

THE AVOIDANCE OF STATUTORY BENEFITS TO EMPLOYEES BY HONG KONG EMPLOYERS



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In 2006, Hong Kong's Court of Appeal had to decide whether it was lawful for an employer to deliberately adopt a strategy to avoid having to make a statutory payment to an employee. The employer's liability to make that payment was contingent on the employee completing a prescribed period of continuous service. The employer engaged the employee under successive, non-continuous contracts of employment, each for a shorter duration than the prescribed period to prevent his liability for the payment from crystallising. The Court of Appeal held that there was nothing unlawful in an employer arranging his affairs so as to prevent his liability for the payment from even arising. This article analyses the case concerned and expounds how the foregoing decision could see employers avoiding a whole range of employee rights and benefits under the Employment Ordinance. The article views such conduct as negating the legislative intention and as being contrary to the norms of justice. To rectify the situation as it currently stands, we propose an amendment to the Employment Ordinance to prohibit such avoidance.

Introduction

“... While it may be true that morality cannot be legislated, behavior can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless.” (King, 1963).¹ This quotation aptly points out that laws are needed to protect individual or classes of individuals from those who seem to lack a conscience. This is particularly true of workers in societies who do not seem to protect or adequately protect employees from being exploited by their employers. This article highlights Hong Kong legislation enacted to confer employment rights, benefits and protections upon employees only to have the legislative intentions thwarted by “heartless” employers taking advantage of loopholes emanating from

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¹ Martin Luther King Jr., “Social Justice”, *Western Michigan University*, 1963, speech transcription available at <http://www.wmich.edu/library/archives/mlk/transcription.html> (visited 4 July 2012).

less than adequately drafted statutory provisions. We conclude with a proposed amendment to the relevant legislation to ensure that employees do actually enjoy the employment rights, benefits and protections that the legislature had previously clearly identified as being necessary.

Employment law in Hong Kong is the English common law relating to employment except to the extent it has been modified by statute.² The English common law confers rights and imposes duties upon both employers and employees. In Hong Kong, most of the common law rights and duties of the parties to a contract of employment are codified in the Employment Ordinance (Cap 57) (EO) which came into force on 27 September 1968 (after being passed two days earlier). In addition, the EO also confers other rights, benefits and protections upon employees. The rights, benefits and protections accorded to employees by the EO are the bare minimum that an employer must provide. Section 70 of the EO expressly provides that any term in a contract of employment purporting to exclude or diminish any right, benefit or protection conferred upon the employee by the EO shall be void. Where the EO makes a right, benefit or protection contingent upon an employee serving a specified minimum period of service under a continuous contract, it would be possible for an employer to avoid incurring liability for a right or benefit either by avoiding or by evading the same. And, as we shall see, employers have resorted to a whole host of arrangements to evade or avoid granting such statutory rights or benefits to employees who have put in the requisite period of service.

The primary focus of this article is a case in which, to avoid making a statutory payment, an employer in Hong Kong adopted a stratagem to prevent his liability to make the payment from arising. The case was *Lui Lin Kam v Nice Creation Development Ltd* (hereafter abbreviated to *Lui's Case*) which began life as a claim in the Labour Tribunal,³ and was moved, on appeal by the defendant, to the Court of First Instance of the

² The list of relevant statutes includes the Labour Tribunal Ordinance (Cap 25); Companies Ordinance (Cap 32); Apprenticeship Ordinance (Cap 47); Labour Relations Ordinance (Cap 55); Employment Ordinance (Cap 57); Factories and Industrial Undertakings Ordinance (Cap 59); Contracts for Employment Outside Hong Kong Ordinance (Cap 78); Inland Revenue Ordinance (Cap 112); Immigration Ordinance (Cap 115); General Holidays Ordinance (Cap 149); Employees' Compensation Ordinance (Cap 282); Trade Unions Ordinance (Cap 332); Protection of Wages on Insolvency Ordinance (Cap 380); Occupational Retirement Schemes Ordinance (Cap 426); Minor Employment Claims Adjudication Board Ordinance (Cap 453); Sex Discrimination Ordinance (Cap 480); Mandatory Provident Fund Schemes Ordinance (Cap 485); Personal Data (Privacy) Ordinance (Cap 486); Disability Discrimination Ordinance (Cap 487); Occupational Health and Safety Ordinance (Cap 509); Family Status Discrimination Ordinance (Cap 527); Race Discrimination Ordinance (Cap 602); and Minimum Wage Ordinance (Cap 608).

³ *Lui Lin Kam v Nice Creation Development Ltd* (Labour Tribunal Claim No 3887 of 2001).

High Court⁴ and, on further appeal by the defendant, finally decided by Hong Kong's Court of Appeal.⁵ The article begins with a brief account of the statutory payment in question and the legal provisions governing it. It then sets out the facts of the case and analyses the decision of the Court of Appeal and the statutory provision upon which the Court rested it. The possible impact of the decision on other service-based rights/benefits is then analysed. Finally, the article proposes an amendment to the EO to nullify the effects of the decision.

Redundancy and Severance Payment

The statutory payment that the employer in *Lui's Case* (CFI) sought to avoid is what is variously referred to as "redundancy pay"⁶ or "redundancy payment"⁷ or "severance pay on redundancy"⁸ or "severance payment".⁹ Redundancy and the fear of redundancy have long been recognised as a source of anxiety for employees in Hong Kong.¹⁰ The word "redundant" applies to superfluity or excess or to something unnecessary. Thus, where an employer has more workers than he needs, he may be said to have "redundant" employees. When the contract of employment is terminated by the employer because the services of the employee are no longer required, the employee is said to be made redundant. An employee is made redundant when his position disappears or when the employer requires fewer workers to carry out his operations. This may be the result of the employer closing down, closing a particular division, having less business or even, moving its operations to a different location. An employee who is made redundant is, subject to his fulfilling prescribed conditions, entitled to redundancy pay (statutory or otherwise). In Hong Kong, redundancy and

⁴ *Lui Lin Kam v Nice Creation Development Ltd* (unrep., HCLA 106/2002, [2003] HKEC 855) (hereinafter, "*Lui's Case* (CFI)").

⁵ *Lui Lin Kam v Nice Creation Development Ltd* [2006] 3 HKLRD 655 (hereinafter, "*Lui's Case* (CA)").

