Employment Ordinance

六、僱傭條例的一般問題

A Concise Guide to the Employment Ordinance
published by the Labour Department on website

<https://www.labour.gov.hk/eng/public/ConciseGuide.htm>

https://www.labour.gov.hk/eng/public/wcp/ConciseGuide/EO_guide_full.pdf

《僱傭條例簡明指南》：見勞工處網頁

<https://www.labour.gov.hk/tc/public/ConciseGuide.htm>

https://www.labour.gov.hk/tc/public/pdf/wcp/ConciseGuide/EO_guide_full.pdf

Part 7: Wage

七、工資

The “long title” of Employment Ordinance:
《僱傭條例》：詳題

“To provide for the **protection of the wages** of employees, to regulate general conditions of employment and employment agencies, and for matters connected therewith.”

「本條例旨在就僱員工資的**保障**訂定條文，對僱傭及職業介紹所的一般情況作出規管，並就相關事宜訂定條文。」

Definition of Wage 工資的定義

What type of payment is included or excluded in the definition of “wage”? 工資的定義包括或不包括甚麼？

- Name is irrelevant 標籤不重要
- Bonus of a gratuitous nature is excluded, but other types of bonus are included 不包括賞贈性質的花紅，但包括其他花紅
- Travelling allowances is included, but non-recurrent travelling allowance or actual reimbursement is excluded 包括交通津貼，但不包括非經常出現的性質的交通津貼或因工作招致的實際開銷
- Overtime pay is included if it is of a constant character or its monthly average over the last 12 months constitutes 20% or more of the average wage 包括超時工作薪酬，如屬於定期性質或其每月平均在過去12個月佔了平均工資20%或以上

Calculation of relevant statutory entitlements based on 12-month average wages 以 12 個月平均工資計算有關法定權益

Why do we need this? 為什麼要這樣計算？

Lisbeth Enterprises Limited v. Mandy Luk [2006] HKCFA 29, 28
Feb 2006, Court of Final Appeal 終審法院判決，2006年2月28日

How? 如何計算？

A Concise Guide to the Employment Ordinance

<https://www.labour.gov.hk/eng/public/wcp/ConciseGuide/Appendix1.pdf>

《僱傭條例簡明指南》

<https://www.labour.gov.hk/tc/public/pdf/wcp/ConciseGuide/Appendix1.pdf>

Payment in lieu of holiday? 以薪代假?

Failure to grant rest days, annual leave or statutory holidays without reasonable excuse: criminal offence

如無合理辯解而沒有給予休息日、年假、法定假日，屬刑事罪行

Compelling employees to work on rest days: criminal offence

強迫要求僱員在休息日工作，屬刑事罪行

Payment in lieu of statutory holiday or “buy-out” of a holiday: not allowed:

Yam Yui Wai and others v. Wanchai Hsin Kuang Restaurant Co Ltd

[2003] 1 HKLRD 793, Court of Appeal, 28 May 2002

不容許以薪酬代替法定假日或買斷假日：

任銳威及其他人訴 灣仔新光酒樓有限公司 [2003] 1 HKLRD 793，上訴法庭，2002年5月28日

Part 8: Termination of employment

八、終止僱傭

It goes without saying that the usual cause of termination is that the employer is unhappy with the employee.
通常僱主終止僱傭的原因都是不滿意員工的表現。

While there seems to be various modes of termination, in practice the only significant question is whether summary dismissal is justified. The determining factor is whether there is “evidence”.
(What is “evidence”?)

雖然法律上有多種終止僱傭的模式，但實質上最重要的問題是：可否即時解僱？當中的決定因素在於有沒有「證據」。（甚麼是「證據」？）

An NGO must consider any reputational risk associated with summary dismissal, but there could be pros and cons of “publicity”, how the NGO handles it.

