BUTTERWORTHS HONG KONG EMPLOYMENT LAW HANDBOOK

Ninth Edition (Volume 1)

BUTTERWORTHS HONG KONG EMPLOYMENT LAW HANDBOOK

Ninth Edition (Volume 2)

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The commentary in this book states the law as at 1 September 2025.

related person	有關連人士
relevant date/ the relevant day	有關日期
renewal	續訂
requisite document	所需文件
rest day	休息日
school	學校
school attendance certificate	在學證明書
school day	上課日子
school hours	上課時間
school term	學期
secondary education	中學教育
severance payment	遣散費
sickness allowance	疾病津貼
sickness day	病假日
specified date	指明日期
specified document	指明文件
specified employee	指明僱員
specified entitlement	指明權利
specified period	指明期間
specified provision	指明條文
spouse	配偶
statutory holiday	法定假日
strike	罷工
sub-contractor	次承判商
subsidiary	附屬公司
substituted holiday	代替假日
successor	繼承人
summer holidays	暑假
tips and service charges	小費及服務費
transition date	轉制日
tribunal	審裁處
wage period	工資期
wages	工資
week	星期
whole employment period	整段僱傭期
work	工作
working hours	工作時間
young person	青年

EMPLOYMENT ORDINANCE

(CAP 57)

Introduction

The Scope of Employment Law in Hong Kong

1. The Employment Contract

Summary

The employment contract represents all the legal rights and obligations governing the relationship between each employer and employee. While an employer and employee are free to decide on the terms of employment, the law does impose minimum employment terms and requirements which cannot be ignored even where the parties mutually agree on different terms.

While there is no general legal requirement for an employment contract to be in writing or to be signed by either party, it is a common practice for employment agreements to be evidence in writing.

During the course of employment, it is not uncommon for employment terms and conditions to be replaced by new terms and conditions, and these revised terms will usually become incorporated into the employment contract. This is especially so in the case where an employee has been employed for some time. Therefore, it is often necessary to examine various supporting documents and past practices to ascertain the exact terms of employment.

Employment Contract

The employment contract represents all the legal employment rights and obligations that apply to an employer and an employee. These rights and obligations are commonly called terms of employment.

Written contractsThere is no general legal requirement for the terms of employment to be in writing although this is recognised as good human resource practice and a very common practice in Hong Kong. However, the Employment Ordinance (Cap 57) does require employment contracts lasting more than one month to be evidenced in writing and signed by both parties (s 5(2)) and such information be informed by the employer to the employee (s 44). In the event of the employment contract (which is for a longer duration of one month) not being signed by both parties, the Employment Ordinance will treat such contracts as being a contract for a duration of one month (renewable from month to month) and either party may terminate the contract by giving the other party either one month's notice or by making a payment in lieu of such notice: Employment Ordinance (Cap 57), ss 5(1) & 6.

Case-note: In *Elizabeth Harrington v Cap Gemini Ernst & Young Hong Kong Ltd*

[2004] HKCU 535 (unreported, HCCL 10/2002, 17 May 2004) (CFI), the court found that although the parties had reached a consensus for entering a two-year fixed contract that could only be terminated by cause, the parties were subject to the provisions of s 5(2) by reason that neither party had in fact signed any document evidencing the employment contract. As a result, the court determined that the employer was entitled to terminate the employee's contract by giving one month's notice. The employee's argument that the parties had entered into a binding oral agreement for a duration of two years was rejected by the court which observed:

> There certainly was an understanding that a formal agreement ultimately would be forthcoming which set out the agreed product of the negotiations, but in my view this formed part and parcel of the overall contract negotiations, no more and no less. Mr Smith acknowledged that a mere 'understanding' was insufficient for his purpose, and after reflecting on the evidence I am unable to accept the contention that this understanding may conveniently be regarded as, or transmuted into, a separately identifiable and specifically enforceable agreement.
>
> Accordingly, I find, as a matter of fact, that in this case there is no such independent agreement as that for which the plaintiff now contends. This argument strikes me as essentially artificial, and as a classification of the facts advanced solely by reason of the strictures imposed upon this claim by virtue of section 5(2) of the Employment Ordinance.

Example 1

Employment contracts exceeding one month must be made in writing and signed by both parties:

Gadgeteer Industrial Asia Ltd employed Cynthia Tam on a fixed-term contract of three years. The contract did not allow either party to terminate the employment by giving the other party notice of termination. The letter of appointment was signed on behalf of Gadgeteer, but not by Cynthia. As the employment terms were not signed by both parties, the Employment Ordinance (Cap 57) regards the employment as being renewable from month to month which allows either party

to terminate by giving the other party either one month's notice or by making a payment in lieu of such notice.

In accordance with s 6(2)(a) of the Employment Ordinance (Cap 57), even though the employment contract is stated to run for three years either party may terminate the employment contract by giving the other party not less than one month's notice or by making a payment in lieu of notice equivalent to one month's average of wages.

Case-note: In *Zee Yee Ka v Greenwood (Asia) Ltd & Anor* (unreported, Civ App No 63 of 2007) (CA) a former employee who claimed to have been employed under a fixed-term employment contract for three years conceded that by reason

that neither party had signed the contract it had to be regarded as an employment contract renewable month to month. As a consequence, the employee accepted that damages were only payable by the employer for one month and not the seven months that the employee took to find alternate employment.

Letter of appointment:

Case-note: The case of *Ko Hon Yue v Liu Ching Leung & Ors* (2012) 15 HKCFAR 72, [2012] HKCU 418 (CFA) involved a school teacher who had been employed under a fixed-term contract of one year. The fixed-term employment contract was not entered formally and was merely evidenced in board minutes but was not signed by both parties. The employee commenced legal proceedings to challenge the legality of his employment being terminated by making him a payment in lieu of one month's notice. The employee argued that his terms of employment required that he be given three months' notice of termination. The employee further argued that termination of his employment in such circumstances could only be given effect in the event of his employment being terminated by reason of unsatisfactory performance. However, the Court of Final Appeal agreed with the findings of the trial judge and the Court of Appeal below that the agreement was on the same terms as the previous contractual documents which were signed and that was sufficient to take the case out of s 5(2). The matter was remitted to the trial judge who found that the contract of employment was wrongly terminated according to the terms of the contract ([2017] 5 HKLRD 510, [2017] HKCU 2478 (CFI)).

Example 2

Employment terms must be construed in the light of changing circumstances:

Joseph Chu commenced employment with Dualustre Enterprises Ltd in 1990 as a trainee manager. The terms of his employment were detailed in a letter of appointment. Although Joseph is now the deputy managing director of the company, his original terms of employment have never been replaced by another written agreement. In order to ascertain the terms and conditions which apply to his position, it is necessary to look at all the unwritten variations of terms which have occurred since his employment began.

Case-note: In *Cui Hong v Wah Ngai Printing Ltd* [2005] HKCU 565 (unreported, DCCJ 966 and 1320 of 2005, 31 March 2005) (DC) an employee was employed under terms of employment that were neither written nor evidenced in writing. The employee claimed that her employer had orally agreed to pay her a commission in the event that she was able to successfully negotiate any contract price that exceeded her employer's normal contractual rates.

After the employee successfully negotiated a contract that exceeded her employer's normal contract rate by US$34,969.00 the employee's employment was summarily dismissed after the employee demanded to be paid a commission equivalent to the US$34,969.00 surplus.

The employee commenced proceedings to recover the outstanding commission based on her employer's oral agreement. In rejecting the employee's claim the court noted:

(1) That the only commission scheme that the employer ever had in place had been long abandoned and had only ever been awarded to field salespersons at the rate of 2% of the contract price. The claimant had been engaged in office administration and was not a field salesperson.

(2) A colleague of the claimant who had voluntarily left her employment and who had been employed in carrying out similar office duties as the claimant testified that she was never entitled to be paid a commission.

(3) The claimant had pleaded and then subsequently adduced evidence as to her entitlement to a commission that was both 'inconsistent and illogical'.

In rejecting that the employer had ever orally agreed to pay the claimant such a generous and one-sided commission the court observed:

> I find [the claimant's] alleged commission scheme bizarre. If the [the claimant was] so effective to get an additional 30% over the contract price the [employer] might well be happy to give the [the claimant] the surplus. However, her alleged scheme had no limit of commission. In a keenly competitive trade, it was a selfish scheme that would only benefit the [the claimant]. The alleged scheme would require the [the employer] to finance a limitless rip-off of a customer at the expense of skinning it once and for all, as well as loss of reputation. It would have no medium- or long-term benefit to the employer. I reject her allegation of this commission scheme.