⁶ The term is used in Australia's Fair Work Regulations, Available at <http://www.fairwork.gov.au/termination/redundancy/pages/how-much-redundancy-pay.aspx> (visited 1 July 2012).

⁷ The term appears in the Irish government's "Citizen Information", Available at http://www.citizensinformation.ie/en/employment/unemployment_and_redundancy/redundancy/redundancy_payments.html (visited 1 July 2012).

⁸ The expression was used by the Acting Secretary for Social Services in moving the second reading of the Employment (Amendment) (No 2) Bill 1974: *Hong Kong Hansard*, 3 July 1974, p 986.

⁹ Part VA, the EO.

¹⁰ See, for example, *Hong Kong Hansard*, 14 February 1968, p 34.

redundancy pay or a severance payment on redundancy are provided for in Pt VA of the EO.

In Hong Kong, where an employee who has been employed under a continuous contract for not less than 24 months is dismissed by his employer, *inter alia*, by reason of redundancy, the employer shall pay him a severance payment.¹¹ Redundancy for purposes of severance payment exists if an employee's dismissal is attributable wholly or mainly to the fact that the business has closed or is about to close or where the type of work the employee was employed to do has ceased or diminished or is expected to cease or diminish.¹² Redundancy can also be caused by the employer re-locating his business.¹³

The institution of the severance payment did not always exist in Hong Kong and was introduced in the territory only in 1974 by way of an amendment to the EO.¹⁴ It was introduced in order to comply with International Recommendation No 119¹⁵ concerning the termination of employment at the initiative of the employer. That International Recommendation was formulated only in 1963 and in enacting the legislative provision for severance payment in 1974, Hong Kong was not far behind the rest of the world.¹⁶ The situation that existed in Hong Kong at the time the Bill relating to severance payments was introduced in the legislature may be gleaned from the following:¹⁷

“... an employee may have been working for his or her employer for 5, 10 or even 20 years and suddenly his or her employment could be terminated by the employer for no fault of the employee's own but for reason of redundancy. The existing labour legislation gives the employee no more protection or

¹¹ EO, s 31B(1). Section 31B reads:

“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 –
- (a) is dismissed by his employer by reason of redundancy; or
 - (b) is laid off within the meaning of section 31E,
- the employer shall ... be liable to pay the employee a severance payment calculated in accordance with section 31G.”

¹² EO, s 31B(2)(a)(i) and (b).

¹³ EO, s 31B(2)(a)(ii).

¹⁴ By the Employment (Amendment) (No 2) Bill 1974.

¹⁵ International Labour Organisation (ILO) Recommendation concerning Termination of Employment at the Initiative of the Employer (Adoption: Geneva, 47th ILC session, 26 June 1963), Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:241665524978876::NO:12100:P12100_INSTRUMENT_ID:312457:NO (visited 10 July 2012).

¹⁶ The remarks were made by the Acting Secretary for Social Services in moving the second reading of the Employment (Amendment) (No 2) Bill 1974. Cited from *Hong Kong Hansard*, 3 July 1974, p 987.

¹⁷ Dr Chung speaking on the resumption of debate on the second reading of the Employment (Amendment) (No 2) Bill 1974: *Hong Kong Hansard*, 31 July 1974, pp 1095–1096.

compensation than a period of notice, ranging generally from seven days to one month, from the employer prior to termination. At present, any compensation for such loss of employment due to redundancy is left to both the employer and the employee concerned to make their own bargains.”

Before the enactment of Pt VA of the EO, there was no statutory requirement for the employer to pay compensation to a worker made redundant. The absence of any contractual provision regarding redundancy pay did not prevent employees from claiming the same. This occurred because there were employers who had their own schemes of payment to employees upon redundancy. Where an employer did have a scheme of redundancy payment, there were disputes on the quantum payable and the time of payment thereof to employees made redundant.

The nature or rationale for severance payment on redundancy was authoritatively stated in the Hong Kong legislature by the then Acting Secretary for Social Services. Moving the second reading of the Employment (Amendment) (No 2) Bill 1974 to provide for severance pay on redundancy, this official said:¹⁸

“Severance pay on redundancy is the means whereby an employee may be compensated for loss of employment through no fault of his own. It is simply compensation for loss and not a reward for long service or good behaviour such as a gratuity or bonus. It arises only from dismissal due to redundancy and not where there is any element of volition or fault on the part of the employee. Where employment is terminated at the initiative of the employee or where the employee is dismissed for misconduct the loss may be regarded as self-induced and not deserving of compensation ... The bill has three main aims. It will serve to protect employees against possible hardship arising from redundancy and, with Hong Kong’s present system of social security, it seems important that this form of protection should be available to all employees who come within the scope of the Employment Ordinance. Second, it should serve to reduce the incidence of labour disputes concerning redundancy by introducing a minimum legal obligation in all cases. Third, it should help to clear up much of the existing confusion by confirming the practice, and regulating the method, of making severance payments.”

The introduction of severance payment was clearly motivated by the desire to do right by an employee who lost his job through no fault of his own. In seeking to cushion the employee against the hardship consequent

¹⁸ *Hong Kong Hansard*, 3 July 1974, p 987.

upon involuntary unemployment, the provision in question may be said to be moved by an ethical concern. An employer seeking to evade or avoid the liability imposed by the provision may be said to be acting unethically even though the measures he adopts are in themselves legal.

Service under a Continuous Contract

In Hong Kong, as elsewhere, employers have been exercised by the statutory grant of rights, benefits and protections on employees because compliance with the legislation affects their bottom lines. Perhaps to increase the acceptability of such requirements, the legislation usually links the rights, benefits and protections it confers upon employees to continuous employment, ie to working under a continuous contract of employment for a minimum prescribed duration.¹⁹ Generally, the employee must have served the same employer for the requisite period of continuous employment to enjoy a statutory right or benefit or protection. Different qualifying periods of continuous employment may be fixed for different rights, benefits or protections. For example, to be entitled to the minimum statutory period of notice, an employee must have worked under a continuous contract for a minimum of four weeks and for 18 hours or more in each of those weeks.²⁰ The qualifying period of service under a continuous contract for other benefits conferred by the EO is:

- 1 1 month for sickness allowance [s 33];
- 2 3 months for holiday pay [s 40];
- 3 12 months for annual paid leave [s 41AA(1)];
- 4 40 weeks for maternity leave pay before the date of expected confinement [s 14(2)(a)];
- 5 60 months for long service payment [s 31R(1)].

