

employee's employment terminating. The court concluded that by reason that the severance package had only been in part offered as an inducement, the employee should only be liable to pay salaries tax on one tenth of the severance package.

In *Lam Yau Kuen v Easy (Hang Fung) Transportation Company Ltd & Anor* Civil Action No 1 of 2006, District Court the question arose whether an employee was entitled to a severance payment in spite of having been summarily dismissed by his employer. After finding that the employee's summary dismissal had in fact been unlawful the court observed:

"On the 4th question as to whether the Plaintiff was entitled to severance payment, the Defendants had the burden of proof to show on a balance of probabilities that the Plaintiff was dismissed for reasons other than redundancy. The Defendants had not discharged this burden at all. By virtue of section 31Q of the Employment Ordinance (Cap 57), the Plaintiff was presumed to have been dismissed for reason of severance. By their Defence, the Defendants only disputed whether the Plaintiff was an employee. In para 9 of their Defence, they stated that if the court found the Plaintiff to be their employee, they would ask for the amount of the counterclaim to be deducted from the sum/s awarded to the Plaintiff. On this basis, the Plaintiff's claim for severance payment would succeed."

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

[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* Labour Tribunal Appeal No 79/86, High Court, 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* Labour Tribunal Appeal No 95/2002, Court of First Instance (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.*

The extent to which the term place 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). See however *Wong Yuk Ling & Ors v East East Food Products Ltd & Anor* Labour Tribunal Appeal No 95/2002, Court of First Instance (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.

In *Leung Wan Jing & Ors v Chiat Si Plastic Metalware Manufactory* [1987] HKCU 48; Labour Tribunal No 17/87, High Court, 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) & Anor v Siu Kwok Keung & Ors* [1993] HKCU 424, [1993] HKCU 469; Labour Tribunal Appeal No 37/93, High Court, 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.

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* Labour Tribunal Appeal No 11/75, District Court, 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). 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* Labour Tribunal Appeal No 77/96, High Court. 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 *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 *Merciales, Sally C v Wong Tang-tat* Labour Tribunal Appeal No 105/96, High Court, 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 amah and a Chinese helper who had replaced the amah 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 amah, 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 *Yan Kwok Tung & Ors v Napoleon Restaurant Ltd & Anor* [1993] 2 HKLR 1, 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* Labour Tribunal Appeal No 95/2002, Court of First Instance (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 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 *Afia Worldwide Insurance v Ho Yeung Seung & Ors* Labour Tribunal Appeal No 12/79, District Court, 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 *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 *Archer, Carla Rigmour v Organisation Search Ltd* [1998] HKCU 438; Civil Action No A6439/97, Court of First Instance, 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 *Actem Engineering Ltd v Chan Chun Wah* [1991] HKCU 213; Labour Tribunal Appeal No 5/91, High Court, 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 *Star Fair Electronics 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 *Fan Man Yiu v General Locks & Metalwares Factory Ltd* [1984] HKC 486, 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 *Kam Hung Industries Co Ltd v Lam Ming Sun & Ors* [1997] HKCU 9; Labour Tribunal Appeal No 61/86, High Court, 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.

In *Wing Ming Garment Factory Ltd v Pun Yun Kit & Ors* Labour Tribunal Appeal No 13/79, District Court, 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 and *Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor* [1987] 2 HKC 310. See also *Precieux Garment Factory Ltd v Lam Kin Chung & Ors* Labour Tribunal Appeal No 5/97.

In *Leung Yu Ting and Anor v Gold Union Far East Ltd t/a Ristorante Romano* Labour Tribunal Appeal No 185/95, High Court, 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* Labour Tribunal Appeal No 16/83, High Court, 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* Civil Action No 15260 of 2005, Court of First Instance, 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.

[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* Labour Tribunal Appeal No 21/79, District Court, 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 the Interpretation and General Clauses Ordinance (Cap 1) s 3 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; Labour Tribunal Appeal No 37/93, High Court, 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 does not include contracts for services. For cases and commentary, see paras [2.10], [2.14] and [2.15].

Example 4

Failure to observe statutory rules will enable employees to claim remedies for unreasonable termination:

Three days before it was to transfer ownership of the company's insurance business, Eurasia International Corporation Ltd informed staff that their employment was to be terminated on the following Wednesday. After the transfer, the new owners of the business, Interdec (Hong Kong) Ltd, offered to re-employ staff on the same terms and conditions. Because Eurasia did not terminate the employment of staff by giving them proper notice or payment in lieu, employees are under no obligation to accept the offer of renewed employment. No matter how unreasonable their refusal, staff refusing to be re-engaged will be entitled to claim remedies for unreasonable termination. Had Eurasia given proper notice of termination, no remedies would be available to staff who unreasonably refused Interdec's offer of employment.

It should be noted that as the remedies for unreasonable termination are discretionary, a court or Labour Tribunal would in all likelihood not be very sympathetic to any employees who relied on a technical failure by the former employer for the purpose of advancing any claim for a remedy.