Case-note: In *Liang Current Tien Tzu v Hutchison Global Communications Holdings Ltd* [2006] HKCU 1671 (unreported, HCA 15/ 2003, 4 October 2006) (CFI), a former employee claimed a performance bonus from his former employer amounting to $872,718. The employee's employment contract provided for the payment of a bonus as follows:

> 7. Performance Bonus: Your performance bonus will be calculated based on the amount of any equity related fund raising including but not limited to:
>
> (1) Placement of new or old shares of the Company, its subsidiaries or associated companies and
>
> (2) Issue of bonds or similar instruments for the Company, its subsidiaries or associated companies.
>
> Excluded from your performance bonus calculation are the following items:
>
> (a) Proceeds from IPO or spinning-off of the Company's subsidiaries, associates and related companies;
>
> (b) Syndication loans or loans of a similar nature and
>
> (c) Trade financing, loans or credit facilities from commercial banks granted to the Company or any of its group companies.
>
> The bonus is calculated as:

> 0.3% on any amount of funds raised of less than US$25 million
>
> 0.5% on the amount in excess of an aggregate of US$25 million
>
> The bonus shall only be applicable to the total of such funds raised during the period from the Date of Commencement of your employment to the Company's financial year ending on 31 March 2001. This performance bonus scheme will be reviewed and if necessary, revised on an annual basis.

The court disallowed the employee's bonus claims on the grounds that the convertible bonds in respect of which the bonus was claimed had been issued after 31 March 2001. The court held that, on its proper construction, the bonus scheme would automatically terminate as from 1 April 2001 in the absence of the parties renewing the bonus scheme. The court also held that the bonus scheme that was put in place as from 1 April 2001 did not apply to the issuance of convertible bonds.

Case-note: In *Norton Yan Yan, Susan v Hong Kong Airlines Ltd* [2010] HKCU 1368 (unreported, HCLA 8/2010, 21 June 2010) (CFI) the question arose whether a pro rata gratuity was payable for employment of less than three years. The court held that having regard to the proper construction of the relevant contractual provisions the presiding officer was correct in holding that a pro rata gratuity was payable for employment service of less than three years.

Case-note: *Yip Kwong To v United Waters U.W. Holding Hong Kong Ltd* [2011] HKCU 2007 (unreported, HCLA 24/2011, 18 October 2011) (CFI). An employee's letter of appointment provided for the payment of an annual bonus on the following terms:

> Additional 'annualized' fixed payment of USD80, 000 paid on the 31st of January every year, first year payment on the 31st of January 2010 will be on pro-rata basis. By definition, it means the [the claimant] will entitle a pro-rata payment of the relevant benefits if [he] leaves the [the defendant] in the middle of a year.

The employee's resignation was effective September 2010. The Labour Tribunal awarded the employee a pro rata annual bonus amounting to $367,661.58 for the period 1 February — September 2010.

The employer applied to appeal the Labour Tribunal's award on the grounds that:

(1) that the employee's entitlement to a pro rata annual bonus only arose in the event of the employee's employment terminating in the 'middle of the year' (ie 31 July) but not at any other time during the year, and

(2) in any event by reason that the employee's employment contract prohibited the payment of a pro rata annual payment, the terms of the employment agreement were void by virtue of s 11F of the Employment Ordinance (Cap 57).

Without deciding the second ground of appeal the court held that there was nothing under the relevant provisions of the employment agreement that could be construed as limiting a pro rata payment only to a resignation that took effect as at 31 July.

Editor's note: By reason of the court's finding it was not necessary for it to
to consider the argument that the terms of the employment agreement were
by virtue of s 11F.

Statutory Provisions

Minimum statutory provisions The law allows an employer and an employee
agree on many employment terms, eg medical benefits, housing allowance,
bonus, commission payments and other contractual benefits and entitlements
without regard to any statutory provision. However, the law specifies that certain
minimum provisions must be complied with where benefits or allowances
awarded that relate to such matters as minimum wage, maternity leave, paternity
leave, sickness leave, annual leave, holidays, severance pay, long service
payment period within which wages are to be paid, etc.

Example 1

Terms of employment must comply with statutory requirements

The provisions under which Benson So is employed by Gainhill
Travel (HK) Ltd provide for the payment of sickness allowance
two-thirds of his normal salary. As such an entitlement is less
the statutory minimum of four-fifths of his daily average of wages,
such an employment term is void by virtue of s 70 of the
Employment Ordinance (Cap 57). In such circumstances, the law
operates to disregard the express contractual term by implying
contractual entitlement of sickness allowance at the rate of four-fifths
of Benson's daily average of wages.

Reducing or extinguishing employee's statutory entitlement. Many of the
minimum rights are granted by legislation. Such legislation may also provide
parties cannot circumvent these minimum rights by private agreement. For
example, a contractual term which attempts to reduce or extinguish an employee's
statutory entitlement conferred by the Employment Ordinance (Cap 57) will be
void and unenforceable even where the employee and employer have both
consented to such an arrangement: Employment Ordinance, s 70. A similar
contracting out provision also exists in the Minimum Wage Ordinance (Cap 608),
s 15. Furthermore, such arrangements to reduce an employee's minimum statutory
entitlement may also amount to an offence.

Case-note: In *Chan Siu Ming & Ors v Kwok Chung Motor Car Ltd* (unreported,
LTA 37 of 2006) (CFI), a minibus operator argued that by reason that its drivers
had never treated their relationships as one of employment, the drivers should not
be permitted to claim to have been engaged as employees. In rejecting the
argument the court observed:

> 48. Finally, the Company relies on the legal principle of 'estoppel by
> convention' and submits that as both parties had presumed and
> acknowledged that no employment relationship existed between them,
> they should be bound by the agreement. Nevertheless, the label cannot

serve to convert what is basically an employment relationship into an
independent self-employment, which also goes against the spirit of the
Employment Ordinance (Cap 57). As Megaw LJ observed in *Ferguson v
Dawson & Partners* [1976] 1 WLR 1213 at p 1223:

> ... The parties cannot transfer a statute-imposed duty of care for
> safety of workmen from an employer to the workman himself
> merely because the parties agree, in effect, that the workman shall
> be deemed to be self-employed, where the true essence of the
> contract is, otherwise, of a contract of service.

49. Accordingly, the legal principle of 'estoppel by convention' does not apply
to the statutory rights of a party to the contract. As Viscount Radcliffe
stated in the Privy Council case of *Kok Hoong v Leong Cheong Kweng
Mines Ltd* [1964] AC 993 at p 1015:

> The respondent has invoked in support of its defence a principle
> which appears in our law in many forms, that a party cannot set
> up an estoppel in the face of a statute. Thus a corporation upon
> which there is imposed a statutory duty to carry out certain acts
> in the interest of the public cannot preclude itself by estoppel in
> pais from performing its duty and asserting legal rights
> accordingly. See *Maritime Electric Co Ltd v General Dairies Ltd
> and Southend-on-Sea Corporation v Hodgson (Wickford) Ltd.*
> Given a 'statutory obligation of an unconditional character' it is
> not open to the court to allow the party bound by that obligation
> to be barred from carrying it out by the operation of an estoppel.
> Similarly, there is, in most cases, no estoppel against a defendant
> who wishes to set up the statutory invalidity of some contract or
> transaction upon which he is being sued, despite the fact that by
> conduct or other means he would otherwise be bound by
> estoppel: see *In re Bankruptcy Notice,* in particular *per* Atkin LJ.

50. This is in line with the provision in section 70 of the Employment
Ordinance, which forbids anyone from extinguishing or reducing by
means of contractual terms the rights conferred by the Ordinance.

Case-note: In *Leung Kam Wah v Fung Yuk Ching Yvonne trading as Hong Kong
Transportation Co*, Court of First Instance, Labour Tribunal Appeal No 43 of 2006,
an employee was employed as a cross-border truck driver. The driver commenced
a claim for employment benefits in the Labour Tribunal. The transport company
argued that the driver had in fact been engaged as an independent contractor by
reason that:

(1) The parties had entered an agreement voluntarily that expressly provided
that the driver was not engaged as an employee;

(2) There being no evidence to show that the driver was coerced, threatened
or tricked when the agreement was entered;

(3) The terms of the agreement itself was the best material from which to
gather the true relationship between the parties: see *Julian Smith v
Reliance Water Controls Ltd* [2003] EWCA 1153, *per* Scott Paker LJ at
para 11.

On appeal from the Labour Tribunal that holding that the driver had been employed as an employee, the court rejected that the parties' view as to their relationship should be accorded the most significant if not the determinative weight in determining the parties' relationship. In downplaying the importance of the view held by both parties, the court observed:

> It is well settled that it is for the court and not the parties to evaluate the facts and determine their true legal relationship: *Chan Kwok Kin v Mok Kwok Hing & Another* [1991] 1 HKLR 631 per Clough JA at p 636A–B. Thus the parties' own view, even agreement, as to the relationship is but one factor that the court takes into account.

The Employment Ordinance (Cap 57) provides for a limited number of exceptions to the rule that employees are not competent to surrender their statutory rights and protections, but they are extremely narrow in scope. The following items of discrimination legislation also operates in a similar manner, as a result even though an employer and employee may voluntarily agree on certain discriminatory arrangements, such an agreement will not prevent an employee from making a claim of discrimination at a later stage:

(1) Sex Discrimination Ordinance (Cap 480);
(2) Disability Discrimination Ordinance (Cap 487);
(3) Race Discrimination Ordinance (Cap 602); and
(4) Family Status Discrimination Ordinance (Cap 527).