An employee who has been employed under a continuous contract is entitled to not less than one rest day in every period of seven days [s 17(1)].

In Hong Kong, a “continuous contract” is a statutory construct. The EO defines a “continuous contract” to mean “a contract of employment

¹⁹ As indicated by the argument whether severance pay, when introduced, should be backdated two or five or seven years of earlier service: *Hong Kong Hansard*, 31 July 1984, p 1096. Dr Chung speaking on the resumption of debate on the second reading of the Employment (Amendment) (No 2) Bill 1974 reported on the argument as to whether the qualifying period for severance pay should be 6, 20 or 36 months: *Hong Kong Hansard*, 31 July 1974, p 1098.

²⁰ EO, s 6 read together with s 5.

under which an employee is deemed by virtue of the provisions of Sch 1 (to the EO) to be in continuous employment”.²¹ Section 3(2) then proceeds to place on the employer the onus of proving that a contract of employment is not a “continuous contract”.

Paragraph 1 of Sch 1 simply declares, “the provisions of this Schedule are to ascertain whether or not any contract of employment is a ‘continuous contract’ for the purposes of the EO”. The rest of Sch 1 could have been better drafted but para 2 and para 3(1) thereof read:

- “2. Subject to the following provisions, where at any time an employee has been employed under a contract of employment during the period of 4 or more weeks next preceding such time he shall be deemed to have been in continuous employment during that period.
3. (1) For the purposes of paragraph 2, no week shall count unless the employee has worked for 18 hours or more in that week, and in determining whether he has worked in any hour the provisions of sub-paragraph (2) shall apply.”

What the foregoing provisions mean is that to be deemed to be in “continuous employment” a person must have worked for the same employer for a period of not less than four weeks and during each of the four weeks, he must have worked for at least 18 hours. It follows then that if a period of continuous employment of, say, 23 months and three weeks is followed by a week in which the employee does not work at all for other than a lawful reason (eg medical or annual leave), his continuity of employment is broken. Such a break in the continuity of employment of an employee will disqualify him from receiving any benefit or protection for which 24 months continuous service is a condition precedent.

One of the earliest judicial interpretations of the concept of a continuous contract of employment as defined in the EO arose out of a claim for a long service payment. A long service payment is predicated on a minimum of 60 months’ service under a continuous contract. The provisions concerning long service payments were incorporated into the EO by the insertion therein of Pt VB entitled, “Long Service Payments”. The quantum of any long service payment is calculated based on the duration of service under a “continuous contract”; the longer the service under a

²¹ EO, s 3(1).

continuous contract, the higher the long service payment.²² Part VB of the EO came into effect on 2 January 1986.

Not all employers were thrilled by the prospect of having to fork out long service payments if and when these became due and payable. One such employer was the appellant in *David Hot Blocking Press Ltd v Ho King Yam*.²³ The case represents an employer setting into motion an attempt to circumvent the long service payment even before the provisions concerning long service payments came into operation. Seeking to avoid its liability for long service payments when the long service provisions came into force (on 2 January 1986), the appellant employer terminated a number of its employees (including the respondent on whom we focus hereafter). The respondent's contract of employment was terminated on 30 December 1985 and the appellant employer paid the respondent all the monies due to him under the EO on the same day. At the risk of stating the obvious, be it noted that these did not include any long service payment. The appellant then reemployed the respondent under a written contract. The contract was signed on 31 December 1985 and was expressed to take effect on 2 January 1986.

Part VB of the EO provided that an employee eligible for a long service payment who had served under a continuous contract for a maximum of nine years before 1 January 1986 was entitled to that benefit as calculated from 1 January 1977. The employee (Ho King Yam) in *David Hot Blocking Press Ltd v Ho King Yam* seems to have been in the continuous service of the employer from earlier than 1977. The employer thought that the break in the continuity of employment (from 30 December 1985 to 2 January 1986) that it had created would prevent a "continuous contract of employment" from being computed from the first day the employee respondent was employed by the appellant employer before 1977. The employee disagreed and instituted proceedings in the Labour Tribunal which allowed his claim. The employer appealed to the then High Court of the Supreme Court of Hong Kong.

At the High Court, the appeal was heard by the Honourable D Yam J (as his Lordship then was). The learned appeal judge had no difficulty discerning the stark choice presented to him by the facts of the case and the law. Here was an employer who had set into motion, even before Pt VB of the EO came into operation, an arrangement that, if

²² See s 31V (read together with Sch 7) of the EO for the formula for calculating the long service payments.

²³ [1996] 1 HKC 270.

upheld, would defeat the benefit of a long service payment the Part meant to confer upon employees in the position of the respondent. And, whether the appellant employer succeeded or fell depended on the interpretation of the notion of a “continuous contract” as defined in the EO.

The Hon D Yam J faced an insurmountable problem in the language of para 2 and para 3(1) of Sch 1 to the EO. The language clearly means that to be deemed to be in “continuous employment” a person must have worked for the same employer for a period of not less than four weeks and during each of the four weeks, he must have worked for at least 18 hours. It follows then that if a period of continuous employment of, say, 23 months and three weeks is followed by a week in which the employee does not work at all for other than a lawful reason (eg medical or annual leave), his continuity of employment is broken. Such a break in the continuity of employment of an employee will disqualify him from receiving any benefit or protection for which 24 months’ continuous service is a condition precedent. To overcome this problem, the Hon D Yam J began by holding:

“... that the concept of ‘continuous employment’ is not a concept which can be deduced from the wording itself. In other words, the exercise of finding the meaning of ‘continuous employment’ is not an exercise to find out the plain and obvious meaning of the word ‘continuous’. It is a statutory concept and the meaning thereof could only be found in the statute rather than construction of the words. Put it in another way, the use of the word ‘continuous’ is generic as well as descriptive. This is in line with a number of decisions which I shall come to in a moment.” (para 8)

Whether one finds the foregoing valid as a principle of statutory construction is not relevant but it did permit the learned appeal judge to traverse a plethora of authorities to draw a conclusion as to the import of para 2 and para 3(1) of Sch 1 to the EO. His Lordship held that for a contract of employment not to be a “continuous contract”:

“... an employer must dismiss an employee for four or more weeks (before a material date) or during those four weeks preceding (the material date), the employee was not asked to work for 18 or more hours.” (para 14)

As the appellant employer had dismissed the employee for less than four weeks before re-employing him and in the four weeks preceding the dismissal had employed him for more than 18 hours or more in each of those weeks, the employee had worked under a continuous

contract. In other words, the break in the continuity of employment from 30 December 1985 to 2 January 1986 could be ignored and the employee was entitled to a long service payment computed with effect from 1 January 1977. This decision, as we shall see, would loom large in Lui's case.