32E. Associated companies

- (1) Where the employer is a company, any reference in section 32B, 32C or 32D to renewal or re-engagement by the employer shall be construed as a reference to renewal or re-engagement by that company or by any associated company, and any reference in section 32B, 32C or 32D to an offer made by the employer shall be construed as including a reference to an offer made by an associated company.
- (2) Subsection (1) shall not affect the operation of section 32D in a case where the previous owner and the new owner are associated companies; and where that section applies, subsection (1) shall not apply.
- (3) For the purposes of this section, 2 companies shall be taken to be associated companies if one is a subsidiary of the other, or both are subsidiaries of a third company, and 'associated company' shall be construed accordingly.
- (4) In this section, 'company' (公司) and 'subsidiary' (附屬公司) have the meanings respectively assigned to them by section 2 of the Companies Ordinance (Cap 32).

[32E.01] Definitions

For 'employee' and 'employer', see s 2; for 'company' and 'subsidiary', see the Companies Ordinance (Cap 32) s 2.

[32E.02] Section 32E(1): Scope

Section 32E deals with transfers of employees between related employers ('associated companies'). This is in contrast to s 32D which applies only where there has been a change of employer occasioned by a transfer of business.

Section 32E overrides the settled legal principle which recognizes associated companies as distinct and separate legal entities by extending the provisions of s 32B(3) concerning re-engagements by the same employer to include re-engagements of an employee by an associated company.

Any employee re-engaged by an associate company will not be entitled to claim a remedy for unreasonable termination of employment.

The provisions of s 32E also apply to offers of renewals or re-engagements by associated companies. Any employee who unreasonably refuses a reasonable offer of employment by an associated company will not be entitled to any remedy for unreasonable termination of employment.

Example 1

No remedies for unreasonable termination where employee is re-employed by related employer:

New Idea Manufacturing Ltd unreasonably terminated the employment of KK Lo. Immediately upon his termination taking effect, KK was re-employed by New Style Investment Co Ltd. New Style is a subsidiary company of New Idea. No remedy will be available to KK for his employment being unreasonably terminated as he has been re-engaged by a subsidiary of his former employer.

[32E.03] Section 32E(2): Application

The provisions of s 32D take priority over s 32E where there has been a transfer of ownership between associated companies and the preconditions laid down s 32D(1)(b) have been satisfied.

By contrast, the provisions of s 32E will apply to re-engagements or offers of renewals or re-engagements by associated companies where there has been no change of ownership or, where there has been a change in ownership, where the previous owner fails to terminate an employee's contract by notice or payment in lieu within the manner specified in s 32D(1)(b).

See also para [32D.03].

[32E.04] Section 32E(3): Application

There are three ways in which two companies may be associated:

- company A may be a subsidiary of company B;
- company B may be a subsidiary of company A; or
- both company A and company B may be subsidiaries of company C.

[32E.05] Section 32(4): Application

The terms 'company' and 'subsidiary' are defined in the Companies Ordinance (Cap 32) s 2. See also paras [32E.07] and [32E.12].

[32E.06] 'Associated company'

For the purposes of Part VIA, a company may be associated with another company in a number of ways.

Two companies will be associated where one company:

- controls the composition of the board of directors of the other company;
- controls more than half the voting power of the other company; or
- holds more than half of the issued share capital of the other company.

Within a group of companies, company A (a subsidiary of company B) will also be considered an associate of holding company C where company B is a subsidiary of company C.

Two companies will be associated where both are subsidiaries of a third holding company.

[32E.07] 'Company'

In this section, the term 'company' is defined by reference to s 2 of the Companies Ordinance (Cap 32) as meaning a company formed and registered under the Companies Ordinance (Cap 32) or an existing company.

[32E.08] '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 includes 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].

[32E.09] 'Employer'

The term 'employer' covers both the actual employer of an employee, as well as authorized persons acting on behalf of such an employer. In this regard, human resource and other staff acting in a management capacity are regarded as employers for the purposes of the Employment Ordinance.

As the term 'employer' is defined by reference to any person, special regard should be had to the Interpretation and General Clauses Ordinance (Cap 1) s 3, which defines a person to include corporate and unincorporated bodies.

For cases and commentary, see paras [2.10], [2.14] and [2.15].

[32E.10] 'New owner'

The term 'new owner' is defined in s 31ZA(2) by reference to the person who, immediately after the transfer of the business, is the owner of the business.

[32E.11] 'Previous owner'

The term 'previous owner' is defined in s 31Z(1)(b) by reference to the person who was the employer immediately prior to the transfer of the business.

[32E.12] 'Subsidiary'

The term 'subsidiary' is defined by reference to the Companies Ordinance, ss 2(4), 2(5) and 2(6), which provide that a company will be a subsidiary of another company where one company:

- controls the composition of the board of directors of the other company; or
- controls more than half the voting power of the other company; or
- holds more than half of the issued share capital of the other company.