Example 2

An employee cannot voluntarily surrender employment terms:

Havach Engineering Co (Asia) Ltd requires employees who have given notice of termination to use up any outstanding annual leave during the notice period. While employees can be required (if permitted under their employment contract) to use up non-statutory annual leave during the notice period, s 6 of the Employment Ordinance (Cap 57) prohibits an employer requiring an employee to take statutory annual leave during the notice period. As a consequence, Havach's policy results in the extinction of employees' statutory right to receive annual leave compensation on termination. Such a practice amounts to Havach acting unlawfully and committing an offence.

Case-note: In *Kao, Lee & Yip (a firm) v Lau Wing (also known as Stephanie Lau) & Anor*, Final Appeal No 7 of 2008, [2009] 2 HKC 1, (2008) 11 HKCFAR 576 (CFA), the employer argued that an employee had wrongfully terminated her employment by unilaterally including one day of annual leave in the one month's notice of termination that she had given. After reviewing the provisions of the Employment Ordinance (Cap 57), the Court of Final Appeal unanimously held that while s 6(2A) prohibits an employer from compelling an employee to take annual leave during any period of notice being served by an employee, there was

nothing to prevent an employee from electing (without the agreement of the employer) to include annual leave for the purposes of shortening the notice period.

Example 3

An employee who surrenders employment terms may later complain of discrimination:

After being unemployed for eight months, Jennifer agreed to commence work for Prodical Medical Laboratory on a salary of $16,700 per month. Soon after she commenced employment she discovered that male colleagues who undertook exactly the same work were paid $25,900 per month. The fact that Jennifer had voluntarily agreed to work for a lesser amount would not prevent her from lodging a sex discrimination complaint against her employer.

Other important statutes While the Employment Ordinance (Cap 57) is the most important statutory source on employment terms and conditions in Hong Kong, the following statutes have also come to have an important impact on the employment contract:

(1) Personal Data (Privacy) Ordinance (Cap 486);
(2) Minimum Wage Ordinance (Cap 608);
(3) Employees' Compensation Ordinance (Cap 282);
(4) Mandatory Provident Fund Schemes Ordinance (Cap 485);
(5) Sex Discrimination Ordinance (Cap 480);
(6) Mandatory Provident Fund Schemes Ordinance (Cap 485);
(7) Disability Discrimination Ordinance (Cap 487);
(8) Race Discrimination Ordinance (Cap 602); and
(9) Family Status Discrimination Ordinance (Cap 527).

Example 4

Discrimination legislation must be taken into account for the purposes of employment:

Darius Leung was employed as a secretary on terms that required her to work 10 hours overtime every week. Soon after commencing her employment, Darius notice that male members of the company were not required to work any overtime. The Sex Discrimination Ordinance (Cap 480) states that female employees should not be treated any less favourably than male employees. In this example, Darius would be entitled to lodge a discrimination complaint in the event of other male employees carrying out similar duties to her not being required to work overtime.

Contractual Provisions

Implied termsIt is not uncommon for terms to be implied into an employment contract where no express terms either apply, or if formerly applied, are no longer applicable. Terms may be implied into an employment contract by:

(1) custom;

(2) a court;

(3) common law; or

(4) statute law.

Example 1

Terms may be implied into contract where no applicable express term exists:

The express terms in the letter of appointment under which Fairyland Restaurant (Kowloon) Ltd employs employees makes no mention of the payment of an annual bonus nor explicitly states where the place of employment is to be. As a matter of practice, the restaurant pays each employees member an annual bonus equivalent to one month's salary. Employees have always been paid the bonus since the restaurant commenced operations in 1978.

Fairyland plans to open another restaurant in Tsim Sha Tsui. Henry Tang refuses to relocate to work at the new restaurant on the ground that relocation is not stated in his employment contract. Fairyland has informed Henry that if he does not relocate he will be summarily dismissed for refusing to obey a lawful order.

In order to consider the respective rights and obligations of both parties, it is necessary to consider which terms may be implied into the contract. The courts recognise that most employment contracts contain an implied term that employees may be required to relocate to another place of employment so long as the requirement is lawful.

There is an implied term in every employment contract that entitles an employer to terminate summarily for wilful disobedience of a lawful and reasonable order.

The Employment Ordinance (Cap 57) recognises that an employee may be entitled to receive an annual bonus on the basis that such a contractual right can be implied as a result of previous practice of long standing. The Employment Ordinance implies a term into every employment contract to the effect that an employee is not entitled to a pro rata bonus payment in the event of the employee being summarily dismissed.

Case-note: In *Trijump Ltd v Choi Wai Ki* [2009] HKCU 1842 (unreported, HCA 1898/2005, 20 November 2009) (CFI), the question arose whether an employee had been employed under a written employment agreement that provided either party to give three months' notice in order to terminate the employment contract.

The court held that although no written agreement had been located, the fact that the employee had formerly been employed by an associate company since 1996 on written terms were grounds for inferring that the employee had been re-engaged by his employer on the same written terms by the associated company. In concluding that the employee was required to give three months' notice of termination the court observed:

> An employee may terminate his employment by giving the requisite notice as stipulated in the employment contract or wages in lieu. If he fails to do that, he is liable to pay his employer damages equivalent to the wages in lieu of notice: see s 8A(1) of the Employment Ordinance (Cap 57). When the [employee] resigned with immediate effect on 14 February 2005, he should [have paid] 3 months' wages in lieu of notice. But he had only paid one. He is liable for the balance, that is, HK$36,000 (his last monthly wage) x 2 = HK$72,000.

Case-note: In *Chow Jih Yim Wilson formerly known as Chow Chi Kwong Wilson v Global Regency Electronics Ltd* [2005] HKCU 1284 (unreported, HCLA 21/2005, 22 Septemner 2005) (CFI), a senior employee was entitled to be paid a generous performance bonus that amounted to 2/3 of 50% of the net profits of his employer. At the time the employee's employment terminated in March 2003 the employer had accumulated almost $2,000,000 in profits during the current accounting year. Three months later at the end of the accounting year the employer contended that it had in fact suffered extensive losses throughout the year and offered the former employee $29,644 by way of performance bonus. The employee rejected the bonus offered and commenced proceedings.

The question that arose to be decided during the course of the trial was how such a performance profits bonus was to be ascertained when the employment was terminated before the end of the current accounting year. The court noted that there was no express term in the employment contract that provided for calculating a performance bonus prior to the end of the current accounting by observing:

> There is no dispute between the parties before me that the situation arising in this case was not covered by the express term of the contract of employment which was merely to the effect that the Claimant be entitled to Performance Bonus equivalent to 2/3 of 50% of the Net Profits of the Company. Nor is there any dispute before me that in respect of the termination of employment prior to accounting year-end, there is an implied term that the Claimant is entitled to Performance Bonus. The dispute is as to which of the two implied terms contended by the parties the Court should accept.

The former employee argued that there was an implied term that his performance bonus ought to be calculated up to the date of termination of his employment. In finding in favour of the employee the court observed:

> The virtue and merit of the implied term contended by the Claimant (net profits of company up to termination of employment, namely up to end of March 2003) is that it is simple, it is fair and it is certain. It is simple and certain because there can be no dispute as to the date of termination of

employment and the accrued profits as of that date (since this is something which should be known to the Claimant as the profits covered the period when he was in charge). It is fair because it fairly reflects the performance of the Claimant and of the Company during that period of time when the Claimant was employed and entitled to the Performance Bonus. This arguably term is fair both to the Company and to the Claimant. It is therefore both a reasonable and a necessary term (in the sense to give business efficacy) satisfies the usual accepted notions of an implied term.

The employer argued that after the employee's employment terminated there was an implied term that the employee's performance bonus would be calculated (only) after current accounting year had ended. In rejecting this argument the court observed:

> The same cannot be said of the implied term contended by the Defendant (net profits of the company for the period up to accounting year-end and to be pro-rated according to the months worked during the accounting year). This proposed implied term is complicated, open to dispute and is neither reasonable nor fair. It is unreasonable and wholly unfair because it seeks to impose the Bonus not by reference to the period when the Claimant was employed which would then fairly reflect the performance of the Claimant and of the Company during that period, but by reference to extra months (until year-end) when the Claimant was not employed and when the performance of the Company was not due to his employment. A very busy new management (after the departure of the Claimant) could radically wipe out all profits previously accrued, just as a new brilliant manager can radically increase the profits several fold. What is the logic or reason, in the above first case, to penalize the employee by taking away the accrued profits and thereby the accrued bonus. Where is the reason or logic, in the above second case, of giving the employee a windfall of profits to which he has contributed nothing. Where is the fairness in that formulation to either the Claimant (in the first situation) or to the Company (in the second situation). It is therefore not only unfair but against the whole spirit of Performance Bonus which is employment related and not year-end related. (Mr Remedios' point about equality to all employees to have their respective bonus all calculated to year-end ignores the fact that Claimant when terminated before year-end stands in a different position from other employees who continued employment until year-end). It is further objectionable because it introduces a new concept of pro-rata for the months employed which again has no logic or reasonableness or fairness behind it. There is finally another serious objection to using the year-end as basis for ascertainment of profits, because this would be after the departure of the Claimant employee when the preparation of the accounts would be outside the control and knowledge of the Claimant employee. The risk of a disgruntled employer so massaging the accounts as to diminish the accrued profits must be considerable specially when there are related company dealings and accounts. It is therefore not only complicated but dangerous to introduce such a term into the contract. In my view, the implied term advanced by the Defendant is neither reasonable nor necessary. It is contrary to all the accepted notions of an implied term.

