employee's original intention was to give one month's notice. I agree with the employer's counsel that the employee wanted to leave immediately despite the notice requirement. However, the undisputed evidence is that employer's representative did allow the employee to leave immediately. The presiding officer was entitled to conclude that employer's representative had waived the right to notice. But that is not the end of the matter. For it does not necessarily follow that employer's representative had also waived the right to payment in lieu. Unfortunately, the presiding officer had not conducted any investigation on this point at all. His finding that the employer is now debarred from claiming wages in lieu cannot stand."

The right of one party to receive a payment in lieu of notice does not permit the other party to compel the party entitled to receive the payment from surrendering any such right of payment.

Perhaps through a legislative oversight, no corresponding waiver may be made on the part of an employee to any period of notice which he is entitled to run concurrently with a period of annual leave or maternity leave as prohibited by s 6(2A) and (2B). In the absence of being permitted to so waive, any such agreement on the part of an employee would run the risk of being struck down as void by virtue of s 70 in the event of the waiver being construed as reducing or extinguishing any right, benefit or protection conferred by the Ordinance on an employee.

By contrast, there would be little difficulty with an employer allowing, at the request of an employee, annual leave or maternity leave to be included in any period of notice which the employer was entitled to be given. This is because there are no statutory restrictions preventing an employer from surrendering any or all of his rights under the Ordinance.

[8.03] s 8(b): Effect

The provisions of ss 6 and 7 which allow either party to terminate by notice or by making a payment in lieu in no way restrict the right of an employee to terminate without notice or payment in lieu under ss 10 or 11(2), or the right of an employer to terminate summarily under s 9.

[8.04] 'Contract of employment'

By virtue of s 2, 'contract of employment' means any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee, and also a contract of apprenticeship. The term does not include contracts for services. For cases and commentary, see paras [2.10], [2.14] and [2.15].

would have been payable had the contract been terminated in accordance with section 7 shall be payable by the party terminating the contract to the other party.

(2) Without prejudice to section 9, 10 or 11(2), where a party to a contract of employment, having given proper notice in accordance with section 6 thereafter terminates the contract before the expiry of the period of notice otherwise than in accordance with section 7, such proportion of the sum referred to in subsection (1) as is proportionate to the period between the termination of the contract and the time when the notice given would have expired shall be payable by the party terminating the contract to the other party.

(3) For the purpose of calculating the sum referred to in subsection (1), where the party terminating the contract has not given notice of the termination to the other party, in calculating the daily average or monthly average of the wages earned by the employee in accordance with section 7, the reference in that section to the date on which the party terminating the contract gives notice of the termination to the other party or to the date of notification is to be construed as a reference to the date of termination of the contract.

Added 7 of 2007 s 4)

[8A.01] Definitions

For 'contract of employment', 'employee', 'wages', see s 2.

[8A.02] s 8A(1): Effect

The Employment Ordinance recognizes that a contract may be lawfully terminated in the following ways:

- by an employee under s 6 (with notice), s 7 (by making a payment in lieu of notice), s 10 (termination without notice or payment in lieu in response to an employer's serious breach of its employment obligations), or 11(2) (termination without notice or payment in lieu on being suspended);
- by an employer under s 6 (with notice), s 7 (by making a payment in lieu of notice), or under s 9(summary dismissal by reason of an employee's serious breach of his or her employment obligations); or
- by mutual agreement of an employer and employee under s 8.

A wrongful termination may occur in a number of ways. As a general rule, a termination which is wrongful will arise only where one party to the employment terminates in a manner which is inconsistent either with the

· An employer or employee terminating an employment contract by giving no notice or giving insufficient notice of termination.

· An employer or employee terminating an employment contract by not giving payment in lieu of notice or giving insufficient payment in lieu of notice of termination.

· An employer summarily dismissing an employee in circumstances where the employer cannot be shown to have been in serious breach of its employment obligations.

· An employee claiming to have been constructively dismissed in circumstances where the employer cannot be shown to have been in serious breach of its employment obligations.

· An employer compelling an employee to include any period taken as maternity leave for the purpose of notice of termination.

· An employer or employee insisting that the period of notice include statutory annual leave.

· An employer terminating the employment of any female employee who is entitled to maternity protection by giving her notice or payment in lieu. To do so is a criminal offence.

· An employer terminating the employment of any employee who is entitled to take paid statutory sickness leave by notice or payment in lieu. To do so is a criminal offence.

· An employer forcing an employee to resign in circumstances where the employer could not justify summarily dismissing the employee with cause.

Where an employer or employee terminates an employment contract with either insufficient or no notice of termination other than in accordance with s 6 such termination will be wrongful.