Within a group of companies, company A (a subsidiary of company B) will also be considered a subsidiary of holding company C where company B is a subsidiary of company C.

[32E.13] No remedies for unreasonable termination where employee is offered reasonable terms of re-employment by a related employer

Where an employer is a company, no remedies for unreasonable termination are available in the event of an employee unreasonably refusing an offer of re-engagement by some other employer who is related either as a subsidiary or holding company to the employer. In order for the offer of re-employment to be regarded as validly made by a related employer, the offer of re-employment must:

- be made not less than seven days before the employment terminates;
- comprise terms of employment that would not differ from the corresponding provisions of the contract as in force immediately before the termination; and
- the renewal of employment must take effect on or before the date of termination: ss 32C(1) and 32E(1).

Two companies are taken to be related companies if one is a subsidiary of the other, or both are subsidiaries of a third company: ss 32E(3) and 32E(4).

Example 1

No remedies for unreasonable termination where employee is offered reasonable terms of re-employment on the same terms by related employer:

General Distributing Co Ltd unreasonably terminated the employment of Henri Dai. Immediately after the termination taking effect, Henri was offered re-employment on the same terms of employment by General Acceptance Corporation Ltd. Because General Acceptance is the holding company of General Distributing, Henri will have no remedies for unreasonable termination in the event of unreasonably refusing the offer of re-employment.

Where an employer unreasonably terminates an employee's employment, the remedies of reinstatement, re-engagement or terminal payments will not be available to any employee who unreasonably refuses an offer of re-employment from a related employer on terms which differ from those under which the employee was previously employed. In order for the offer of re-employment on different terms to be regarded as validly made, an offer of re-employment must:

- be in writing and made not less than seven days before the employment terminates;

- comprise terms of employment that would differ from the corresponding provisions of the contract as in force immediately before the termination, but which constitutes an offer of suitable employment and terms which are no less favourable to the employee as previously engaged; and
- the renewal of employment must take effect on or before the date of termination: ss 32C(1) and 32E(1).

Example 2

No remedies for unreasonable termination where employee is offered reasonable terms of re-employment on different terms which are no less favourable by related employer:

Dias Marine Ltd unreasonably terminated the employment of Giorgio Tam. Prior to the termination taking effect, Diax Gracious Co Ltd offer Giorgio employment on terms which were different but which were no less favourable. No remedies for wrongful termination will be available to Giorgio in the event of his unreasonably refusing the offer by the related employer.

Whether or not an employee's refusal to be re-engaged under a further employment contract is reasonable will be determined by reference to the surrounding facts and circumstances applying to the unreasonable termination and offer of renewal.

Example 3

Whether an employee's refusal to be re-employed is unreasonable is dependent on the particular facts and circumstances applying to a case:

Ausnation International Ltd unreasonably terminated the employment of Sioux Po. Austai Enterprise Co Ltd offered Sioux re-employment on terms that required her to work every Saturday morning and work additional compulsory overtime every day. If the additional office hours do not result in any increase in remuneration, Sioux would easily be justified in refusing the offer. If by contrast, the offer included additional salary to compensate for the additional hours, it might well be argued that although there are additional hours to be worked, the overall terms of employment offered are no less favourable than previously offered. In such circumstances no remedies would be available in the event of Sioux unreasonably refusing the offer.

32F. Relevant date

For the purposes of and subject to this Part, 'relevant date' (有關日期)-

- in relation to the termination of employment of an employee, has the same meaning as in section 2(1); and
- in relation to the employer varying the terms of the contract of employment of an employee, means the date on which that variation takes effect.

[32F.01] Definitions

For 'employee' and 'employer', see s 2.

[32F.02] Section 32F: Application

The term 'relevant date' is defined in s 2(1) by reference to the date on which an employment contract terminated. By way of exception, where an employment contract is terminated by a payment in lieu of notice, the relevant date is defined not by reference to the date on which the employment terminates, but rather by reference to the later date up to which the payment is calculated. Where an employment contract is varied, the relevant date is defined by reference to the date on which the variation comes into operation.

[32F.03] '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].

[32F.04] 'Employer'

The term 'employer' covers both the actual employer of an employee as well as authorized persons acting on behalf of such an employer. In this regard, human resource and other staff acting in a management capacity are regarded as employers for the purposes of the Employment Ordinance.

As the term 'employer' is defined by reference to any person, special regard should be had to the Interpretation and General Clauses Ordinance (Cap 1) s 3, which defines a person to include corporate and unincorporated bodies.

For cases and commentary, see paras [2.10], [2.14] and [2.15].

32G. Death of employer or employee

For the purposes of this Part, Part I of the Eighth Schedule shall have effect in relation to the death of an employer and Part II of that Schedule shall have effect in relation to the death of an employee.