Lui Lin Kam v Nice Creation Development Ltd (Lui's Case)

The facts in *Lui's Case*, in so far as they are material to redundancy, are simple and straightforward. The defendant operated a seafood restaurant and employed the three claimants. By a notice dated 14 February 2001, the defendant terminated the employment of all three claimants. The reason for the termination was that the restaurant needed redecoration and its scale of operation would be reduced thereafter.²⁴ Clearly, this was a case of an employer making employees redundant. On 28 May 2001, the claimants sued the defendant in the Labour Tribunal. The claimants sought various reliefs. On 22 October 2002, the Adjudicating Officer²⁵ at the Labour Tribunal awarded all the three claimants severance payments as well as compensation for rest days. The defendant appealed to the Court of First Instance against the award of severance payments only and even then, it did not appeal against the same award to the first claimant. In other words, the appeal was limited to the award of severance payment to the second and third claimants.

The substantive employment history of the second and third claimants with the defendant may be shortly stated. The second claimant worked for the defendant for the period from 23 October 1996 to 15 March 2001 (a period of four years and five months) under three written contracts, all on their face, for 18 months each. The third claimant worked for the defendant from 1 September 1995 and her last day of work was 15 March 2001 (a period of five years and seven months). The first contract of both respondents did run for 18 months. However, the duration of the second 18-month contract of the second and third claimants was extended by agreement, by a month, to 19 months until the end of September 1999. Both the second and third claimants signed, on 15 October 1999, another

²⁴ The factual information in this paragraph is reproduced from *Lui's Case* (CFI) (n 4 above), para 1.

²⁵ Rather than being designated a "magistrate" or a "judge", the officer presiding over proceedings at the Labour Tribunal is a judicial officer termed an "Adjudicating Officer".

18-month contract and each of the third contracts was prematurely terminated by the defendant on 15 March 2001 (ie after some 17 months).²⁶

There was a dispute of fact as to whether the second and third claimants actually worked for the defendant for the period between the second and third written contracts (“the disputed period”).²⁷ The two claimants said they did work during this period and were paid in cash. The defendant disputed this. The dispute on this point is important because if the two claimants in fact worked during the disputed period, they would have been in the service of the defendant under a continuous contract for not less than 24 months. And, by virtue of the service under a continuous contract for not less than 24 months, each would be entitled to a severance payment. At the Labour Tribunal, the Presiding Officer did not make any finding of fact on the disputed period.²⁸ The Adjudicating Officer did not do so because he seems to have considered himself to be bound by the decision of Yam J which has been discussed earlier in this article. This was the decision in *David Hot Blocking Press Ltd v Ho King Yam* on the import of the provisions of, *inter alia*, paras 2 and 3 of Sch 1 to the EO.²⁹ Yam J in *David Hot Blocking Press Ltd v Ho King Yam* held that the statutory provisions meant that an employee who had had his services terminated and then been re-employed was to be treated as if he had been continuously employed if the period between his first and second stints of employment were to be less than four weeks and if he was asked to work for 18 hours or more within the preceding four weeks.³⁰ The adoption of Yam J’s decision by the Adjudicating Officer deemed the claimants to have been employed under a continuous contract under the contract preceding the disputed period, the disputed period itself and the contract that succeeded the disputed period. This entitled the claimants to a severance payment which the Adjudicating Officer had awarded. The defendant employer appealed to the Court of First Instance.

In the Court of First Instance, Lam DJ (as he then was)³¹ heard the defendant’s appeal and handed down his judgment on 9 July 2003. In so far as the Adjudicating Officer had relied on the decision in *David Hot Blocking Press Ltd v Ho King Yam* to rule that the claimants had been in

²⁶ The factual data in this paragraph is reproduced from *Lui’s Case* (CFI) (n 4 above), para 4.

²⁷ The expression is that used by Deputy High Court Judge Lam in *Lui’s Case* (CFI) (n 4 above), para 3.

²⁸ Details of the “disputed period” and the fact that the Presiding Officer did not make any finding of fact on the dispute are derived from *Lui’s Case* (CFI) (n 4 above), para 3.

²⁹ See n 23 above.

³⁰ See n 23 above at 276C; in the original judgment the remark is at para 14.

³¹ The learned judge is hereinafter identified as “Lam DJ”.

“continuous employment” by the defendant, Lam DJ had no difficulty in holding that to be wrong in law. However, that was not the end of the matter for Lam DJ. His Lordship went on to note that “in addition to mutual agreement (or arrangement) and trade custom, paragraph 3(2)(b) (of the Sch 1) also referred to absence from work in circumstances such that by law an employee is regarded as continuing in employment”.³² His Lordship then went on to invoke and explain the common law concept of a “global contract” by citing, *inter alia*, the following passage from *McLeod v Hellyer Brothers* [1987] IRLR 232 at pp 238–239 as follows:³³

“The concept of a global contract of employment ... may become relevant in cases where the evidence discloses what on the face of them was a series of contracts for service or services entered between the same parties and covering a substantial period of time. On the particular facts of such a case it may be open to the Industrial Tribunal properly to infer from the parties’ conduct (notwithstanding the absence of any evidence as to any express agreement of this nature) the existence of a continuing overriding arrangement which governed the whole of their relationship and itself amounted to a contract of employment. Such a contract is frequently referred to as a ‘global’ or ‘umbrella’ contract.” (*Per Slade LJ*)

Lam DJ applied the concept to the case before him as follows:³⁴

“On the material before me, I am prepared to draw an inference from the indisputable facts in the present case that there was an agreement or tacit understanding between the Claimants and the Defendant in September 1999 that they would be re-engaged after the expiry of the contracts of 1 February 1998 as they eventually did on 15 October 1999. The evidence showed that the Defendant had adopted this practice of signing successive contracts with its employees and having read the transcript of the evidence given in the Labour Tribunal, I found nothing from the testimonies (*sic*) of the defence witnesses to indicate that the Defendant did not intend to

³² *Lui’s case* (CFI) (n 4 above), para 19. The relevant portion of para 3(2)(b) of Sch 1 reads:

“3(2) If in any hour the employee is, for the whole or part of the hour-
 (a)incapable of work in consequence of sickness or injury; ... ; or,
 (b)absent from work in circumstances such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer for any purpose,
 then, ... that hour shall count as an hour in which he has worked.”