The court awarded the former employee $578,065 (plus interest) by way of performance bonus.

Example 2

Terms may be implied into a contract to replace an express term: Under the written terms of her employment agreement with Gaffner (Asia Pacific) Ltd, Princess Leung is entitled to 12 days' annual leave. These terms have not changed since she was first employed in 1991. As she has been employed for more than nine years, Princess is entitled to 14 days' annual leave under the provisions of the Employment Ordinance (Cap 57). In such circumstances, the provisions of the Ordinance become implied into the employment contract and override the express terms in her employment agreement.

Implications of contractual breaches:

Breach of contractIf either party to an employment contract fails to perform a contractual term or obligation, such a party will be deemed to have breached the employment contract. A serious breach will entitle the aggrieved party to terminate the employment contract immediately without notice or making a payment in lieu.

What constitutes a serious breach of contract is often not easily determined. Each evaluation must be considered by reference to its own particular facts and circumstances.

Example 1

A serious breach must be determined by the facts of the case: Ishii Trading Co Ltd wishes to terminate the employment of Julia Hui by reason that she is habitually late for work. Just before a decision was taken to summarily dismiss her, Julia informed the company that she was pregnant.

Although the Employment Ordinance (Cap 57) recognises Ishii's right to summarily dismiss Julia even if she is pregnant, a court would look very carefully at the alleged breach to determine if the misconduct was sufficiently serious to justify such a dismissal.

If Ishii was found to have terminated the contract for a breach that was not sufficiently serious, the company would be liable to be ordered to pay compensation for wrongful termination.

Wrongful termination in the case of pregnancy would also give rise to criminal liability under the Employment Ordinance (Cap 57) and would also in all likelihood, amount to a discriminatory act under the Sex Discrimination Ordinance (Cap 480).

Terms more generous than statutory minimum Employment contracts

often provide for terms which are more generous than the minimum statutory requirements. Although the statutory provisions may not apply to those benefits and entitlements which exceed the statutory minimum, they will continue to apply to those contractual entitlements that are equivalent to the minimum statutory provisions.

Example 2

Even where contractual terms are more generous, statutory provisions continue to apply

Gainer Line (Asia) Co Ltd grants 15 days' annual leave to its employees. This is more generous than the Employment Ordinance (Cap 57) which awards just seven days' annual leave during an employee's first three years of employment service.

In this example, seven of the 15 days of annual leave must be granted strictly in accordance with the provisions of the Ordinance while the remaining eight days' annual leave may be granted in accordance with the terms of the employment contract.

Case-note: In *Sumitra Jayasena Kelly v Cathay Pacific Ltd* (unreported, LTA 10/2004) (CFI), a former airline employee sued her former employer for compensation in lieu of the concessionary airline tickets that the airline refused to award her and her spouse. The Labour Tribunal refused to award the claim by holding that the former employee had no contractual right to be awarded such entitlements by reason that the concessionary airline ticket policy had only been introduced after the former employee had already commenced her employment. On appeal, the court held that the Labour Tribunal had erred in law by not properly investigating why an earlier concessionary airline ticket policy and a later employees' benefit handbook did not give the former employee a contractual right to claim the compensation that she sought. The former employee's claim was referred back to the Labour Tribunal to be heard by a different presiding officer.

Illegality and Unenforceability of Contract

Doctrine of public policy: A contract of employment, like most other contracts between parties, may not be enforceable if it is based on any term which is unlawful or illegal. The concept of contracts being unenforceable by a court for unlawfulness or illegality has emerged for reasons of public policy. Public policy dictates that where a contract involves illegal acts, the parties thereto should not be able to take action in the courts to obtain any benefit from such a contract.

A contract may be considered to be illegal if it falls into either of two broad categories. Firstly, a contract may be for illegal purposes, in which case it will be unenforceable in a court regardless of the parties' intentions. A contract may also be illegal by reason of the way the terms of the employment contract are proposed to be performed. For example, if the employment contract is for a legal purpose, but one or more of the parties decides to carry out their obligations under the contract in a manner which is illegal, the contract may be considered illegal. In

those circumstances, if both parties know of the proposed illegality, the contract will be unenforceable by either party. However, if only one party knew of the illegal behaviour, the innocent party may still be able to rely on the provisions of the contract.

Consequence of illegality: A further result of a finding of illegality in relation to an employment contract will be that the employee concerned may not be considered to be an 'employee' for the purposes of the relevant employment statutes, and consequently may lose the normal statutory rights and protections which an employee is afforded under a particular statute. A common example of situations involving employees losing their statutory rights is where it is established that the employee concerned does not have the correct immigration status.

Example 1

Damages for loss of income may not be awarded to an employee as a result of a breach of an employment contract based on illegality:

William Lau was employed for three years by Force International Ltd, under an employment contract whereby he worked partly in Hong Kong and partly abroad. William had at no time held a valid employment visa enabling him to work in Hong Kong. Relations between William and his employer eventually broke down and the employment ceased. William is owed money in respect of salary and profit-sharing entitlement and intends to bring an action in the Labour Tribunal in Hong Kong against Force International Ltd for breach of contract.

In this example, a court would, in all likelihood, be reluctant to award William compensation for his loss of salary and profit sharing against Force International Ltd by reason that the employment contract could not be performed without either party knowingly being engaged in an illegal activity.

Courts may enforce statutory protection The courts have shown some reluctance to deny employees their statutory protection in the event of some illegality affecting the employment relationship. The courts are aware that a balance must be drawn between the impact of illegal acts and the possible harsh consequences of withholding employment protection. For example under s 2(2) of the Employees' Compensation Ordinance (Cap 282) ('the ECO'), the court is empowered to award an employee compensation for work-related injuries arising out of an employment contract that involves some illegality.

In line with the general principles outlined above, employees will

generally only be able to obtain help from the court on a contract which is tainted with illegality if the contract was not itself for an illegal purpose and the employee did not have knowledge of any proposed or actual illegal conduct.

The courts are often reluctant to exercise any power of selective enforcement in the event of an employment contract involving immoral or criminal acts or where the party seeking to rely on the contract had knowledge of the illegal purpose or performance.

Example 2

Illegal provisions may not be severed from the contract:
Upon the termination of his employment, Paul Mak was owed salary and expenses by his employer White Communications (Asia) Ltd. Paul's employment contract contained provisions on salary and expenses which were clearly designed to defraud the Inland Revenue Department. In this example, it may be that Paul will not be able to enforce his contract in court to recover his outstanding salary. If the provisions as to payment of salary and expenses are clearly illegal the courts would be very reluctant to sever them from the remaining contract.

Case-note: In *Liu Le Wen v Chan Sing & Anor* [2008] HKCU 125 (unreported, CACV 185/2007, 17 January 2008) (CA), an employee who was visiting Hong Kong from mainland China on a two-way permit was seriously injured while working unlawfully in Hong Kong. The injuries required the employee to spend prolonged stays in hospitals in the mainland. By reason of the employee's hospitalisation and his inability to locate the employer in Hong Kong, the judge at first instance refused the employee's application to commence compensation proceedings after the two-year time limit expired by reason that the employee had been working in Hong Kong illegally. The Court of Appeal held that, having regard to the employee's prolonged hospitalisation combined with the repeated efforts to locate the employee, the employee did in fact have a reasonable excuse for not commencing the proceedings within the two years as laid down by the Employees' Compensation Ordinance. The court allowed the employee to commence compensation proceedings out of time.

Case-note: In *Chen Xiu Mei v Li Siu Wo & Anor* [2007] 5 HKC 516, [2008] 2 HKLRD 211 (CA), a visitor from mainland China was killed whilst working in a factory in Hong Kong. The District Court refused his family's application for compensation on the grounds that the deceased employee had been working in Hong Kong illegally and that his employer had been sentenced to six months' imprisonment. The deceased's family appealed to the Court of Appeal.

The Employees' Compensation Assistance Fund Board which opposed the family's compensation application argued that the deceased had not been killed 'in the

course of his employment'. While the Board conceded that the deceased had been employed as a manual labourer, he had not been employed to drive the truck that had resulted in his death. The Court of Appeal rejected this argument after finding that driving the truck from time to time was part of the removal work that the deceased had been employed to perform.