In *Home Essentials (HK) Ltd v John McLennan* District Court, Civil Action No 7954 of 2002 & 943 of 2003, an employer claimed one month's wages in lieu of notice by reason that the employee terminated his employment without giving sufficient notice. The employee's legal counsel argued that the employer should not be permitted to succeed in the claim by reason that the employer had surrendered its rights to makes such a claim by waiver by election. In rejecting the employee's defence the court noted:

> "70. The principles of waiver by election was set out by Yuen JA in *Large Land Investments v Cheung Siu Kwai* [2003] 1 HKLRD 313 (at paragraph 15) as follows:
>
> "The principles to be applied in this area of law are as follows:
>
> 1 A waiver by election occurs:

> (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at p398).
>
> 2 It is a prerequisite of election that the party making the election must first be aware of the facts which have given rise to the existence of his right (*Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* at p398).
>
> 3 It may be that the party must also be aware of his legal right of affirming or rescinding the contract when there has been a repudiation by the other party (*Peyman v Lanjani* [1985] Ch 457 – although this aspect was not disputed and therefore not considered by the House of Lords in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)*.
>
> 4 Further, since a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (*Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* at p398)."
>
> 71. Here, there was nothing that suggested Mr Exline was aware of the plaintiff's legal right to insist the defendant should serve a notice of termination or to pay wages in lieu thereof. There was no waiver by Mr Exline and the plaintiff should recover this part of its claim."

In *Matilda & War Memorial Hospital v John Henderson* High Court, Miscellaneous Proceedings No 4285/96, submissions were made on behalf of an employee to the effect that his employment contract had not been lawfully terminated under s 7 by reason that the employer had not tendered the payment at the time of termination. The employee also cited the case of *Yip Wan Chiu v Magnificent Industrial Ltd* [1974] HKLR 183, for the proposition that termination under s 7 requires mutual consent. In responding to these submissions, the court observed:

> 'Counsel for the Defendant submitted that the termination was not within s 7 of the Ordinance because wages in lieu due under s 7 were never tendered together with the October letter. In fact it was not until 20 December 1996 that an amount, different from that mentioned in the October letter, was tendered. He also placed reliance on *Yip Wan Chiu v Magnificent Industrial Ltd* [1974] HKLR 183 for the proposition that for an effective s 7 termination, there must be mutual agreement. But whether mutual agreement is necessary is unclear: in The Employment Ordinance – An Annotated Guide (p 32 of Part II)] it was noted that subsequent courts have proceeded on the basis that a unilateral undertaking to make payment in lieu is sufficient to meet the provisions of s 7 despite the majority decision of the Full Court in Yip Wan Chiu. Be that as it may, it is unnecessary for the purposes of the present application to make any determination as to whether the Hospital has complied with its

In *Kao, Lee & Yip (a firm) v Lau Wing & Anor.* Court of First Instance, Civil Action 1854/05, an employer which was a law firm refused to accept the resignation of two staff who resigned by giving a combination of one month's notice and the equivalent of two months' wages in lieu of notice. In defending its refusal to accept a payment in lieu of notice the law firm argued that by reason that a payment in lieu of notice could only be made by an employee in the event of the employer agreeing to accept such a payment in lieu of notice. In citing with approval the decision of Stone J. in *ICAP (Hong Kong) Limited v BGC Securities (Hong Kong) LLC & Ors*, the court rejected the law firm's argument by finding that either party to an employment contract was free to terminate the employment by making a payment in lieu of notice without the need to obtain the consent of the other party. In *Kao Lee & Yip v. Lau Wing & Another* Court of Appeal, Civil Appeal No.121 of 2006 the lower court's finding was upheld. The Court of Appeal rejected the firm's reliance on the early case of *Yip Wan-Chiu v. Magnificent Industrial Limited* [1974] HKLR 183 whereby the majority of the Full Court expressed the view that a payment in lieu of notice could only be made with the agreement of both parties. The court of Appeal held that the views expressed in the Yip Wan-Chiu case were not strictly necessary for the main decision that it made. The Court of Appeal further observed that since s. 8A had been enacted after Yip Wan-Chiu was decided, then the current position was as follows;

> 39 "As I understand the law the position now is that contrary to the dictum of the majority in Yip Wan Chiu and in any event after the passing of s.8A, a contract of employment may be lawfully terminated by either party by giving notice (under s.6) or by 'agreeing' (ie undertaking or promising) to pay wages in lieu of notice (under s.7). If the terminating party having agreed to pay wages in lieu fails to do so, the cause of action would be for breach of that agreement. But if a party terminates a contract of employment without either giving notice or agreeing to pay wages in lieu that would be an unlawful termination and the innocent party's cause of action would be for damages for wrongful termination, which is set by the legislature under s.8A at the notice period's wages."