[32G.01] Section 32G: Application

The Eighth Schedule makes the following provisions:

1. Para 1:

Where an employer dies after an employee's right of action for a remedy or remedies in relation to:

- unreasonable termination of employment;
- unreasonable variation of an employment term; or
- unlawful termination of employment

has arisen but before the adjudication of the claim, the claim will be actionable by the employee against the personal representative of the deceased employer.

PART XII

EMPLOYMENT AGENCIES

(Part XII replaced 35 of 1973 s 2)

50. Interpretation and application of Part

(1) In this Part, unless the context otherwise requires-

'certificate of exemption' (豁免證明書) means a certificate issued under section 54;

'employment agency' (職業介紹所) means a person who operates a business the purpose of which is-

- (a) to obtain employment for another person; or
- (b) to supply the labour of another person to an employer, whether or not the person who operates the business will derive any pecuniary or other material advantage from either the employer or such other person; (Amended 41 of 1990 s 21)

'licence' (牌照) means a licence issued under section 52 and 'licensee' (持牌人) shall be construed accordingly.

(2) Subject to subsection (3), this Part shall apply to any employment agency which is carried on in Hong Kong, whether the employment is to take place within or outside Hong Kong.

(3) This Part shall not apply to any employment agency-

- (a) which is carried on or subvented by Her Majesty's Government or the Hong Kong Government;
- (b) which is carried on under the terms of a permit to maintain a crew department granted or deemed to be granted under the Merchant Shipping (Seafarers) Ordinance (Cap 478); (Amended 44 of 1995 s 143)
- (c) (Repealed 41 of 1990 s 21)
- (d) (Repealed 10 of 1980 s 4)
- (e) which is carried on by an employer for the sole purpose of recruiting persons for employment on his own behalf;
- (f) which is carried on by a contractor, or sub-contractor, who employs any person on work for another person;
- (g) which is carried on by the proprietor of a newspaper or other publication if the operation of an employment agency is non-profit making and is not the principal purpose of the publication of the newspaper or other publication;
- (h) which is-

- (i) non-profit making;
- (ii) wholly maintained or managed by the owner, staff or students of a school, college, university or other educational institution recognized by the Permanent Secretary for Education; and (Amended 3 of 2003 s 41; L.N. 130 of 2007)

(iii) carried on solely for or in connection with the employment of the students or graduates of such school, college, university or other educational institution; or

- (i) subject to any regulations which may be applicable thereto, in respect of which a certificate of exemption has been issued.

[50.01] Definitions

For 'business' and 'employer', see s 2; for 'person', see the Interpretation and General Clauses Ordinance (Cap 1) s 3. By virtue of Schedule 8 s 2 of Interpretation and General Clauses Ordinance (Cap 1), any reference to Her Majesty is to be construed as a reference to the Government of the Hong Kong Special Administrative Region.

[50.02] Section 50(1): Scope

This section provides the interpretation of certain terms for the purposes of this Part of the Employment Ordinance.

The provisions of Part XII have been enacted to enable Hong Kong to give effect to its international obligations under the Recruitment of Indigenous Workers Convention 1936 (Convention No 50).

The terms defined in this section are: 'certificate of exemption', 'employment agency' and 'licence'.

[50.03] Section 50(2): Application

As the provisions of Part XII are directed at controlling the activities of employment agency operators, it is irrelevant where the employment is to be undertaken.

[50.04] Section 50(3): Application

The reference to Her Majesty's government in this subsection is to be construed as a reference to the Government of the Hong Kong Special Administrative Region; see Schedule 8 s 2 of Interpretation and General Clauses Ordinance (Cap 1).

This subsection contains the exceptions to this Part. It does not apply to:

- Any employment agency which is operated or financed by the Hong Kong Government. This includes such services as the

Local Employment Service, Higher Education Employment Service and Central Recruitment Unit of the Labour Department;

- The recruitment of crew members which are regulated by of the Merchant Shipping (Seafarers) Ordinance (Cap 135), which provides for the licensing and control of crew departments;
- Employers recruiting employees solely on their own behalf. Contractors or sub-contractors operating recruitment agencies will not be governed by the provisions of the Ordinance when recruiting employees to work for other contractors;
- Newspaper proprietors or publishers of other publications who are operating employment agencies where the operation is non-profit making and not the main activity of the publication; and
- An employment agency being undertaken by a school, college, university or other educational institution recognized by the Director of Education.

The manner in which an educational institution may be recognized by the Director is not spelt out in the Employment Ordinance, but see the Education Ordinance (Cap 279).

- Employment agencies which have been issued with certificates of exemption.

[50.05] 'Business'

A 'business' is defined in s 2 as including a trade or profession or any like activity carried on by a person. The term 'person' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as including any public body and any body of persons, corporate or unincorporate.

[50.06] 'Certificate of exemption'

The term 'certificate of exemption' is defined as meaning a certificate of exemption issued under s 54 by the Commissioner for Labour.