The Court of Appeal went on to consider whether the District Court was correct in refusing to exercise its discretion to allow the family's claim by reason that the employment was unlawful and therefore contrary to public policy. The Court of Appeal noted that the District Court had ignored an earlier case of *Chan Cheuk-ting v Analogue Engineering Co Ltd & Anor* [1986] HKLR 935, [1986] HKCU 297 (CA) in which the Court of Appeal had observed:

> We are in agreement with the judge that there is no consideration of policy of such weight that it would require the court to refuse to exercise its discretion. The deceased was performing lawful work. He was covered by a policy of insurance in the performance of the work he was doing. He suffered an injury causing his death in the course of his employment. We see nothing in public policy that would require a court to refuse to exercise its discretion so as to deny the dependants the benefit of the insurance policy.

In finding that the District Court had wrongfully withheld its discretion to award the deceased's family compensation the Court of Appeal noted:

> 38 First, in *Chan Cheuk-ting*, the employer had an employees' compensation insurance coverage. I do not see any distinction in a situation where the employer does not have such a coverage. The employer is the person primarily responsible for the payment of compensation under section 5(1) of the ECO. This responsibility continues irrespective of whether he has an insurance coverage as required by section 40 of the ECO.
>
> 39 Second, even if, for the purpose of argument, the potential liability of the Employees' Compensation Assistance Scheme Fund ('the Fund') is a relevant factor to be taken into account on the exercise of the discretion, I agree with the argument of Ms Gladys Li S.C. and Mr. Mohan Bharwaney, counsel for the applicant, that it should not affect the outcome of the exercise. An employer is required to effect employees compensation insurance coverage under section 40 of the ECO. The levy imposed on such policies under s 14 of the Employees' Compensation Insurance Levies Ordinance, Cap 411 ('ECILO'), is a source of revenue for the ECAS Fund to satisfy judgments for compensation against uninsured employers. *Chan Cheuk-ting* is a long established decision given more than 20 years ago. The Fund ought to have realized its exposure to potential claims by illegally employed workers whose employers were unlikely to provide them with insurance coverage. No steps had been taken by the Fund to adjust the levy or introduce legislative change so as to preclude the Fund from making payment in such a situation. The Fund should not be allowed to take advantage of its inertia and use it to preclude the claim of the applicant.

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Employment Law Handbook

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The commentary in this book states the law as at 1 September 2025.

EMPLOYMENT ORDINANCE

(CAP 57)

Part VA

Severance payments

(Part VA added 67 of 1974 s 5. Format changes—E.R. 3 of 2017)

31A. *(Repealed 76 of 1985 s 4)*

31B. General provisions as to right to severance payment

(1) Where an employee who has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date— *(Amended 76 of 1985 s 5)*

(a) is dismissed by his employer by reason of redundancy; or

(b) is laid off within the meaning of section 31E,

the employer shall, subject to this Part and Part VC, be liable to pay to the employee a severance payment calculated in accordance with section 31G. *(Amended 52 of 1988 s 5)*

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that—

(a) his employer has ceased, or intends to cease, to carry on the business—

(i) for the purposes of which the employee was employed by him; or

(ii) in the place where the employee was so employed; or

(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish. *(Replaced 62 of 1992 s 4)*

(3) For the purposes of the application of this Part to an employee who is employed as a domestic servant in, or in connection

with, a private household, this Part (except section 31J) shall apply as if the household were a business and the maintenance of the household were the carrying on of that business by the employer.

[cf. 1965 c. 62 ss. 1 & 19(1) U.K.]

[31B.01] Definitions

For 'business', 'cease', 'contract of employment', 'domestic servant', 'employee', 'employer', 'relevant date', 'renewal', 'severance payment', 'wages'; see s 2; for 'continuous contract', see s 3 and the First Schedule; for 'dismissed', see s 31D; for 'month', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

[31B.02] section 31B(1): Application

An employee who has been employed under a continuous contract for not less than 24 months will be entitled to a severance payment if he is dismissed by reason of redundancy, as defined in s 31D, or laid off as defined s 31E.

The total period of an employee's continuous contract will be determined by reference to the relevant date, see para **[31B.016]** above.

The amount of severance payment is calculated by reference to s 31G.

On the death of an employer, special provisions apply by virtue of the Third Schedule, para 7 in calculating the continuous employment of an employee where the employee was re-employed by the personal representative of the deceased employer.

In *Shell Electric Manufactory Co Ltd v Lau Shu Cheung* [1980] HKDLR 9, an employer attempted to argue that any employee who had been laid off was precluded from claiming a severance payment on the grounds of redundancy. In rejecting this argument, the court noted that the lay-off provisions of s 31E 'were merely alternative to dismissal by reason of redundancy under [s] 31B(1)(a)'.

In *Chu Wing v Quali-Hing Enterprise* [1993] HKCU 426, [1993] HKCU 471, a question arose as to whether the Labour Tribunal was correct in holding that an employee was not entitled to a severance payment because the worker had been employed for less than 24 months. The court found that as the presiding officer had not clearly established the date on which the employment had commenced, the matter should be returned to the Labour Tribunal for further determination. In many circumstances, an employee who has been laid off under the provisions s 31E will also be redundant for the purposes of s 31B(1).

In *Lui Lin Kam & Ors v Nice Creation Development Ltd (t/a Fu On Seafood Restaurant)*, Court of First Instance, Labour Tribunal Appeal No 106/2002, the question arose whether the three employees had lost their entitlement to be awarded a severance payment by reason that their employment had ceased to be continuous. Although the court conceded that the employees had not worked during the two weeks prior to their employment terminating, their continuity of service had in

fact been preserved by virtue of the provisions of paras 2 and 3 of the First Schedule.

[31B.03] section 31B(2): Scope

A redundancy situation may arise in one of three ways:

1 *An employer has ceased (or intends to cease) to carry on business for the purpose for which the employee was employed by him.*

The courts have had little difficulty in finding a redundancy where employers have shut down the business. In *Chan Wai Man(formerly t/a Shanghai Night Club) v Kong Wing Fung & Ors* [1985] 1 HKC 441, the court upheld a Labour Tribunal finding that a club which ostensibly closed down for renovation but never reopened had ceased to carry on business in accordance with s 31B(2)(a).

Even where an employer has closed down part of a business, the courts have been prepared to hold that the provisions of s 31B(1) (a) have been satisfied. In *Wong See Yee v Fung Hang Musical Co Ltd*, High Court, Labour Tribunal Appeal No 79/86, the court held that the fact that an employee who was originally responsible for keeping the books of two shops was replaced by an employee who was paid less to keep the books of just one shop was sufficient for a redundancy to arise.

In *Yan Kwok Tung & Ors v Napoleon Restaurant Ltd & Anor* [1993] 2 HKLR 1, the operator of a fast food chain lost its licence to operate a restaurant at Ocean Park. As a result, the contracts of employees who were employed there were terminated. The Labour Tribunal awards of severance payments to staff were challenged on the grounds that the tribunal had erred in finding that the employees had been dismissed by reason of redundancy. The court concluded that because the employer's fast food business elsewhere in Hong Kong was continuing, employees affected by the Ocean Park close-down could not rely on s 31B(2)(a) to claim a redundancy situation. See however *Wong Yuk Ling & Ors v East East Food Products Ltd & Anor*, Court of First Instance, Labour Tribunal Appeal No 95/2002 (on appeal from Labour Tribunal Claim No 5326/2002) where the court held that a fast-food operator had no contractual right to require part-time staff to relocate from Lok Fu to Aberdeen to undertake their employment.

2 *An employer has ceased (or intends to cease) to carry on business in the place where the employee was so employed.*

In *Leung Wan Jing & 4 Ors v Chiat Si Plastic Metalware Manufactory* [1987] HKCU 48 (unreported, HCLA 17/1987, 24 June 1987) (SC), in a undefended hearing, Penlington J held that the term 'work of a particular kind in the place' was to be construed as referring only to different work being offered in the same place and not to different work being offered in some other location. On this basis, the judge held that the provisions of s 31B(2) did not apply to relocation from Yuen Long to Shamshipo.

In *Ip Pui Wai t/a Wai Shun Mould Manufacturing Factory, Mallon Plastic Mould Co Ltd v Siu Kwok Keung and 4 Ors* [1993] HKCU 424

(unreported, LTA 37/1993, 29 November 1993) (HC), the court held that the evidence before the Labour Tribunal which suggested that the employer had moved most of the factory machines to China, coupled with the fact that part of the factory had been sub-let, was ample proof that a redundancy situation had in fact arisen.

The extent to which the term refers to a geographical location rather than a place where an employee could be required to work under the employment contract was considered at length in *Yan Kwok Tung & Ors v Napoleon Restaurant Ltd & Anor* (above). In coming to the conclusion that the employees were dismissed by reason of redundancy, the court held:

29. I return to Section 31B(2)(c) of the Employment Ordinance, which is the section I must construe. The second of the three criticisms which I have sought to level against the contractual test does not apply to Section 31B(2)(c) because there are no words corresponding to 'the place where the employee was so employed' in section 31B(2)(a), being the equivalent in the Employment Ordinance of section 1(2)(a) of the Redundancy Payments Act 1965. However, there is, in my view, an additional reason why the words 'the place where the employee was so employed' in section 31B(2)(c) imports the geographical test, and that is that the words 'the place in which the employee was or is so employed' in section 31B(2)(b) can only refer to the place at which the employee actually worked. Any other construction would make section 31B(2)(b) unworkable. It cannot have been the intention to limit an employee's entitlement to a severance payment by reason of section 31B(2)(b) to those cases in which an employee could before his dismissal have been contractually required to work only on the Island of Hong Kong, but whose subsequent dismissal was attributable to the fact that his employer could contractually require him to work only in either Kowloon or the New Territories, or vice versa. When an Ordinance uses the same language in different sections, the sections should, if possible, be given the same construction. The construction which, in my view, has to be placed on section 31B(2)(b) dictates that the geographical test should govern section 31B(2)(c).