In *Kao, Lee & Yip (a firm) v Lau Wing (also known as Stephanie Lau) & Anor* Court of Final Appeal, Final Appeal No. 7 of 2008 the court was called on to finally determine whether it was legally open for one party to terminate the employment contract in accordance with the provisions of s. 7 by unilaterally undertaking to make a payment in lieu of notice. After undertaking a review of the provisions of s. 7, the reasoning of the full court in *Yip Wan-chiu v Magnificent Industrial Ltd* [1974] HKLR 183 and the legislative history of s. 7, the Court of Final Appeal unanimously held that there was nothing under the provisions of s. 7 that required the mutual consent of both parties to enable an employment contract to be terminated by one party unilaterally agreeing to make a payment in lieu of notice to the other party.

property belonging to the family. The employee was convicted of theft and sentenced to three months' imprisonment. On appeal the employee's conviction was quashed on the grounds that the police were in possession of information that was material and relevant to the helper's defence. (See: *HKSAR v Godagan Deniyalage Prema C* Court of First Instance, Magistracy Appeal No 722 of 2002). The employee commenced the proceedings against the employer for malicious prosecution. In finding that the employer and employment agent had in fact given false evidence against the employee, the employer and employment agent were ordered to pay $240,370.00 by way of exemplary damages.

The decision was upheld on appeal, see: *Godagan Deniyalage Prema C v Cheung Kwan Fong & Anor* Court of Appeal, Civil Appeal No 72 of 2005.

An employer purporting to summarily dismiss an employee other than in accordance with s 9 will be liable to pay compensation for wrongful termination.

In *Lam Yau Kuen v Easy (Hang Fung) Transportation Company Ltd. & Anor* District Court, Civil Action No. 1 of 2006 the question arose whether the employer was justified in summarily dismissing an employee. The employer relied on the fact that the employee had refused a lawful order to drive a truck to China to uplift goods from a customer. The employer produced a letter of complaint from a customer in China in which the customer reserved the right to take legal action against the employer for the loss incurred. After hearing evidence that was given on behalf of the employer the court held that the complaint was not genuine and had been prepared simply to mislead the court. The court concluded that the employee's summary dismissal was unlawful.

In *Lo Pui Sang v Maxim's Caterers Limited* Court of First Instance, Labour Tribunal Appeal No 81 of 2005, an employee was employed as a manager in a restaurant operated by his employer in Japan. The employee was summarily dismissed after it was discovered that the employee had become involved in a business that sold sweet soup inside a Japanese department store in Tokyo. The employee successfully claimed in the Hong Kong Labour Tribunal and the employer was ordered to pay $260,991.30 to the employee for wrongful termination. In deciding in favour of the employee the Labour Tribunal found that the employee's conduct had not amounted to a serious breach of employment by reason that:

a. The employee was merely negligent in not reading clause 17.5 of the staff handbook (which prohibited outside work) and was therefore unaware of it at the time he joined the outside business;
b. The scale of outside business in which the employee was involved was quite different from that of his employer and of a small scale;
c. The employer's business was a Chinese restaurant;

f The employee was merely an investor not involved in the daily operation of the outside business;

g The two businesses were over 20 kilometres (and a time-distance of about 30 minutes) apart;

h As regards whether the outside business adversely affected Lau's performance, the employee's claim that the outside business never occupied much of his time and he performed duties promptly and diligently was unchallenged by evidence.

The employer appealed the Labour Tribunal's decision to the Court of First Instance. The court held that the Labour Tribunal was correct to find that the provisions of the staff handbook that were relied on by the employer to summarily dismissed the employee for undertaking outside work went beyond what was recognised by s. 9 of the Employment Ordinance and was therefore unlawful.

Circumstances that might have justified a summary dismissal may be lost if they are subsequently condoned. In *Madam Ho Yik Ho v Kin Ming Industrial Co* District Court, Labour Tribunal Appeal No 9/73, the District Court held that even if some of the activities complained of would have justified a summary dismissal, the fact that the employer chose to overlook the actions amounted to a waiver. The summary dismissal was held to be wrongful. In *Yeung Chee Kiu v Lam Chee (t/a Yau Fat Furniture Co)* [1966] HKDCLR 65, the District Court held that an employer was wrong to summarily dismiss an employee for misconduct which had previously been condoned. The dismissal was held to be wrongful.

The courts are often required to consider whether the breach in question is sufficiently serious to allow an employer to summarily dismiss.