[50.07] 'Contractor or sub-contractor'

The terms 'contractor' and 'sub-contractor' are not defined for the purposes of Part XII. See however the definitions in Part IXA.

[50.08] 'Employer'

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

[50.09] 'Employment agency'

The term 'employment agency' is defined widely to include any person who operates a business, the purpose of which is to obtain employment for any employee or to supply the labour of any employee to an employer. It makes no difference whether or not the person who operates the business derives any pecuniary or other material advantage from either the employer or employee. The provisions of the Ordinance do not apply to any employment agency which is financially supported by the Hong Kong Government.

[50.10] 'Licence'

The term 'licence' is defined as meaning a licence issued under s 52, and 'licensee' is to be construed accordingly.

[50.11] 'Person'

The term 'person' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as including 'any public body and any body of persons, corporate or unincorporate'. For cases and commentary, see para [2.15].

51. Prohibitions in respect of the operation of employment agencies

- (1) No person shall operate, manage or assist in the management of an employment agency unless-
 - (a) he is the holder of a licence or certificate of exemption issued in respect of the employment agency; or
 - (b) he is in the employment of the holder of a licence or certificate of exemption.
- (2) No person shall operate, manage or assist in the management of an employment agency at any place other than the place of business specified in the licence or certificate of exemption issued in respect of the employment agency.
- (3) (Repealed 28 of 1992 s 2)

[51.01] Definitions

For 'business' and 'employer', see s 2; for 'certificate of exemption', 'employment agency', 'licence', see s 50; for 'person', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

[51.02] Section 51(1): Scope

This subsection prohibits the operation of any employment agency which is unlicensed or is not exempt from the provisions of Part XII under s 50(3).

The prohibition extends to any person managing or assisting in the management of an unlicensed or non-exempted employment agency.

The Employment Agency Regulations require that where an agency is owned by a company, the name of the person appointed to operate, manage or assist in the management of the agency must be forwarded to the Commissioner.

Similar notification must be given where there has been a change in the management of the employment agency.

Under reg 8, when an employment agency ceases to operate as a business it is required to inform the Commissioner of that fact within seven days. On ceasing operation, the licence must be forwarded to the Commissioner for cancellation.

By virtue of s 60(6), any person who contravenes the provisions of s 51(1) is guilty of an offence and liable to a fine at level 5. Under s 60(1), any person who contravenes the provisions of s 51(2) is guilty of an offence and liable to a fine at level 3. Any person in breach of the provisions of the Employment Agency Regulations because of failure to notify who is managing the agency where the agency is owned by a company (reg 7) or failure to notify a change of address (reg 9) is guilty of an offence and liable to a fine at level 3. Additional offences are imposed by the Employment Agency Regulations reg 17 in respect of agencies which fail to notify the Commissioner the name of the person appointed to manage, operate or assist in the management of the employment agency. Schedule 8 of the Criminal Procedure Ordinance (Cap 221) currently provides for a fine of \$10,000 and \$50,000 respectively for level 3 and 5 offences. The offences created by s 60 are of strict liability, ie offences which may be committed without any requisite knowledge on the part of a person that an offence has been committed. See *Attorney General v Ng Chung Hing* [1991] HKLR 225, [1990] 2 HKC 389(HC); *Attorney General v Demand Enterprises Ltd* [1987] HKLR 195 (HC); *Attorney General v China State Construction Engineering Corporation* [1996] 1 HKC 53 and *Gammon (Hong Kong) Ltd v Attorney General* [1985] 2 HKC 661, [1985] AC 1 (PC). As the offences are created in respect of any person, special regard should be had to the definition of 'person' in the Interpretation and General Clauses Ordinance (Cap 1) s 3, which includes 'any public body and any body of persons, corporate or unincorporate'.

[51.03] Section 51(2): Scope

This subsection prohibits the operation of an employment agency at a place of business which is different from the place of business specified in the licence or exemption.

Any person contravening this provision will be guilty of an offence. See para [51.03].

The Employment Agency Regulations (reg 9) requires that the Commissioner be notified whenever an employment agency changes its place of business. The licence must accompany the notification and must be forwarded not less than 14 days before the date of the relocation. Failure to notify in accordance with the regulations is an offence.

The Commissioner is required to endorse the change of address and return the licence to the licensee.

[51.04] 'Business'

A 'business' is defined in s 2 as including a trade or profession or any like activity carried on by a person. The term 'person' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as including 'any public body and any body of persons, corporate or unincorporate'.

[51.05] 'Certificate of exemption'

The term 'certificate of exemption' is defined in s 50 as meaning a certificate of exemption issued under s 54 by the Commissioner for Labour.

[51.06] 'Employer'

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

[51.07] 'Employment agency'

The term 'employment agency' is defined widely in s 50 to include any person who operates a business, the purpose of which is to obtain employment for any employee or to supply the labour of any employee to an employer. It makes no difference whether or not the person who operates the business derives any pecuniary or other material advantage from either the employer or employee. The provisions of the Ordinance do not apply to any employment agency which is financially supported by the Hong Kong Government.