29. In the interest of completeness, I should add that Mr. Ma relied on two passages in the judgment of Penlington J (as he then was) in *Leung Wan Jing & 4 others v. Chiat Si Plastic Metalware Manufactory* (Labour Tribunal Appeal No. 17/87). Penlington J. said:

'... provided similar work at the same salary is still available to an employee without having to go from either Hong Kong to Kowloon and the New Territories or vice versa, the employee has not been dismissed by reason of redundancy'.

However, that is a reference to section 31B(2)(b), not to section 31B(2)(c). What Penlington J said about section 31B(2)(c) in the previous sentence of his judgment was that this provision 'appears to conflict with [section 31B(2)(b)] but I am satisfied this simply means that if employment is offered in the same place of employment but doing work of a different

kind that shall constitute a dismissal by reason of redundancy'. I too see no conflict between the two provisions, but I prefer to express it slightly different. An employee's dismissal will be by reason of redundancy if it is attributable to his place of work being moved from the Island of Hong Kong to Kowloon or the New Territories or vice versa. It will also be by reason of redundancy if his dismissal is attributable to the fact that at the place where he worked, wherever it was, his employers no longer needed as many employees, or any employees at all, to do the work which he was doing. Incidentally, although the point does not appear to have been argued before him, Penlington J assumed that the geographical test was the correct one.

30. For these reasons, I agree with the Presiding Officer that on the primary facts found by him the dismissal of the Claimants was by reason of redundancy, though I have reached that conclusion by a different route.

In *Wong Yuk Ling & Ors v East East Food Products Ltd & Anor*, Court of First Instance, Labour Tribunal Appeal No 95/2002 (on appeal from Labour Tribunal Claim No 5326/2002) the court held that a fast-food operator the express mobility clause (ie clause 4 of the employment contract) was not engaged, and that they could not require part-time staff to relocate from Lok Fu to Aberdeen to undertake their employment. In coming to this conclusion, the court held:

8. In my judgment, on a proper construction of the contract of employment in general and clause 4 in particular, clause 4 which provides for an express power on the part of the employers to transfer the employee to another place of work is predicated upon the presence of a 'need' (如有需要). In other words, the employers may only exercise the power to transfer if there is a need to do so. Moreover, as a matter of construction, I would construe the word 'need' to mean a genuine business, administrative or operational need of the employers.

...

15. Given those findings of fact, I am of the view that clause 4 was simply not engaged. In other words, based on those findings of fact, there was no genuine need for the transfer. In other words, the Defendants had no power under clause 4 to make the proposed transfer.

3 *The requirements of the business for employees to carry out work of a particular kind either generally or in the place where the employee was employed have ceased, diminished or are expected to cease or diminish.*

In *Mindex Battery Works Ltd v Cheng Pak Woon*, District Court, Labour Tribunal Appeal No 11/75, the District Court accepted a Labour Tribunal finding that an employee who was transferred from one section of a factory to another with which he had no experience could be considered redundant for the purposes of s 31B(2)(b).

In *Yan Kwok Tung and Ors v Napoleon Restaurant Ltd and Anor* [1993] 2 HKLR 1, [1993] HKCU 528 (HC), the High Court had to decide

whether employees of a caterer who shut down a particular operation had been dismissed by reason of redundancy. In particular, the court was required to rule whether the provisions of s 31(2)(c) (as then in force) which related to the place of employment, applied purely to a geographical location or to some other place under the terms of the contract an employee could be required to work. After an analysis of various Hong Kong and English authorities, the court concluded that an employee could be made redundant in accordance with s 31B(2)(c) whenever employment in the physical place where an employee was employed ceased or diminished. See however *Wong Yuk Ling & Ors v East East Food Products Ltd & Anor*, Court of First Instance, Labour Tribunal Appeal No 95/2002 (on appeal from Labour Tribunal Claim No 5326/2002) where the court held that a fast-food operator had no contractual right to require part-time staff to relocate from Lok Fu to Aberdeen to undertake their employment. The fact that an employer shut down a business on the grounds that the club was unable to obtain the requisite fire regulations approval was held to give rise to a redundancy situation in *Choi Tze Keung v Green Club*, High Court, Labour Tribunal Appeal No 77/96. In reaching this conclusion, the court held that the net result was that the employee was dismissed because the nature of work for which the employee had been employed had diminished as a result of the closure.

In *Merciales, Sally C v Wong Tang-tat*, High Court, Labour Tribunal Appeal No 105/96, the letter of termination issued by the employer stated that the reason for the termination was redundancy. In determining whether there had in fact been a redundancy, the presiding officer made a comparison of duties undertaken by a Filipino domestic helper and a Chinese helper who had replaced the Filipino domestic helper to determine whether there had been a redundancy. In finding that there were eight items of work that the Chinese helper was not required to undertake, that had been formerly undertaken by the Filipino domestic helper, the presiding officer observed: 'However, comparing the substantial similarity of other work which the amah had to do, that was just "*de minimus*" deviation from the usual duties of the amah'. The presiding officer concluded that there was no redundancy by reason that:

'Considering all the evidence as a whole, I found that there had been no cessation or diminution in the requirements of

the Defendant's household for an employee to carry out the duties usually done by the Claimant. What the Defendant and his wife said to Claimant upon termination, what was stated in the release letter and the request to Claimant to help sister were consistent with the intention of the Defendant and his wife to end the relationship amicably rather than to dismiss the Claimant for redundancy.'

In *Actem Engineering Ltd v Chan Chun Wah* [1991] HKCU 213, the High Court overturned a Labour Tribunal's finding that a foreman was not dismissed by reason of redundancy, but rather because of the employer's strong suspicion that the employee had arranged for the staff to work for

the employer's competitors. The court held that so long as an employee's dismissal was mainly attributable to a redundancy situation, then it made no difference on what grounds an employer chose to terminate or retain staff. In this case the dismissal was partly attributable to a diminishing requirement in the employer's work force and, therefore, a redundancy situation was made out.

In *Leung Yu Ting and Anor v Gold Union Far East Ltd t/a Ristorante Romano*, High Court, Labour Tribunal Appeal No 185/95, former employees of a restaurant claimed a severance payment on the grounds of redundancy by reason that their employer closed down the business some six months after their employment was terminated. The court rejected the employees' claim by reason that there was no evidence that the restaurant would close down at the time the employment of the effected staff was terminated.

In *Leung Yiu-chung and 6 Ors v Gammon (Hong Kong) Ltd*, High Court, Labour Tribunal Appeal No 16/83, the Labour Tribunal held that although the employment of seven employees was terminated for reasons that were not justified (the employees had been prosecuted for gambling on the employer's premises), the employees were not entitled to be awarded severance payments by reason that there was no evidence that the termination was by reason of redundancy. The High Court on appeal noted that by reason that the employer had conceded that no replacements had been recruited to replace the seven employees the case should be returned to the Labour Tribunal with a direction for the tribunal to enquire whether the employees had in fact been made redundant by reason of their positions not being filled.

In *Huen Fook Nam v Pentalpha Enterprises Limited*, Court of First Instance, Civil Action No 15860 of 2005, the court held that an employee was not entitled to a severance payment by reason that the true reason for the employee's employment being terminated was by reason of a dispute between the parties and not by reason of redundancy. As a consequence, the court held that the presumption under s 31Q was easily rebutted.

4 *Diminution of role and responsibilities rather than cessation of business*

The extent to which a redundancy may arise as a result of a diminution rather than a cessation of business has been considered frequently by the courts.

In *Hong Kong & China Gas Co Ltd v Wong Yuen Kwong* [1987] 3 HKC 508 (HC), the High Court upheld a severance payment awarded to an employee who had been engaged as a night shift worker but who was later transferred to day shift duties. The court held that the effect of unilaterally transferring the employee to day shift duties (with a loss of a 17.5% shift allowance) amounted to a constructive dismissal on the part of the employee. As a redundancy arose by virtue of the employers closing down its night shift activities, the employee's severance payment was upheld.

In *Afia Worldwide Insurance v Ho Yeung Seung & Ors*, District Court, Labour Tribunal Appeal No 12/79, the court upheld a Labour Tribunal finding that the termination of employment of three clerks who refused to accept a transfer within a company was attributable to a diminishing requirement for clerks within the company.