In *Wing Ming Garment Factory Ltd v Pun Yun Kit & Ors* District Court, Labour Tribunal Appeal No 13/79, the court disagreed with a Labour Tribunal finding that the concerted act of employees who failed to return to work after being required to do so did not amount to misconduct which justified summary dismissal. The court concluded that the misconduct was not of a degree which warranted the employer's action of summarily dismissing the employees involved. The court upheld the Labour Tribunal's award of damages for wrongful termination. In *Cheung Tim Fuk v Far East Cotton Industries Ltd* High Court, Labour Tribunal Appeal No 71/95, the court was doubtful whether a Labour Tribunal had acted properly in finding that a summary dismissal was justified by reason of the employee's refusal to obey a lawful order. The court came to such a view after hearing evidence to the effect that the employee's supervisor had not in fact intended to dismiss the worker and had only issued a note confirming the dismissal at the insistence of the employee. The court remitted the case back to the Labour Tribunal to determine whether the employee had been dismissed or whether the employee had simply left his employment on his own accord. For a similar case in

court upheld a Labour Tribunal finding that the employer's actions in summarily dismissing staff for failing to report an incident of grey market selling was held to be 'premature and wrongful' by reason that the employer had not sufficiently detailed the manner in which such reports should be made. *Lau Tsim v Brillant Plastic Manufacturing Ltd* High Court, Labour Tribunal Appeal No 13/99 involved a case in which the Labour Tribunal found that the employer had wrongfully summarily dismissed an employee. On appeal, the employer argued that the Labour Tribunal erred in law by finding that the summary dismissal was not justified by the fact that the employee had engaged, during his employment, in concurrent employment for another employer. The court rejected the appeal on the grounds that the Labour Tribunal had not considered the concurrent employment claim in depth for the simple reason that the employer had failed to prove the allegations against the employee. In *King's Flair Development Ltd v Choi Lai Ching* Court of First Instance, Labour Tribunal Appeal No 37/99, the court heard that an employee resigned by giving one month's notice of termination. Soon after notice was given the employment was terminated immediately. The employer claimed that the parties agreed to the early termination by mutual consent. The employee argued that the employee had been told to leave immediately by the employer. After hearing the evidence of both sides the Labour Tribunal held that the employee's employment had been wrongfully terminated. The tribunal ordered the employer to pay the employee a payment in lieu of notice under s 8A. On appeal, the Court of First Instance, in upholding the tribunal's decision, held that there was no question of the parties having mutually agreed to waive the notice period as provided by s 8. In coming to this conclusion the court held that notice or a payment in lieu of such notice could only be waived 'at the time the notice is required'. In such circumstances, the court held that a 'Final Remuneration' statement that the employee had signed could not be regarded as notice of termination and therefore could not be considered as amounting to a waiver.

In *Lee Yuet Ho v Hing Yip Knitters (o/b Wayloy Investment Ltd)* High Court, Labour Tribunal Appeal No 26/2000, (where the Labour Tribunal found that an employer had insufficient grounds for terminating the employment of an employee who refused to commence work earlier than the time she had been required to start during the preceding seven years. The trial judge concluded that while it was open for the parties to negotiate an earlier commencement time:

> 'I do not think that the provision in the written contract could be construed as conferring on the employer a unilateral right to alter the working hours as agreed in the oral contract.'

Whether an employee had resigned or the employer had terminated the

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refused to pay the employee any payment in lieu of notice by reason that the employee had resigned. The court refused to interfere with the Labour Tribunal's finding that the employee's actions evinced no intention to resign and that the employee was entitled to be paid a payment in lieu of notice by reason of having been dismissed by his employer.

In *Ching Kin Wah v Union Electrical & Mechanical Engineering Co Ltd* District Court, Civil Action No 9886/2001, the court held that an employee, who refused to continue his employment without giving proper notice of termination, was not entitled to be awarded a payment in lieu of notice by reason that the employee's employer was entitled to summarily dismiss the employee by reason of the employee's misconduct.

Whether or not an employment contract was wrongfully terminated and by whom are matters that often have to be decided by the courts.

In *倫志豪經營飛鵬速遞服務公司 (Lung Chi Ho (t/a Fei Pang Courier Services Co)) v Lai Suk-man, Maskun* Court of First Instance, Labour Tribunal Appeal No 73/2001 an employee gave seven days' notice of termination on 6 December. The employment was terminated after a falling out between the employer and the employee. The employer claimed seven days' payment from the employee on the grounds that the employee had wrongfully terminated her employment by not completing the notice period.

A similar approach was taken in *Star Fair Electronics Co Ltd v Wong Tak Cheung & Ors* [1985] 2 HKC 92HC, (where the court held that the industrial action taken by employees was not of such a nature to justify their summary dismissal. The court held that the summary dismissals were wrongful.