[51.08] 'Licence'

The term 'licence' is defined in s 50 as meaning a licence issued under s 52, and 'licensee' is to be construed accordingly.

[51.09] 'Operate, manage or assist in the management of an employment agency'

For cases in which the courts have called upon to consider what amounts to 'operate, manage or assist', see *Chen Ta Hoi and Ors v R* [1986] HKLR 1189; *R v Fung Sik Chung* [1985] HKLR 387; *Tam Wing Kwong and Ors v R* [1988] 2 HKLR 313; *Lau Shun Dick & Ors v R* [1991] 2 HKLR 245 and *Chan Kai & Ors v R* [1992] 1 HKCLR 202.

[51.10] 'Person'

The term 'person' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as including 'any public body and any body of persons, corporate or unincorporate'. For cases and commentary, see para [2.15].

52. Application for and issue of licences

(1) The Commissioner may issue a licence to operate an employment agency to any person who applies therefor in such manner as may be prescribed.

In *HKSAR v Penta-Ocean Construction Co Ltd* Magistracy Appeal No 945 of 2007, Court of First Instance, an employer was charged under ss 63A and 72B(1)(b) after the employee complained that his employment had been terminated by reason that he had complained to the Labour Department of labour irregularities on the employer's construction site. After a trial lasting 14 days the magistrate dismissed the summons on the grounds that he found the employee's evidence wholly unreliable. The employer's application to be awarded costs under the provisions of the Costs in Criminal Cases Ordinance was rejected by the magistrate on the grounds that the employer had brought suspicion on itself by not giving reasons for terminating the employment of the employee. The employer appealed the magistrate's refusal. In allowing the appeal, the Court of First Instance ruled that by reason that the employer had no legal duty to give reasons for the employee's dismissal, the magistrate had erred in law in relying on such circumstances in refusing to award costs.

[63A.05] Summary of offences relating to sections 31, 72A and 72B and penalties

Section	Subject of section	Offence under section	Fine	Strict liability (I)	Defence of reasonable excuse?
31	Employer not to enter contract unless he believes he can pay wages	63A(1),(3)	level 6	No	Yes
72A	Duty of public officers not to disclose source of complaint, etc	63A(2)	level 6	Yes	No
72B	Employment not to be terminated because employee has given evidence	63(a)(2)	level 6	Yes	No

1 Strict liability.

A strict liability offence is one which may be committed without any requisite knowledge on the part of an employer that an offence has been committed. See *Attorney General v Ng Chung Hing* [1991] HKLR 225, [1990] 2 HKC 389 (HC); *Attorney General v Demand Enterprises Ltd* [1987] HKLR 195 (HC); *Attorney General v Yip Man Cheong* [1989] 2 HKLR 547; *Attorney General v China State Construction Engineering Corporation* [1996] 1 HKC 53 and *Gammon (Hong Kong) Ltd v Attorney General* [1985] 2 HKC 661, [1985] AC 1 (PC).

63B. Offences relating to sections 32 and 72(1)(a), (b) and (c)

(1) Any person who contravenes section 32 or fails to comply

- with a requirement made by an officer under section 72(1)(a), (b) or (c) commits an offence.
- (2) Any person who wilfully or recklessly gives information which is false in a material particular or withholds information as to any of the matters in respect of which information is required to be given under section 72(1)(b) or (c) commits an offence.
- (3) A person who commits an offence under this section is liable to a fine at level 6 and to imprisonment for 1 year. (Amended 103 of 1995 s 21)

(Added 31 of 1992 s 4)

[63B.01] Section 63B(1): Scope

Any person who makes a deduction from wages contrary to s 32 or fails to co-operate with a public officer under s 72 commits an offence. As the section is worded, an offence may be committed even where a person is unaware that the activities amount to an offence. In this sense, the provisions of s 63B(1) may be considered to impose strict liability.

Under the provisions of s 63B, an offence is committed whenever any 'person' makes an unlawful deduction or fails to comply with the directions of a public officer under s 72. As a result, persons acting contrary to s 32 or 72 will be liable irrespective of whether they are acting on behalf of an employer.

In *Lam Yau Kuen v Easy (Hang Fung) Transportation Company Ltd & Anor* Civil Action No 1 of 2006, District Court, the question arose whether the employer was entitled to withhold an employee's wages in order to pay traffic fines and to pay for the employee's annual business registration fees. In determining that the employer had no legal right to make such deductions the court observed:

"On the 3rd question whether the Defendants were entitled to withhold the Plaintiff's wages for the costs related to traffic accidents and for the payment of business registration fees, I think ss 32(1)(b) and 63B of the Employment Ordinance (Cap 57), would provide the answers here. The simple answer to this question is no and it might be a criminal offence to do so."