In *Wing Ming Garment Factory Ltd v Pun Yun Kit & Ors*, District Court, Labour Tribunal Appeal No 13/79, the court accepted as flawless the employer's argument that as piece-rated workers were paid for the work they produced, they could not be made redundant by reason of a diminution of business. On this basis, the court struck down the Labour Tribunal's severance payment award. This decision has never been referred to or followed in similar cases about piece rated workers; see *Chau Chun Man & Ors v International Fur Co* [1981] HKC 333 (DC); *Fashion Art Garment Factory Ltd v Yeung Mau Ching & Ors* [1989] 2 HKC 467 (HC); *Winsome Watch-Case Manufactory Ltd v Chan Hau Chung* [1984] HKC 113 (HC); and *Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor* [1987] 2 HKC 310 (HC). See also *Precieux Garment Factory Ltd v Lam Kin Chung & Ors*, Labour Tribunal Appeal No 5/97.

In *Fan Man Yiu v General Locks & Metalwares Factory Ltd* [1984] HKC 486 (HC), the court held that the failure of an employer to provide an employee with his original position on his return from a temporary secondment amounted to a redundancy.

In *Star Fair Electronics Co Ltd v Wong Tak Cheung & Ors* [1985] 2 HKC 92 (HC), the High Court rejected an employer's claim that the Labour Tribunal had misconstrued the presumption under s 31Q. The court held that the tribunal was correct in finding that the diminution of the business of the employer rather than misconduct of employees was the motivation behind the dismissals. The court held that the facts as found by the Labour Tribunal gave ample support to the proposition that the dismissals were wholly or mainly attributable to the employer's intention to cease or diminish carrying on business.

In *Wong See Yee v Fung Hang Musical Co Ltd* Labour Tribunal Appeal No 79/1986, the court held that replacing an employee with another employee with fewer responsibilities and lower salary was capable of amounting to a redundancy. In *Carla Rigmor Archer v Organisation Search Ltd* [1998] HKCU 438 (unreported, A6439/1997, 23 April 1998) (HC), the court held that an employee, whose employment was terminated by reason that the employee was 'surplus' to an employer's requirements could not be regarded as having been dismissed by reason of redundancy.

In *Kam Hung Industries Co Ltd v Lam Ming Sun, Choi Man Choi and Sze Nang Tung* [1987] HKCU 9 (unreported, LTA 61/1986, 23 January 1987) (HC), the court implicitly upheld a Labour Tribunal award that a substantial reduction of work provided to piece-rated employees amounted to a diminution of business which entitled the employees to be paid a severance payment. The court refused to upset the tribunal's finding that

a substantial reduction in the earnings of employees amounted to repudiatory conduct on the part of the employer which the employees were entitled to accept.

[31B.04] section 31B(3): Application

For the purpose of severance payment entitlement, employees engaged as domestic servants in a private household are to be considered as being employed as part of a business. The change of ownership provisions contained in s 31J do not apply.

A domestic servant is defined in s 2 as including a garden servant, chauffeur, or boatboy and any other personal servant of a like class.

[31B.05] 'Attributable wholly or mainly'

In *Welfare Finishing & Dyeing Fty Ltd v Ma Yun Wah*, District Court, Labour Tribunal Appeal No 21/79, the District Court was called upon to decide the extent to which a termination partly attributable to negligent performance and partly arising out of a redundancy situation was capable of giving rise to a severance payment. The court held that provided the termination was partly attributable to redundancy, that was sufficient to meet the requirements of the section.

In *Chan Suk Bing Angie v Harbour Phoenix Ltd & Anor* [1992] 2 HKC 459 HC, the High Court held that a presiding officer of the Labour Tribunal erred in holding that a dismissal was not wholly or mainly due to the diminishing requirements of the business. The Court of Appeal held that an abundance of factual evidence which suggested a diminished requirement for the employee's services could not be rebutted simply by a self-serving, ambiguous and unverified letter to the contrary on the part of the employer.

[31B.06] 'Business'

A 'business' is defined in s 2 as including a trade or profession or any like activity carried on by a person. By virtue of s 31B(3), Part VA will apply to an employee who is employed as a domestic servant in, or in connection with, a private household, as if the household were a business and the maintenance of the household were the carrying on of that business by the employer. The term person is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as including any public body and any body of persons, corporate or unincorporate.

[31B.07] 'Cease'

The term 'cease' is defined in s 2 in relation to Part VA and the Third Schedule as meaning ceasing either permanently or temporarily and from whatever cause, and the term diminish has a corresponding meaning. An employee will be considered redundant in circumstances in which an employer ceases or intends to cease carrying on business.

[31B.08] 'Continuous contract'

Whether a contract of employment is a continuous contract must be considered by reference to s 3 and the First Schedule. In *Ip Pui Wai (t/a Wai Shun Mould Manufacturing Factory) & Anor v Siu Kwok Keung & Ors* [1993] HKCU 424, [1993] HKCU 469, the court was called on to consider circumstances under which an employee terminated his employment but who was re-engaged two months later on the understanding that his previous service would be preserved. A question arose whether the employee was entitled to count the two months break as service for the purpose of calculating a severance payment award. The court held that the Labour Tribunal was wrong to do so and reduced the employee's award accordingly.

By virtue of s 2, 'contract of employment' is defined as meaning any agreement, whether in writing or oral, express or implied, whereby an employer agrees to employ an individual as an employee and the employee agrees to serve the employer as an employee. The term is also defined to include a contract of apprenticeship. The term 'employment contract' does not include any contract for personal services that are provided by an independent contractor on behalf of an employer. For cases and commentary, see paras [2.10], [2.14] and [2.15].

[31B.09] 'Diminish'

By virtue of the definition of 'cease' in s 2, the term 'diminish' means diminishing either permanently or temporarily and from whatever cause. In *Wong See Yee v Fung Hang Musical Co Ltd*, High Court, Labour Tribunal Appeal No 79/86, the High Court was asked to decide whether an employee had been made redundant in accordance with the provisions of s 31B(2). The court held that a diminution in business was evidenced by the fact that an employee who had been responsible for keeping the books of two shops was replaced by an employee who was paid a lower salary for keeping the books of a single shop.

[31B.10] 'Dismissed'

The three basic forms of termination which give rise to a dismissal under this section are given in s 31D(1).

[31B.11] 'Domestic servant'

A 'domestic servant' is defined in s 2 to include domestic helpers, carers, chauffeurs, gardeners, boat-boys.

[31B.12] 'Employee'

For definitions, see ss 2 and 4. Although s 4 defines 'employee' explicitly by reference to employees currently engaged under a contract of employment, the provisions of the Ordinance also include prospective and former employees (with a limited number of exceptions; see ss 21A and 21C). For cases and commentary, see paras [2.10], [2.14] and [2.15].

[31B.13] 'Employer'

The term 'employer' covers both the actual employer of an employee as well as authorised persons acting on behalf of such an employer. In this regard, human resources and other staff acting in a management capacity are regarded as employers for the purposes of the Ordinance. As the term 'employer' is defined by reference to any person, special regard should be had to s 3 of the Interpretation and General Clauses Ordinance (Cap 1), which defines a person to include corporate and unincorporated bodies. For cases and commentary, see paras [2.10], [2.14] and [2.15].

[31B.14] 'Month'

Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) defines 'month' as meaning a calendar month. In *Far East Drug (BVI) Co Ltd v First Pacific Company Ltd*, Court of First Instance, Commercial Action No 41 of 2003 and *Far East Drug (BVI) Co Ltd v First Pacific Company Ltd*, Court of Appeal, Civil Appeal No 166 of 2004 the court held the term 'month' does not mean a lunar month as recognised by the common law (ie a period of 28 days) but rather refers to a calendar month which is calculated by reference to the corresponding date rule. In coming to this conclusion the court relied on the dicta of Lord Diplock in *Dodds v Walker* [1981] 1 WLR 1027 where the learned Law Lord observed:

> '[A] reference to a "month" in a statute is to be understood as a calendar month. The Interpretation Act 1889 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester v Garland* (1808) 15 Ves Jun 248, that in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given.'

[31B.15] 'Redundancy'

The manner in which a redundancy may arise is provided for in s 31B(2). For an additional form of redundancy see, s 31K(3).

[31B.16] 'Relevant date'

The term 'relevant date' is defined in s 2, and refers to the date on which a contract of employment terminates.

[31B.17] 'Severance payment'

A 'severance payment' is defined in s 2 as meaning the severance payment payable by an employer to an employee under s 31B(1). Note that the term 'severance

payment' does not apply to those severance payments which are payable under the employment contract to the extent to which they exceed the provisions of the Ordinance.

[31B.18] Statutory severance pay entitlement

Under the provisions of the Ordinance, employees who have been employed under a continuous contract for not less than 24 months are entitled to a severance payment where:

- the employee is laid off; or
- the employment of an employee is terminated by reason of redundancy: s 31B(1).

An employee will be regarded as being continuously employed in the event of working not less than 18 hours per week irrespective of whether the employment is undertaken under one or more contracts of employment. An employee who is entitled to a severance payment award is not entitled to a long service award: ss 3, 31R and the First Schedule.