In *Wong Donald v Colex Electronics Co Ltd* High Court, Civil Action No 7711/84, the question arose whether an employee's summary dismissal for acting outside his authority was justified. The court, although doubting whether the employer had in fact acted contrary to his instructions, concluded that if the incident complained of had occurred, it 'failed by a wide margin' to justify the dismissal. Damages amounting to $115,148.00 were awarded.

In determining whether an employer was justified in summarily dismissing an amah, the court in *Sampayan, Mariel Amigo v Ho Hang-sheung* Court of First Instance, Minor Employment Claims Adjudication Appeal No 6/98 observed:

> 'Summary dismissal of an employee is a very drastic step and is only justified in very exceptional circumstances. There were material upon which the adjudicating officer could conclude as he did that there were insufficient grounds for a summary dismissal.'

In the absence of a contract term to the contrary, the continued failure on the part of an employee to meet a monthly sales target cannot be construed as sufficient neglect of duties which will allow an employee to be summarily

Hong High Court, Labour Tribunal Appeal No 28/94, [1994] HKCU 129, the High Court upheld a Labour Tribunal finding that an employee who had been summarily dismissed for failing to meet his monthly sales targets, and for adopting his own method of sales contrary to his employer's established sales practice had been wrongfully dismissed.

In *Warburton, Graham v Jade Furs Ltd* High Court, Civil Action Nos 8119 and 5707/84, a question arose whether the summary dismissal of an employee for withholding a cheque to the value of US $6,768.00 from his employer had been justified. The court accepted that the employee's actions had not been dishonest, but rather had been motivated by desperation from being owed arrears of salary over the previous two years. The court held the dismissal to be wrongful.

In *Tsang Tak Chi v China Wall Ltd* [1999] 1 HKC 366, it was held that summary dismissal was a very serious step to take against any employees. It was 'capital punishment', in that if the dismissal was justified, the employee would be deprived of all protection provided by the Employment Ordinance. Immediate dismissal of an employee by reason of one single act of misconduct could only be justified in very exceptional circumstances. The court might also balance the impact of the summary dismissal on the employee with the effect of the employee's misconduct on the employer to decide whether summary dismissal was justified; *Jupiter General Insurance Co Ltd v Ardeshir Bomanji Shroff* [1937] 3 All ER 67 applied. In *Allidem Mae G v Kwong Si Lin* Court of First Instance, Labour Tribunal Appeal No. 4/04, the trial judge after approving Tsang Tak Chi observed:

> 'There are many decided cases on what amounts to conduct which justifies summary dismissal. A helpful decision in this regard is that of Barnett J in *So Ching v Kwan Hang Ching and Another* (1987) 2 HKC 297. The headnote to the report sufficiently reflects the position:
>
> '(2) What must be looked for was whether what was done by the employee was something which was expressly or impliedly a reputation of the fundamental term of contract such as to justify an instant dismissal.
>
> (3) The conduct which was relied on by an employer for dismissing an employee might be a single incident, such as one refusal to obey a lawful order, or it might be the cumulative effect of a series of incidents on the part of an employee.'
>
> At common law summary termination is justified for gross misconduct meaning really serious misconduct which would amount to conduct sufficiently grave to amount to a repudiation of the contract by the employee. Lord Evershed MR in *Laws v London Chronicle Newspapers Ltd.* (1959) 1 WLR 698, and 700 described it as conduct involving 'a disregard by the employee of a condition essential to a contract of service.'

30. It also

In *Yau Luen Transportation Co Ltd v Kwok Fu* District Court, Labour Tribunal Appeal No 2/74, the High Court had to decide whether five employees who had been awarded a payment in lieu of notice by the Labour Tribunal by reason of their wrongful dismissal had in fact been wrongful dismissal had in fact been wrongful dismissal had in fact been wrongfully dismissed. The employees had been dismissed after the discovery of their attempt to conceal the accidental loss of ten bags of sugar which had fallen overboard. The Labour Tribunal held that their dismissals were wrongful in so far as their actions amounted to stupidity rather than dishonesty and maliciousness. The High Court overturned the Tribunal's finding by holding that the employees' actions amounted to misconduct which would entitle an employer to summarily dismiss. The award of damages for wrongful termination was set aside.