[63B.02] Section 63B(2): Application

The provisions of s 72 laid down the circumstances in which a person may be required to give information to the public authorities. An offence will be committed where a person deliberately or recklessly gives information to a public officer which is known to be false. An offence is also committed where a person withholds relevant information which is required to be given. As the subsection is worded, an offence will only be committed so long as an employer can be proved by the prosecution to have a requisite degree of guilty knowledge. In other words, an employer can only be convicted so long as the failure to give, or the false information that was given, resulted from the person acting wilfully and deliberately. A person, for example, who failed to

pay through some oversight would not be guilty of an offence under this section. Even where an employer has deliberately not acted in accordance with the requirements of s 72, the subsection offers a person an opportunity to negate the offence if the person being prosecuted proves a defence that there was a reasonable excuse for not giving the information requested.

Example 1

Defence of reasonable excuse:

Labour Department officials visit the South Kowloon Dairy Farm Factory unexpectedly to examine the company's employee records. The assistant personnel manager refuses to hand over the records until the personnel manager can be contacted.

Although the employee has committed an offence, a defence that she had acted with reasonable excuse may be open to her. Whether the refusal to hand over the statutory lists was reasonable, will be a question which the courts must decide with regard to the particular circumstances of the case. In the above example, the fact that the assistant manager was acting in good faith would in all likelihood persuade the court that the employee had made out the defence of 'reasonable excuse'.

Personal liability is imposed under s 64B where an employer who is a body corporate commits an offence under s 64B with the consent, connivance or neglect of any individual serving in a managerial capacity. As the terms 'manager' and 'secretary' are not defined in the Employment Ordinance, the courts will have a wide discretion to look to any person who is responsible or involved in the management of the offending company. Under the provisions of s 64, no prosecution for an offence under s 64B may be commenced without the written consent of the Commissioner for Labour. By virtue of the Criminal Procedure Ordinance (Cap 221) s 14B, the written consent of the Commissioner is not required in the event of the Attorney General's bringing a prosecution in relation to the same or some other offence.

Personal liability is imposed under s 64B where an employer who is a body corporate, or a partnership, commits an offence under s 64B with the consent, connivance or neglect of any individual serving in a managerial capacity. As the terms 'manager' and 'secretary' are not defined in the Employment Ordinance, the courts will have a wide discretion to look to any person who is responsible or involved in the management of the offending company or partnership.

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

[63B.03] 'Officer'

An 'officer' refers to a public officer. The term 'public officer' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as meaning any person holding an office or emolument under the Government, whether such

office is permanent or temporary. The term 'person' is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 as including 'any public body and any body of persons, corporate or unincorporate'. For cases and commentary, see 'employer' in [2.15], above.

[63B.04] Summary of offences relating to sections 32 and 72(1)(a), (b) and (c)

Section	Subject of section	Offence under section	Penalties (1)	Strict liability (2)	Other s 64	Section s 64B	Defence of reasonable excuse? (3)
32	Restriction on deduction from wages	s 64B	level 6 1 year	Yes	Yes	Yes	No
72(1)(c)	Powers of officers	s 63B(1)	level 6 1 year	Yes	Yes	No	No
72(b)-(c)	False information	s 63B(2)	level 6 1 year	No	Yes	No	No

(1) Penalties.

By virtue of s 101H of the Criminal Procedure Ordinance (Cap 221) both a fine and imprisonment may be imposed cumulatively.

(2) Strict liability.

A strict liability offence is one which may be committed without any requisite knowledge on the part of an employer that an offence has been committed. See *Attorney General v Ng Chung Hing* [1991] HKLR 225, [1990] 2 HKC 389 (HC); *Attorney General v Demand Enterprises Ltd* [1987] HKLR 195 (HC); *Attorney General v Yip Man Cheong* [1989] 2 HKLR 547; *Attorney General v China State Construction Engineering Corporation* [1996] 1 HKC 53 and *Gammon (Hong Kong) Ltd v Attorney General* [1985] 2 HKC 661, [1985] AC 1 (PC).

(3) Defence of reasonable excuse.

As the provisions of the subsection are worded, it will not be necessary for the prosecution to prove that the person charged did not have a reasonable excuse for doing or failing to do the activities with which that person is charged. As a result, the presence or the absence of a reasonable excuse will not affect the elements of the offence which must be proved by the prosecuting authorities. See *R v Yiu Chi Fung* [1991] 1 HKPLR 167 and *R v Nok Pang* [1991] 1 HKPLR 357. Where it is proved that an employee has committed an offence under the provisions of s 63C, an employer or person charged with an offence

will still be able to avoid a conviction so long as a defence, amounting to a reasonable excuse, can be made out by the person being charged. For cases which have considered what amounts to a reasonable excuse, see *Wong Kam v R* [1977] HKLR 458; *Chan Tak Fai v R* [1978] HKLR 443; *R v Lee Shek Ching* [1986] HKLR 304; *R v Ma Kui* [1985] HKLR 414 and *Derek Aplin & Ors v R* [1976] HKLR 1028.