³³ Quoted from Lam DJ in *Wong Man Kwan v Chun Shing Holdings Ltd* [2003] 3 HKLRD 403, para 13.

³⁴ See n 4 above, para 21.

continue with the employment of the Claimants in September 1999. To the contrary, their evidence clearly showed that there was a tacit understanding of re-engagement of the Claimants in October 1999 ... Hence, even if the Claimants did not work during the Disputed Period, the case may come within Paragraph 3(2)(b).”

Thus, Lam DJ disagreed with the reasoning of the Adjudication Officer but not his ultimate conclusion; only, Lam DJ reached that by a different route. The learned judge held that the three contracts by themselves amounted to a global contract and that, consequently, there was a continuous contract unaffected by the two-week break in the employment of the claimants between the second and third contracts. The employer appealed to the Court of Appeal.

The reception of the exposition of the concept of a “continuous contract” in the EO by the Hong Kong courts merits examination. In fact, Yam J himself recorded this in another case his Lordship decided, *Wong Man Sum v Wonderland Seafood Restaurant* (“*Wong Man Sum*”).³⁵ In this case, the employer resorted to the device of successive 18-month contracts separated by a break of 16 days during which the employee did not work for the employer company at all. Discouraging on the statutory definition of a “continuous contract” in Sch 1 to the EO, Yam J reversed himself on the stand he had taken in *David Hot* on the statutory definition of a “continuous contract”. In *Wong Man Sum*, the learned judge recorded:³⁶

“13. In *David Hot Blocking Press Ltd v. Ho King Yam* [1996] 1 HKC 270, at 276C, I had said, by way of obiter, that:

‘In other words, in order to defeat the purposes of this part of the Ordinance, an employer must dismiss an employee for four or more weeks or during those four weeks preceding, the employee was not asked to work for 18 or more hours ... ’

14. I am afraid this part of my judgment is quite misleading. From the whole of my judgment and the provisions in the First Schedule, it actually meant that ‘... the employee was not asked to work for 18 or more hours’ in any one of those four weeks. Otherwise, it would not stand to reason that during the four preceding weeks the employee would only be required to

³⁵ *Wong Man Sum v Wonderland Seafood Restaurant* (unrep., HCLA 133/2002 [2005] HKEC 885).

³⁶ See n 35 above, paras 13–16.

work for 18 or more hours in order to have a continuous contract even there was a break of four solid weeks.

15. Subsequent decisions were made to the same effect:

- (1) *Leung Wan Kee Shipyard v. Lik Shau Foo* [1995] 3 HKC 229 per Waung J.
- (2) In *Wong Man Kwan v. Chun Shing Holdings Ltd* (unreported), HCLA29/2002, at para 27, Deputy High Court Judge Lam (as he then was) decided that:

‘The combined effect of paragraphs 2 and 3 [of the First Schedule] is that so long as an employee has worked for 4 weeks preceding the relevant date and worked at least 18 hours for each week, he would be deemed to be in a continuous employment, or in other words, deemed to be employed under a continuous contract.’

- (3) In *Lui Lin Kam and others v. Nice Creation Development Ltd* (unreported), HCLA106/2002, 9 July 2003, Deputy Judge Lam decided to the same effect.

16. Thus it is quite settled law that in deciding whether a person is in continuous employment, a period of not less than four weeks before the relevant date, the employee must have worked for 18 hours at least in each of those weeks, unless the case falls within the exceptions provided under paragraph 3(2).”

The four paragraphs quoted above³⁷ place the import of the statutory provisions beyond doubt. It is clear that where there is a four-week break in employment (the break), the continuity of employment ends. Also, if an employee works for less than 18 hours in any one week, that too breaks the continuity of employment. In both situations, if the employee is thereafter reemployed, he cannot claim to be employed under a continuous contract with reference to his earlier employment.³⁸ And so, back to *Lui’s Case*.

³⁷ In *Lui’s Case* (CA) (n 5 above) at para 10, Tang JA characterised the four paragraphs quoted as Yam J explaining “that his dictum ha(d) been misunderstood and what he meant was that a break of one week was sufficient”.

³⁸ It should come as no surprise that Yam J did not accept this as a ground of appeal in n 35 above. However, Yam J allowed the appeal on the basis that the 16-day break in employment had been pursuant to “some mutual arrangement” between the employer and the employee. The employer appealed to the Court of Appeal but we shall deal first with the appeal in *Lui’s Case* (CA) (n 5 above).

At the Court of Appeal, the leading judgment on the appeal in *Lui's Case* was delivered by Tang JA (with whose judgment the two other members of the Coram agreed).³⁹ The learned Justice of Appeal held that as a matter of statutory construction an employee was not in continuous employment if “the employee was not asked to work for 18 hours or more” in any week preceding a second contract.⁴⁰ The claim was remitted to the Labour Tribunal to take evidence on and decide this point. The rest of the appeal was decided on the basis that the claimants did not have the continuous service of 24 months that would entitle them to a severance payment.

The learned Justice of Appeal also rejected the learned trial judge’s view that the evidence revealed an umbrella or global contract to entitle the claimants to severance payment. His Lordship reviewed the evidence to hold that he could not agree with Lam DJ that there was even evidence to justify “an inescapable inference” that a global contract existed.⁴¹ His Lordship also reviewed the authorities on the existence of a global contract. The authorities established that for a global contract to arise to cover intermittent employment there must, *inter alia*, be a mutuality of obligation spanning the duration of the employment—there must be a mutual arrangement that during the break the employee should be regarded as continuing in employment for any purpose.⁴² Absent such mutuality, a number of sporadic bouts of employment may each amount to a contract of employment without collectively giving rise to a global contract. As Tang JA put it:⁴³

“To constitute a global contract there must be the irreducible minimum of mutual obligations otherwise there will be no contractual link between the individual engagements with the result that there would be no global contract.”

In the case under appeal, the claimants’ second and third 18-month contracts were separated by breaks of two weeks when the mutuality of obligations was missing. There was therefore no global contract and the claimants did not have the continuous contract of 24 months necessary for severance payment. The appeal was dismissed.