Example 1

Employees who are continuously employed entitled to severance award:

In 1995, Janice was employed as a part-time employee by Incere Bloom Investment Ltd for 12 hours per week. The terms of employment expressly state that a severance award is not payable to part-time or temporary employees. For the period 1997–2014, Janice had been working an average of 20 hours per week. As Janice has been continuously employed for a period which exceeds two years, she is entitled to receive a severance payment for the period in which her employment consistently amounted to a minimum of 18 hours per week.

Example 2

Continuity of employment must be calculated by reference to total employment:

In 2010, John commenced her employment with 1-hand Enterprises Ltd as a part-time night cleaner working ten hours per week. In 2014, John was also employed during the day time for 11 hours per week as a part-time assistant in the company's mail room. For the purposes of the

Ordinance, John's total employment service of 21 hours per week is sufficient for him to be regarded as being in continuous employment. Under the provisions of the First Schedule, it is not relevant that

John's service is worked under two separate employment contracts.

A severance payment will be payable whenever an employee is laid off, irrespective of whether the employment has terminated.

Example 3

Employee may be laid off without employment terminating:

Josephine has been employed by Ink Publications Ltd for seven years. As a result of the declining number of publications, Josephine's hours of employment have been drastically reduced from 47 per week to 22. Irrespective of whether Josephine has given consent to such a reduction, she will be regarded as being laid off from the time she is provided with less than one half of her normal working days in any consecutive period of four weeks. The fact that Josephine's employment is not terminated will not affect her statutory right to claim a severance payment.

Example 4

Redundancy entails termination of employment:

Bernice's employment with Inno Electronics Co Ltd was terminated by notice on 16 May 2024 after the company closed down part of its China trading operations. As Bernice has accumulated not less than 24 months' continuous service., she will be entitled to receive a severance payment.

An employee will only be entitled to claim a severance payment in the event of the employment contract having been terminated in one of three recognised ways. These recognised forms of termination are considered at length in the paragraphs that follow. No severance payment is payable where the employment is terminated in some manner which is different from the three basic types. Accordingly, no severance will be payable where the employment is terminated by an employee:

(1) voluntarily resigning;
(2) being summarily dismissed by an employer;
(3) wrongfully terminating the employment contract;
(4) resigning without notice or payment as permitted by the Ordinance on being suspended (s 11); or
(5) being certified as being permanently unfit to undertake the employment for which the employee was recruited.

A severance award is payable whether or not the employment contract expressly provides for the making of such a payment. Any term of an employment contract which attempts to avoid or reduce an employee's statutory entitlement will be void: s 70.

Example 5

Contractual terms which purport to reduce statutory rights void:
Simon has been employed by Increase Garment Factory Co Ltd as a non-permanent temporary employee since2021. Simon is employed for a total of 24 hours per week. The terms of Simon's employment contract provide:
Non-permanent staff: Staff who are employed other than on permanent terms of employment are not entitled to receive any benefits, whether statutory or otherwise, other than the agreed hourly rate.
As the terms of employment contravene the minimum statutory requirements, by virtue of s 70, such a term would not be legally enforceable to preclude Simon's entitlement to a severance award.

[31B.19] Termination must be by reason of redundancy

In order to qualify for a severance payment, the termination of an employee's employment must be wholly or mainly be by reason of redundancy. There are three circumstances in which a termination may be regarded as being by reason of redundancy. In determining whether a redundancy is attributable any such factors, it is sufficient if it is established that the termination was mainly attributable to such factors: s 31B(2).

Example 1

Termination need not be wholly by reason of redundancy:
In order to cut down on the total number of employees, the management of Binatone Investments Ltd instructed a line foreman to select 10 members of staff whose employment might be terminated. In making the selection, the foreman suggested that the 10 members of staff who had the most unsatisfactory attendance records should have their employment terminated. Although the terminations may be argued to be directly linked to work performance, the fact that the staff will not be replaced is cogent evidence for arguing that the terminations would be partially, if not wholly, occasioned by reason of redundancy.

1 Redundancy entails cessation of business

A termination will be regarded as attributable to a redundancy where an employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed. The cessation of a business includes part of a business. A business is defined as including a trade or profession and any like activity carried on by a person. The cessation or intention to cease business also includes a reference to any person to whom power to dispose of the business has passed in consequence of some act or event that operated to frustrate the employment contract: s 31L(3).

In the case of a domestic helper, the maintenance of the household is regarded as the carrying on of a business for the purposes of the severance payment provisions: s 31B(3).

Example 2

Redundancy may entail a complete cessation of business:
After sustaining heavy trading losses in the currency markets, BCN (HK) Ltd was put into voluntary liquidation. After the winding-up order was made, the employment of staff was terminated. For the purposes of the severance payment provisions, the employment of staff has been terminated by reason of BCN having ceased carrying on business for the purpose for which staff were employed.

Example 3

Redundancy may entail partial cessation of business:
Battenburg Enterprises (Asia) Ltd operates two production divisions. One division operates for the purpose of producing electrical circuits. The other division operates for the purpose of marketing and selling the company's products. As a result of declining margins, the company decided to close down the production division and concentrate on its sales and marketing efforts. Staff who are made redundant as a result of the close-down of the production division will be entitled to a severance payment.

Example 4

Redundancy may arise whenever there is an intention to cease business:
Bay Passage (Far East) Ltd decided to progressively close down its Hong Kong operations over a two year period. As an initial step, the company decided not to replace staff who resigned or whose employment was terminated during that period. Although the business continues to operate, because the employer has a clear intention to cease business, a severance payment will be payable to staff on the grounds of redundancy in the event Bay Passage terminates the employment of staff during the period prior to the actual cessation of its business.

Example 5

Business includes the maintenance of a household:
A family recruited a Vietnamese domestic helper. Although the family wanted the domestic helper to accompany the family to Canada when

it emigrated there, the idea was dropped when it was learnt that domestic servants were subject to much greater regulatory control than in Hong Kong. The family decided to terminate the employment of the domestic helper as soon as the family left Hong Kong. In the event of the domestic helper's employment being terminated, such a termination will be regarded as being by reason of redundancy on the grounds that the cessation of maintaining a family in Hong Kong is regarded as being equivalent to the cessation of a business. In such circumstances, the domestic helper would be entitled to a severance payment in the event of having sufficient continuous service.

2 *Redundancy entails cessation of business in place where employee employed*

A redundancy situation will arise whenever an employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed. The courts have consistently held that the place is not the actual place that an employee is employed, but the place, where, under the terms of employment, an employee might be required to work. In such circumstances, where an employer conducts or undertakes business in different places, a redundancy will only arise where an employer ceases or intends to cease undertaking business in every place in which the employee, could, under the terms of employment, be required to work. A place of work need not necessarily be Hong Kong so long as the employment is governed by the provisions of the Employment Ordinance: s 31B(2)(a)(ii). In *Cheung Chi Leung v Yau Wah Plastic Mould Factory*, High Court, Labour Tribunal Appeal No 149/95, the court held that it was fundamental for the purposes of disposing of a redundancy claim to establish whether an employee had been employed under one or more employment contracts by determining whether the factories in China and Hong Kong for which the employee worked were owned by the same company that was being sued.

Example 1

Redundancy may entail a complete cessation of business in the place of employment:

Beardsmore Company (Far East) Ltd conducts business in the Asia Pacific region. For strategic reasons, the company has decided to close down its factory and office which is located in Hong Kong. The company terminated the employment of all staff by giving one month's notice of termination. The company's factory is located in Fo Tan and its office is located in Tsim Sha Tsui. For the purpose of the severance payment provisions, Beardsmore will be regarded as having made staff redundant by ceasing to carry out business in the place where staff were employed to work.

Example 2

Redundancy may arise whenever there is an intention to cease business in the place of employment:

As part of a first step to close down its Kowloon operations, Big Harvest Industrial Ltd selectively replaced staff who resigned or who had their employment terminated. So long as such an intention could be clearly established, employees, whose positions remain vacant after their employment was terminated would be eligible to make a severance payment claim. The courts in Hong Kong have held that even those staff whose positions had been filled by a new recruit might still be entitled to make a severance payment claim if it could be satisfactorily established that the replacement staff had been required to work for less

money or required to undertake duties which were materially different to those undertaken by the employee they had been recruited to replace.

Example 3

Cessation or intention to ceases must be in the place or places where an employee could be required to work:

In order to take advantage of less expensive rental on its offices, Big Trend Investment (HK) Ltd decided to relocate the company's operations from Hong Kong to Shenzhen. In the case of most staff, the employment contract was silent as to relocation. In such circumstances, the courts would be extremely reluctant to imply a term into the employment contract requiring such staff to relocate from Hong Kong to Shenzhen. For the purpose of the severance payment provisions, the staff will have little difficulty in establishing a redundancy situation on the basis that the company has ceased undertaking business in Hong Kong which is the place under the employment contract they are required to work.

3 *Redundancy may entail cessation of a particular kind of work*

A redundancy situation will also arise where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish. Accordingly, unlike the situation where an employer ceases to carry on a business or part of a business, a redundancy may also arise were the business continues, but particular work formerly undertaken is either discontinued or scheduled to be discontinued: s 31B(2)(b).

Example 1