In *Chan Yiu Yam v Peter Woo* [1981] HKLR 193, the Court of Appeal upheld a High Court finding that the employee's conduct did not amount to a breach of duty of good faith and fidelity, and so the employer's act of summarily dismissing the employee amounted to an unjustifiable summary dismissal. In *Home Essentials (HK) Ltd v John McLennan* District Court, Civil Action No 7954 of 2002 & 943 of 2003 the question arose whether an employee had obtained his employer's consent to continue and develop his own business concurrently with his employment. The court found that the employer had consented to permit the employee to continue his own business on the condition that such activities did not adversely interfere with his employment duties. After finding that there was no evidence to suggest that the employee's business activities had in fact interfered with his employment the court concluded that the employee was not in breach of any fiduciary duties that he owed his employer. See also *Woo, Peter v Trans-Asia Shipping Co Ltd & Anor* Civil Action Nos 3517 & 3154/77.

Whether an employee is in breach of a duty of fidelity is a matter that can only be determined by examining all relevant facts. In *Chung Man Chiu & Ors v Ad-Link Communications Ltd* High Court, Court of First Instance, Labour Tribunal Appeal No 58/2002, a Labour Tribunal found that there was insufficient evidence to establish that two employees had acted in breach of their respective duties of fidelity by having a contract award in a manner that was adverse to the interests of their employer. On appeal, the court held that the Labour Tribunal had erred in law by failing to allow the employer to cross-examine the employees on whether they had in fact acted in a manner that was inconsistent with established company procedures.

In *Chu Wing v Quali-Hing Enterprise* High Court, Labour Tribunal Appeal No 21/93, [1993] HKCU 426, [1993] HKCU 471 an employer who

Court, Labour Tribunal Appeal No 75/95 upholding a Labour Tribunal's determination that the employees had been dismissed without cause. The court held that the employment contracts of the affected staff had been wrongfully terminated.

In *Doctor Wong Koon v The Chinese University of Hong Kong* High Court, Civil Action No 5307/86, [1987] HKCU 83, the High Court was asked to decide whether a employment contract entailing a three-year probationary period had been wrongfully terminated by giving four months' notice of termination. The employee argued that as his probation had not been reviewed in accordance with the University's terms of service, the termination had been wrongful. The court held that the termination had occurred prior to any review's being necessary, and so the termination had been properly executed.

In *Lui Lim & Ors v Po Shek Restaurant Ltd* [1966] HKDCLR 77, the District Court rejected an employer's claim that a trade custom could override a presumption similar to s 5(1) which provided that, until the contrary was proved, a contract was deemed to be for one month renewable from month to month. As a result, the court held that the employer's failure to give less than one month's notice of termination was wrongful).

Where a party relies on statutory provisions to justify a particular method of termination, care must be taken to ensure that the circumstances accord fully with the particular statutory provisions in question. In *Lee Wai Wah v Kowloon Motor Bus Co (1933) Ltd* District Court, Labour Tribunal Appeal No [illegible], the District Court rejected an employer's claim that employee, in the absence of any misconduct, could be dismissed under s 9(b) without notice in accordance with a prior written agreement between the employer and employee. The court held that the provision was incapable of being construed as being an express agreement to the contrary' for the purposes of s 5(1). The terminations were held to be wrongful. On the basis of this decision, clause 9(c) of the Overseas Domestic Helpers Employment Contracts (prepared by the Hong Kong authorities), which purports to allow an employer to summarily dismiss an employee in the event of incapacitation, would be void by virtue of s 70. Any employer who summarily terminated a contract in the event of incapacity would be liable for damages for wrongful termination.

Because the damages awarded under s 8A are only awardable in respect of wrongful terminations, any loss occasioned by a termination which is not wrongful may only be recoverable at common law. Unlike common law damages, damages awarded by virtue of s 8A are unaffected by the actual loss of the party claiming. In addition, there is no corresponding duty on the part of claimant to mitigate any loss. This latter point was accepted by the court in *Chan Wai Man (formerly t/a Shanghai Night Club) v Kong Wing Fung & Ors* [1985] 1 HKC 441HC. In *Poon Po Wah, Stephen v Delta Asia Credit Ltd* High Court,

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"In the circumstances of this case, that is not so. Section 8A of the Employment Ordinance (Cap 57) provides that '··· where a contract of employment is terminated ··· a sum equal to the amount of wages which would have accrued to the employee during the period of notice required by s 6 shall be payable by the party terminating the contract to the other party'. It is common cause that, in this case, the period of notice was 6 months. It follows that the plaintiff is entitled to payment of the sum of $519,200 as particularised."

By virtue of s 25(3), an employer is permitted to deduct any amount payable under s 8A from any sum owed to an employee on termination.

In *A-O-A Tours Ltd v Joseph CK Young* [1965] HKDCLR 18, the court held that an employee who had entered a contract requiring either party to give 30 days notice of termination could not unilaterally terminate by failing to appear on the agreed commencement day simply because the employment had not commenced. The court held that the termination on the part of employee other than by notice amounted to a wrongful termination.