³⁹ See n 5 above, para 1 at p 657 and para 54 at p 677.

⁴⁰ See n 5 above, para 11 at p 660. Be that as it may, at the time that the Adjudicating Officer had to decide on the claim in *Lui*, the decision in *David Hot* (n 23 above), was binding on him (the Adjudicating Officer).

⁴¹ See n 5 above, para 37 at p 672.

⁴² See n 35 above, para 34.

⁴³ See n 5 above, para 27.

Sections 31B(1) and 70 of the EO and Discrete 18-month Contracts

Section 31B(1) of the EO confers upon an employee the benefit or protection of severance payment if he had been employed under a continuous contract for a period of not less than 24 months ending with the relevant date. In *Lui's Case*, the claimants had been employed under consecutive, but not continuous, 18-month contracts. In disallowing the claim for severance payment, the learned Justice of Appeal clearly applied the literal approach in interpreting s 31B(1). Is there any approach to statutory interpretation that could have led to the claimants' succeeding? Perhaps the only approach that might have had the whisper of a chance would be the purposive approach—which seems to hold sway in the field of statutory construction in Hong Kong. The pre-eminence of the purposive approach in the Territory emerges from the following passage in the unanimous judgment of the Court of Final Appeal in *Town Planning Board v Society for the Protection of the Harbour Ltd.*:⁴⁴

“In interpreting a statute, the function of the courts is to ascertain the intention of the legislature as expressed in the legislation. The statute must be considered as a whole. Any statutory provision must be understood in its context taken in its widest sense.... A purposive approach should be adopted. In construing a statute, the courts should adopt an interpretation which is consistent with and gives effect to the legislative purpose. An interpretation which is inconsistent with and does not serve that purpose should be avoided.” (*Emphasis provided*)

Provided that the foregoing principles are adhered to, words should be given their natural meaning if doing this is consistent with the legislature's intention. This emerges from the following passage in the judgment of the Court of Final Appeal in *Ho Choi Wan v Hong Kong Housing Authority*:⁴⁵

“In construing the language of a statute, it is the task of the court to ascertain and give effect to the intention of the legislature. But that does not mean that the Court must give a literal construction to every word or phrase in the statute. As Lord Bingham of Cornhill said in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at p 695: ‘The court's task, within the

⁴⁴ (2004) 7 HKCFAR 1 at 13–14, paras 28–29, per Chief Justice Li. In *Medical Council of Hong Kong v Chow Siu Shek David* (2000) 3 HKCFAR 144 at 153, Bokhary PJ with whose judgment the other members of the Court of Final Appeal agreed, referred to “... the modern tendency to give statutes a purposive construction”.

⁴⁵ (2005) 8 HKCFAR 628, para 109, per Lord Millett NPJ with whose judgment the other members of the Coram agreed.

permissible bounds of interpretation, is to give effect to Parliament's purpose.' Whenever the legislature enacts or amends an Ordinance, its purpose is to remedy a perceived mischief or defect in the pre-existing legislation. It is to be presumed that it did not intend the statute to go wider in its operation than is necessary to remedy the mischief or defect in question."

It is crucial to remember the background against which the amendment was proposed to insert severance payment in the EO. What was considered to be the mischief were the number and frequency of disputes over redundancies: over the period from 1 July 1968 to 30 April 1974, more than 40 per cent of all major labour disputes dealt with by the Labour Relations Service concerned redundancy.⁴⁶ Legislators were concerned to protect employees against such redundancies and lay-offs. The original bill proposed service under a continuous contract for 24 months or more as the entitlement for a severance payment. A shorter period of six months had been suggested as had been a longer period of continuous employment of 36 months.⁴⁷ Other amendments were also moved. Eventually, the Legislative Council settled on the continuous employment of at least 24 months as a condition precedent for a severance payment. Severance payment then was the remedy upon which the Legislature resolved to protect employees against redundancies and lay-offs but only if they had completed two years' service with the same employer. The qualifying service of two years' employment with the same employer was a part of the remedy. Resorting to the purposive approach would not help the claimants.

Could the Court of Appeal have taken some other factor in the contextual background to strike down the devices that the employers had deployed to defeat the legislative intent of the section? The legislature's intention to provide a cushion for employees against the involuntary cessation of their employment does not appear in s 31B(1) itself but is clearly manifested in the *Hansard*. Could this intention be read into s 31B(1)? The purposive approach permits the court to avoid a result that is contrary to the legislative intention by excluding words in a statutory provision.⁴⁸ The problem in s 31B(1) arises from the words requiring a minimum of 24 months of employment under a continuous contract

⁴⁶ Secretary for Social Services (Acting) moving the second reading of the Employment (Amendment) (No 2) Bill 1974: *Hong Kong Hansard*, 3 July 1974, p 987. This was the bill that inserted provisions relating to severance payment into the EO.

⁴⁷ Dr Chung speaking on the resumption of debate on the second reading of the Employment (Amendment) (No 2) Bill 1974: *Hong Kong Hansard*, 31 July 1974, p 1098.

⁴⁸ *McMonagle v Westminster City Council* [1990] 1 All ER 993. This, however, is a weak authority for the proposition under discussion because in it, the Court was concerned with surplus words in a statutory provision. That clearly is not the case with s 31B(1) of the EO.

to qualify for a severance payment. Can the section be meaningful if the court excludes the words creating the “qualification”? The answer, regretfully, has to be in the negative. It may be argued that where the clear intention of the legislature is frustrated, the court should be able to enlarge or to whittle down, as necessary, the scope of the words defining a remedy in a statutory provision. Here, the remedy is a severance payment if the employee has served the employer continuously for 24 months. May the court somehow interpret the provision to apply after an 18-month stint of employment? Even if the court is seized of such a jurisdiction, for the court to do so would be to go beyond the limits that the legislature was prepared to go when it inserted the severance payment provisions in the EO. For the fact is, as highlighted above, that it was reported to the legislature that the Labour Advisory Board had considered and rejected proposals to make severance payments available after a shorter and longer qualifying period of six months and 36 months and rejected both in favour of 24 months. The legislature could have rejected the views of the Labour Advisory Board but it did not. The intention of the legislature that the period of qualifying period for a severance payment be 24 months cannot be questioned.