63C. Offences relating to time and payment of wages

Any employer who wilfully and without reasonable excuse contravenes section 23, 24 or 25 commits an offence and is liable to a fine of \$350,000 and to imprisonment for 3 years.

(Added 31 of 1992 s 4. Amended 1 of 2006 s 3)

[63C.01] Section 63C: Scope

An employer who fails pay wages when they become due; or who fails to pay on completion or termination of the employment contract, will be liable to a fine and imprisonment. As the section is worded, an offence will only be committed so long as an employer can be proved by the prosecution to have a requisite degree of guilty knowledge. In other words, an employer can only be convicted so long as the non payment resulted from the employer acting wilfully and deliberately. An employer, for example, who failed to pay through some oversight would not be guilty of an offence under this section. Even where an employer has deliberately not made a payment, the section offers the employer an opportunity to negate the offence if the employer proves a defence that there was a reasonable excuse for not making the payment. In *S-J v Li Chi Leung (t/a Transmate Service Co)* Magistracy Appeal No 431/97, High Court, the question arose whether a magistrate had erred in law in holding that offences under ss 23 and 25 were not continuing offences. On appeal by way of case stated, the court held that the offences were in fact continuing by observing:

"No doubt the spirit of the legislation is to protect employees from being exploited by unscrupulous employers who seek to withhold wages improperly. Previously the rights of the aggrieved employees to recover wages payable was confined to taking out civil actions. Under s 63C wilful delay to pay wages or any sum due on termination of the contract has been made a criminal offence and the prospects of facing criminal prosecution will no doubt be a leverage on employers to effect prompt payment. By virtue of the sections, employers are under an obligation to pay the wages or any other sum due under the contract 'as soon as practicable' and in any event not later than 7 days after they were due. Moreover the court is empowered under s 65 of the Ordinance, regardless of the outcome of the prosecution, to order the employer to pay the wages or any other sum outstanding.

The position regarding criminal proceedings against reluctant employers must therefore be this: no criminal sanction can be invoked against an employer unless he has failed to effect payment after the 7-day grace period provided under the sections.

I would assume that, for the sake of illustration, under s 23 the last day of the employee's wage period falls on 31 October. The employer is under an obligation

to pay the wages as soon as practicable. If however, the employer sits back and does nothing, then he would be liable to criminal prosecution earliest by the eighth day of November. Under the Ordinance he is under a duty to perform the positive act of paying the wages due to his employee and unless payment is made, and subject to the statutory defences available, he would be committing an offence.

Let me assume further that by December the employer still has not paid up. If one is to ask the question: since when had the employer been committing an offence under s 23 or s 25? The answer to the question must be that it was from 8 October onwards and thereafter until payment is made although the offence is completed if payment is not made on the eighth day.

The offences before this court is not that the employer had allowed the time prescribed for payment to pass without making payment but that the employer had failed to perform a statutory obligation to pay the employee. This duty exists from the time prescribed for payment until actual payment. The conclusion reached by the learned magistrate was inconsistent with the spirit of the legislation which is to provide a speedy remedy for the aggrieved employees to recover wages or other payments which they are entitled. If the 6-month period under s 26 of the Magistracy Ordinance is applicable to these sections, the purpose of the legislation would be defeated."

In case of In the matter of an application for leave to appeal by Li Fung Ching Catherine pursuant to section 32 of the Court of Appeal Ordinance (Cap 484). In the matter of the decision of the Court of First Instance in the Magistracy Appeal dated 16 December 2011, Magistracy Appeal No 662 of 2011, Court of First Instance, a company director was fined after have been convicted of failing to pay wages on time in accordance with ss 63C and 64B(1) of the Employment Ordinance. The director subsequently sought leave to appeal to the Court of Final Appeal on the grounds that the director's appeal entailed a question of law of great and general importance. The director sought leave in respect of two grounds:

- (1) Whether a person or a company who is making an honest and genuine attempt in salvaging his or her business decided to defer payment of wages to the employees would (amount) to a reasonable excuse under section 63C of the Employment Ordinance (Cap 57)?
- (2) Whether a dissenting director in a company's board of directors meeting who voted against the decision in deferring payment of wages would (amount) to 'consent, or connivance of, or to be attributable to any neglect' on her part within the meaning of section 64B(1) of the Employment Ordinance (Cap 57)?"

In rejecting the director's application the court observed that it was persuaded that the grounds of appeal involved question of law of great and general importance.

In *HKSAR v Li Fung Ching Catherine* [2012] HKCU 1186 Miscellaneous Proceedings No 4 of 2012, the Court of Appeal rejected the director's appeal from the lower court's refusal to grant leave to appeal to the Court of Final Appeal.

In *HKSAR v Kamfaith Industrial Ltd* Magistracy Appeal No 580 of 2005,