In *Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor* [1987] 2 HKC 310, HC, the High Court held that, as employees had been constructively dismissed in accordance with s 10(c), the employees had rightfully terminated their contract in accordance with the provisions of the Employment Ordinance. The court held that the employees were without a statutory remedy for their loss because the provisions of s 8A only require the party who wrongfully terminates to pay damages. The court concluded that, in such circumstances, employees suffering loss arising by reason of a constructive dismissal must prove their actual loss and seek common law damages. A similar finding was made in *De Nicholas, Nenita Cientos v Lee Fung-lan* High Court, Labour Tribunal Appeal No 15/97. In *Mones, Celestina Saldivar v Lui Siu Hun* High Court, Labour Tribunal Appeal No 81/99, where the court remitted a case of an employee who had been constructively dismissed back to the Labour Tribunal for assessment of common law damages to be assessed in such a way as to compensate the employee for loss reasonably incurred as a result of the employer's breach. The court left open the wider issue whether the Labour Tribunal had jurisdiction to hear claims for common law damages. See however *Suzuya International (HK) Co. Ltd. v Chung Chun Hei* District Court, Civil Action Nos. 5251 and 6016 of 2004 the court awarded a former employee who had been constructively dismissed a payment in lieu of notice equivalent to three months' salary and a pro-rata annual bonus. The court did not consider whether the former employee was entitled to recover common law damages for her actual loss.

In *Kao Lee & Yip v. Lau Wing & Another* Court of Appeal, Civil Appeal No. 121 of 2006 the Court of Appeal left open the question whether s 8A placed any limits on claims that could be brought in respect of wrongful

also aware that there have been first instances cases which have held that common law damages may be claimed in a wrongful termination situation: *Ying Cheong Shoe Mfy v Yam Yuk Bing* HCLA 102/1986, 1 May 1987, Rhind J; *Precieux Garment Factory Ltd v Lam Kin Chung* HCLA 5/1997, 18 July 1997, Cheung J (as he then was); *De Nicolas v Lee Fung Lan* HCLA 15/1997, 9 Oct 1997, Beeson DJ (as she then was). I am not prepared to express any definite view on this point in the absence of thorough arguments from both sides.'

In *Law Shiu Kai, Andrew v Dynasty International Hotel Corp & Ors* Court of First Instance, Civil Action No 4/2002, a former employee claimed common law damages for the remainder of the unexpired part of a three-year fixed-term contract. In considering the claim, the court observed:

> 'Prima facie, at common law, if a fixed term employment contract is prematurely and wrongfully terminated by the employer, the employee is entitled to sue for damages calculated by reference to the wages that he would have received from his employer during the unexpired term of employment, less whatever actual income or income that he ought to have been able to earn from other sources during the unexpired period of employment.'

By reason, that court held that the employment contract was one that was renewable for month to month, the court awarded the employee damages equivalent to one month's wage under s 8A. Whether the court was correct in awarding a statutory award of damages limited to one month as opposed to actual common law damages by reason of the employee having been constructively dismissed does not appear to be consistent with the approach taken by the court in *Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor* [1987] 2 HKC 310(HC) and *De Nicholas, Nenita Cientos v Lee Fung-lan* High Court, Labour Tribunal Appeal No 15/97 above.

The amount payable by virtue of s 8A is independent of the actual loss of the party who is adversely affected by the wrongful termination. Although similar to damages at common law, the damages payable in respect of a wrongful termination are fixed by reference to an equivalent of the sum which would have been earned during the notice period, rather than by reference to innocent party's actual loss. In *Chau Chun Man v International Fur Co* [1987] HKC 333 DC, the court held that the provisions of s 7(3) which provide a method of calculating wages which would have accrued to an employee could not be prayed in aid of calculating a payment of an award under s 8A. This reasoning was not followed in *Kin Man Garment Factory v Lam Suk Ching* [1985] 2 HKC 290 HC, in which the High Court granted leave to appeal a Labour Tribunal award under s 8A on the grounds that the amount awarded was in excess of that which would have been awarded under s 7(3). The definition of 'wages' ...

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High Court, Labour Tribunal Appeal No 3/92, [1992] HKCU 107. For a case in which the court held that a transportation allowance and a good attendance bonus were to be regarded as 'wages' for the purposes of calculating a payment in lieu of notice, see *New Bright Industrial Co Ltd v Wong Sau Chi & Ors* [1995] 2 HKC 357 HC. The extent to which the provisions of s 8A preclude recovery of damages under other heads has not been considered authoritatively by the Hong Kong courts. As a general rule, the courts have allowed recovery of various heads of damages. In *Canono Marcelina Manarang v Mr & Mrs SR Butt* High Court, Labour Tribunal Appeal No 30/83, the High Court held that an employer's act of summarily dismissing an employee who refused to make an unlawful penalty payment to the employer amounted to a wrongful dismissal. The court upheld the Labour Tribunal's award of damages under s 8A, comprising air fares to the Philippines, holiday and outstanding wages.