To be entitled to a severance payment, each claimant in *Lui's Case* should have been employed under a continuous contract for a period of not less than 24 months on the date their third contracts were terminated. Here, the claimants had been employed under consecutive, but not continuous, 18-month contracts. The trial judge had, at para 22 of his judgment, said:⁴⁹

“It seems to me that the whole point of this arrangement of successive contracts was a scheme to avoid liabilities for severance payment or long-service payment. DW3 admitted as much in his testimony ... The defendant clearly intended to extinguish or reduce the claimants’ right to severance payment or long-service payment.”

The second sentence of the trial judge reproduced above uses the language of s 70 of the EO which reads, “Any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void”.⁵⁰ Could the claimants seek the assistance of s 70 in their claim for severance payment? Tang JA addressed this question head on. His Lordship seems to hold the view that where severance payment is concerned, s 70

⁴⁹ Cited from *Lui's Case* (CA) (n 5 above), p 661 at para 15, *per* Tang JA.

⁵⁰ Tang JA reproduced s 70 in para 48 of his judgment in *Lui's Case* (CA) (n 5 above) at p 676.

is only engaged when, first, there is a continuous contract of 24 months or more and second, that contract contains a term which purports to extinguish or reduce the employee's entitlement to a severance payment. In *Lui's Case*, these requirements were not satisfied. Accordingly, Tang JA concluded that where parties enter into successive contracts with appropriate breaks so that they do not constitute a continuous contract, the contracts are not covered by s 70.⁵¹ Given the clarity of the words of s 70, no other interpretation is possible.

Avoidance of Obligations Imposed on Employers by the EO

In disposing of *Lui's Case*, Tang JA made several comments that bear repeating. These are reproduced below:

"... An employer is entitled to arrange its affairs to take advantage of the provisions of Sch 1. I conceive it to be my duty to uphold his right to do so." (p 676, para 47, *emphasis provided*.)

"It is quite obvious from the evidence that the defendant had adopted the practice of entering into employment contracts of 18 months only with its employees, with the view to avoid liability to pay, for example, severance pay. Insofar as the right to such payment depended on a continuous contract for 24 months, the defendant was acting perfectly within its legal right not to employ a worker for a continuous period of 24 months. I am concerned with the legal rights of the parties and not with the morality of such a practice. No doubt many employers will be guided by their self interest and they would wish to employ their employees on a long term basis for the sake of good morale and loyalty. But provided an employer was acting within the law, he is also entitled to the full measure of the law." (p 673, para 38, *emphasis provided*)

"I do not believe that entering into successive contracts with the appropriate breaks so that they do not constitute a continuous contract is covered by s 70 at all. As I have explained, the employer was only doing what it was entitled to do under the Ordinance. Nor can I ignore the two weeks' break. It was adopted to break the continuity of employment. Provided there was a real break of two weeks and there was no global contract covering more than one period of 18 months, it must be given the effect which it was designed to have." (p 676, para 49.)

⁵¹ See n 5 above, p 676 at para 49.

In the first of the passages quoted above, the learned Justice of Appeal says, “An employer is entitled to arrange its affairs to take advantage of the provisions of Sch 1”. The remark applies with equal force to the rest of the EO. That is to say, an employer is entitled to so arrange its affairs to avoid or prevent its liability for other service-based benefits to employees from even arising. As such measures are perfectly legal, in adopting them, the employer would be avoiding rather than evading liability under the statute.

In the second paragraph quoted above, the learned Justice of Appeal says, “I am concerned with the legal rights of the parties and not with the morality of such a practice”. The very fact that his Lordship incorporates “morality” into his comment is indicative of the Court being aware that the employer’s ethics in avoiding liability are, at the very least, questionable. But then, his Lordship does not call for an amendment to the EO to prevent such avoidance. The absence of such a call is striking—particularly as may be construed as indicating that the Court of Appeal approves of the law as it stands.

The Impact of the Employer Avoiding Liability under the EO

Allowing employers to avoid their liabilities under the EO will be to grant them a licence to exploit their employees by adopting contracts that prevent their liabilities from arising. After all, employers taking advantage of loopholes in the law is not a new phenomenon as is revealed by the following extracts from speeches delivered in the Legislative Council:

“... in order to shun (*sic*) or cut (ie reduce) the statutory rights of their employees, some unscrupulous employers have been ... changing the contracts of employment to short-term contracts, deliberately making the employees unable to meet the qualifying service for long service payment or severance payment.”⁵²

“... a lot of unscrupulous employers take advantage of the loopholes in the legislation to dismiss employees or deprive them of their benefits by changing the contract of employment. For example, some employers force their employees who have a service of nearly five years to resign first and then

⁵² The Hon Mr Chan Wing Chan, speaking on the resumption of the debate on the Second Reading of the Employment (Amendment) (No 2) Bill 1997: *Hong Kong Hansard*, 17 June 1997, p 128.

re-engage them, and thus prevent their employee(s) from obtaining long service payment provided in the legislation. Some employers may sign non-consecutive short-term contracts of employment of less than two years with their employees to render the latter unprotected under the provisions concerning severance.”⁵³

The closing sentence of the second quotation above mirrors the facts in *Lui's Case*.

The Court of Appeal's recognition of an employer's right to avoid his statutory liabilities in *Lui's Case* gives employers *carte blanche* to avoid as many of their statutory obligations to their employees as they can. One of the ways in which employers can avoid such liabilities is to treat their employees as independent contractors;⁵⁴ the latter are not entitled in law to the benefits and protections conferred upon employees by the EO.⁵⁵ In the past, the courts have struck down employers' attempts to avoid their statutory obligations to their employees even where the employer has had the employee agree in writing that he was not an employee and was not entitled to the benefits and protections conferred by the EO on employees.⁵⁶ Employers seem to have learnt that just requiring an employee to deny his status as an employee and to renounce his benefits under the EO might not survive scrutiny by

⁵³ The Hon Mr Leung Yiu-Ching, speaking on the resumption of the debate on the Second Reading of the Employment (Amendment) (No 2) Bill 1997: *Hong Kong Hansard*, 17 June 1997, p 131. The response of the Secretary for Education and Manpower who closed the debate on the Bill was largely a *non sequitur*. He said, at p 136:

“The Hon Leung Yiu-Ching has just raised many questions, and it is a pity that he is not in the Chamber right now. In fact, I do not quite understand the rationale behind many of his questions. If he had asked one of the questions with the intention of borrowing my car and I think he wants to borrow my car so that he can rush back to this Council to cast his vote, particularly when he votes in support of the Government, I would be most happy to lend him my private car.” (*Hong Kong Hansard*, 17 June 1997, p 136).