機構應考慮即時解僱可能對聲譽的影響，但「公開報導」有利有弊，視乎機構如何處理。

Part 9: Discrimination and harassment

九、歧視及騷擾

- Sex (gender) 性別
- Disability (“just about anything will do”, *per* District Court Judge Muttrie, *L v Equal Opportunities Commission* (DCEO 1/1999 and DCEO 6/1999), 13 November 2002)
殘疾 (麥卓智法官：「差不多甚麼都包括」，*L* 訴 平等機會委員會 (DCEO 1/1999 及 DCEO 6/1999) ，2002年11月13日)
- Family status (limited to “responsibility for the care of an immediate family member”, section 2 of the Family Status Discrimination Ordinance)
家庭崗位 (限於照顧直系家庭成員的責任，見《家庭崗位歧視條例》第2條)
- Race (not including nationality, citizenship, resident status) – how about religion? Language?
種族 (不包括國籍、公民身份、居民身份) ，但是否包括？語言？
- Anti-union discrimination (Employment Ordinance, Part 4A: criminal offence)
防止歧視職工會 (《僱傭條例》 ，第IVA部：刑事罪行)

Harassment 騷擾

- Sex 性別
- Disability 殘疾
- Race 種族

(No family status harassment) (沒有家庭崗位騷擾)

The board's obligations 董事會的責任

- **Reviewing internal policies regularly**
定期檢閱內部指引
- **Providing appropriate training to employees (in particular, HR staff)**
給僱員提供合適的訓練，特別是人力資源部的僱員
- **Setting up effective channels for lodging complaints and preventing victimisation**
設立有效的申訴渠道及防止使人受害的歧視
- **Handling complaints properly**
妥善處理投訴

The board's checklist 董事會的檢查清單

- When was the last review of each policy?
最近一次檢閱內部指引為何時？
- Do all employees have access to the latest version of each policy?
是否所有僱員也隨時取得所有最新版本的指引？
- Are the important provisions in the policies illustrated by examples, in training materials or accompanying explanatory notes?
指引中的重要條文，有沒有用例子解釋（在培訓資料中或包括在指引當中）？
- When was the last training conducted for employees?
最近一次僱員培訓為何時？
- When did the board members last receive information about recent development in discrimination and harassment law?
最近一次董事會收到歧視法及騷擾法的新資訊為何時？

Part 10: Data protection

十、資料保障

- Protecting the data of both the customers and the staff 保障服務對象及僱員的資料
- Protecting data during their whole life cycle from their collection, retention to destruction 保障資料本身，從收集、保存以致銷毀的整個過程
- Ensuring data are used for the specified purpose or a purpose directly related to it 確保資料用於指定目的或直接相關目的
- Ensuring those providing the data are notified of the purpose of collection and the classes of persons to whom the data may be transferred 通知提供資料者收集資料的目的及資料可能傳給何等人
- Six data protection principles: 1. Collection purpose and means; 2. Accuracy and retention; 3. Use; 4. Security; 5. Openness; 6. Data access and correction. 資料保障六大原則：1. 收集目的及方式；2. 準確儲存及保留；3. 使用；4. 保安措施；5. 透明度；6. 查閱及更正。

The board's obligations 董事會的責任

- Reviewing internal policies regularly
定期檢閱內部指引
- Providing appropriate training to employees (regarding both customers' and staff's data)
給僱員提供合適的訓練 (服務對象的資料及僱員資料)
- Setting up effective channels for handling request for data access and change of consent
設立有效的申訴渠道處理查閱資料要求及更改意向
- Handling complaints properly
妥善處理投訴

The board's checklist 董事會的檢查清單

- When was the last review of the policy?
最近一次檢閱內部指引為何時？
- Do members of the public have access to the latest version of the policy and receive adequate reminders (eg. how to unsubscribe from email lists)?
公眾是否可隨時取得最新版本的指引？有沒有收到適量提示，例如如何取消訂閱電郵？
- Are the important provisions in the policies illustrated by examples, in training materials or accompanying explanatory notes?
指引中的重要條文，有沒有用例子解釋（在培訓資料中或包括在指引當中）？
- When was the last training conducted for employees?
最近一次僱員培訓為何時？
- When did the board members last receive information about recent development in data protection?
最近一次董事會收到資料保障法的新資訊為何時？

Part 11: Employment outside Hong Kong

十一、香港境外僱傭關係

中華人民共和國境外非政府組織境內活動管理法

http://www.npc.gov.cn/npc/xinwen/2017-11/28/content_2032719.htm

Articles 27 and 29

第27及29條

Part 12: Concluding remarks

十二、總結



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Gallant

何耀棣律師事務所

5th Floor Jardine House, Central, Hong Kong

香港中環怡和大廈5樓

www.gallantho.com