In *Lam Lung Sing v Yang's Taxi Co Ltd* High Court, Labour Tribunal Appeal No 7/84, leave was sought from the High Court to determine whether a taxi driver who had been transferred from night shift to day shift duties had been constructively dismissed. The employee terminated the employment contract without notice. The Labour Tribunal had held that as the change in shift duties amounted only to a request, the employee could not consider himself to have been constructively dismissed. The employer was awarded damages under s 8A in respect of the employee's wrongful termination. (See also *Seru Dambar Kumar & Ors v Limbu Lalitbahadur (t/a Trishul Engineering & Manpower Services)* Court of First Instance, Labour Tribunal Appeal No 51/2003 where the Labour Tribunal awarded a payment in lieu of notice under s 8A to a group of employees whose employment had been constructively dismissed under s 10.)

The measure of compensation awardable under s 8A is the equivalent of an employee's daily or monthly average of wages (depending on how much notice of termination needs to be given under the employment contract). The Ordinance does not make provision for employees whose contract is silent on notice of termination. In *Ashdown, John Peter v Rightfairs Development Ltd (t/a Funtex Construction and Engineering Co)* High Court, Civil Action No 4874/90, a contract for a fixed term was terminated wrongfully by an employer. As the contract did not provide for termination either by notice or payment in lieu, only common law damages, not damages under s 8A, were awardable. In recognizing the employee's duty to mitigate, the court allowed a 100 per cent mitigation for a period of five months and a partial mitigation for a further two months. As a result, assessed damages of $350,000 were reduced to $187,466. In *Mones, Celestina Saldivar v Lui Siu Hun* High Court, Labour Tribunal Appeal No 81/99, the court left open the wider issue whether the Labour Tribunal had jurisdiction to hear claims for common law damages

noted that as the contract was silent as to the notice period, then in accordance with the provisions of s 6(2)(a), a minimum payment equivalent to one month's notice ought to have been paid by virtue of s 8A. In *Club Deluxe Ltd v Club Metropolitan Ltd* High Court, Civil Action No A8339/90, the court noted that while the employee had given 14 days' notice of termination, the notice given fell short of the one month's notice which was necessary to terminate the employment lawfully. Instead of giving the employee credit for the notice which she had given, and awarding compensation in accordance with s 7(2) for that part which represented a shortfall, the court awarded the employer compensation equivalent to a full month's wages. The failure on the part of the High Court to give the employee 14 days credit for the notice that had been given was noted by the Court of Appeal in *Club Deluxe Ltd v Club Metropolitan Ltd* Court of Appeal, Civil Appeal No 152/93, [1994] HKCU 81, [1994] HKCU 89.

In *Co Minh v Ming Hing Gem Co Ltd* Court of Appeal, Civil Action No 180/93, [1994] HKCU 50, an employee claimed that he had been engaged under an employment contract for a fixed term of three years. The employee further claimed that as the contract made no provision for early termination, the employer had wrongfully dismissed him by terminating his employment after just one month. On this basis the employee claimed three years' salary amounting to some $297,500. In rejecting that there ever had been a written fixed term contract concluded, the Court of Appeal held that the employee had in fact been engaged under an oral contract that was deemed to be a month to month contract under the provisions of s 5. In making this finding, the Court held that the High Court had been correct in holding that it was open to the employer to terminate the employee's employment under the provisions of s 6 by giving one month's notice of termination to the employee.

In *Chan Wing Cheong Virchow v Intech Digital Technology Limited* Court of First Instance, Labour Tribunal Appeal No. 46 of 2007 the court held that it was within the Labour Tribunal's jurisdiction to make awards relating to reimbursements that the employer had failed to pay an employee. The court held that any failure on the part of an employer to repay sums expended by an employee in carrying out his employment amounted to a breach of employment and thus fell within the jurisdiction of the Labour Tribunal.

In *Lee Cheuk Shun v Tradition (Asia) Limited* Court of First Instance, Action No. 2808 of 2006,, an employee was employed under a two year fixed term contract that made no provisions for terminating prior to the expiry of the fixed term. The employee wrongfully terminated his employment before the expiration of the fixed term. The employer claimed damages against the employee under s 6(2)(c) of the Employment Ordinance on two alternate basis:

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