⁵⁴ The EO is silent on independent contractors but the common law in Hong Kong has adopted the concept and its difference from an employee. An employer has to pay wages to an employee but only the agreed contract sum to an independent contractor. Other than the payment for work done, an independent contractor does not enjoy any of the benefits and protections that the EO confers upon employees. The common law has devised various “approaches” or “tests” including the control test, the organisational approach (or integration test), and the overall impression approach (or multifactor test) to distinguish between an employee and an independent contractor. The current approach adopted by the courts is the overall impression approach, which emphasises consideration of the varying factors in the employment relationship. For the “approaches” or “tests”, see, for example, Rick Glofcheski and Farzana Aslam et al, *Employment Law and Practice in Hong Kong* (Sweet and Maxwell, 2010), pp 21–41, and Krishnan Arjunan and Abdul Majid, *Business Law in Hong Kong* (LexisNexis, 2009), pp 560–572.

⁵⁵ These benefits and protections include wages, wages in lieu of notice, paid statutory holidays, paid annual holidays, paid sickness leave, maternity benefits and, where an employee has the requisite “qualifying” continuous service, severance payment and even a long service payment.

⁵⁶ *Lam Yau Kuen v Easy (Hang Fung) Transportation Co Ltd* (unrep., DCCJ 1/2006, [2006] HKEC 2218).

the court. To prove that there was no intention to create an employer-employee relationship and that such a relationship did not in fact come into existence, employers refuse to enter into a contract of employment with an individual; instead, they require the individual to register a business or company to which they contract the job that would otherwise have been performed by the individual. One such case is *Lam Yau Kuen v Easy (Hang Fung) Transportation Co Ltd*.⁵⁷ This case illustrates the extent to which employers will go to avoid their statutory obligations to an employee.

The plaintiff-employee responded to an advertisement for lorry drivers. He was met by and had discussions with Mr Lee, a representative of Easy (Hang Fung) Transportation Company Limited, the first defendant (D1) and Ying Wui Transportation Limited, the second defendant (D2) (hereafter, collectively referred to as “the two employers”). In an elaborate charade to avoid their liabilities as employers under the EO, Lee asked the claimant to register a business name with the Business Registration Office and told him that an agreement would be signed between the two defendants using the name of D1 and the plaintiff using his business name of Kwan Kee Transportation Company (Kwan Kee). What the case report does not expressly state but can be inferred is that D1 and D2 would not enter into a contract of employment with the plaintiff and would use his services only if he registered a business. The rationale for this was brilliant—a business organisation cannot be an employee as it cannot demand overtime, or statutory holidays, or annual leave, or mandatory fund contribution or a sickness day or wages in lieu of notice. The inference is strengthened by the fact that the registration of the plaintiff’s business name was done by Lee for and on the plaintiff’s behalf. By 14 June 2001, the parties had entered into a written agreement (the Agreement). The plaintiff had signed the Agreement in the name of his business, Kwan Kee and the two employers signed in the name of D1. In May 2005, the defendants, using the name of D2, signed a new contract, effective from 1 June 2005, with the plaintiff again using the name of Kwan Kee (the second Agreement). The terms of the second Agreement were basically those of the first Agreement. Reflecting the two employers’ desire to make assurance doubly sure, each agreement expressly provided that the parties were not entering into an employer-employee relationship and that the plaintiff did not have the rights and benefits of an employee.

⁵⁷ *Ibid.*

The plaintiff started work on 14 June 2001 and drove the employers' lorry bearing registration number JE 2403 between Hong Kong and the Mainland until, on 24 October 2005, he was purportedly summarily dismissed by D2 for gross insubordination. The plaintiff sued as an employee who was unlawfully dismissed and claimed against the defendants, *inter alia*, unpaid wages, wages in lieu of notice, statutory holiday pay for nearly four years, annual leave payments and severance payment. The two employers filed a joint defence and counterclaimed various sums from the plaintiff. (Details of the counter claim—which the court ultimately rejected—are not relevant.)

Deputy District Court WC Li heard the claim. The learned judge analysed factors drawn from the control, integration and entrepreneurial tests to decide whether the plaintiff was an employee or an independent contractor to hold:

“... All the factors in this case pointed to the direction that this was a contract of service and not a contract for service. This is so despite the express words in the agreements that the parties were not entering into an employer-employee relationship and the agreements expressly stated that the employee did not have the rights and benefits of an employee. These express stipulations in a contract of employment are void by law. Section 70 of the Employment Ordinance protects an employee from any attempt by an employer who tries to avoid their statutory duties as an employer by contracting out I found that the Plaintiff was the Defendants' employee at all relevant time ... I would find in the Plaintiff's favour that he was entitled to all rights and benefits under the Employment Ordinance, Cap 57. For this reason, the Plaintiff was entitled to have judgment to his claims for annual leave pay and statutory holiday pay that he had been deprived for the years that he had worked for the Defendants.” (para 15)

“The Defendants were under a misapprehension that if the Plaintiff had a business registration name, that would mean the Plaintiff was a business and he would not be an employee but an independent contractor. This would only be a futile attempt in furtherance of a scheme to deprive workers of their entitlement under the employment law.” (para 17)

“On the ... 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 s 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." (para 18)

On the facts, the court rejected the view that the plaintiff had been validly dismissed from employment.

The court in *Lam Yau Kuen v Easy (Hang Fung) Transportation Co Ltd (Lam Yau Kuen)* adopted a holistic view of the transaction that led to the agreement between the plaintiff and the two employers. It looked at the true nature of the transaction which it did not shirk from identifying as an employer-employee relationship rather than the legal effect of the sham business-to-business relationship that the two employers tried to create. In this, the District Court was undoubtedly aided by the fact that there was a contract spanning some years, the terms of which it could strike down as offending s 70 of the EO.

Applying the ratio of *Lui's Case* to *Lam Yau Kuen* produces a completely different result. The two employers in *Lam Yau Kuen* would be perfectly entitled to arrange their affairs so as to prevent their liability under the EO from arising. That is to say, the two employers would be entitled to tell the plaintiff that they would not deal with him unless he agreed to register a business and even then, they would only enter into a contract for service instead of contract of employment. In this situation, a clause declaiming that the contract did not entitle the business to any of the benefits, privileges and protections conferred upon employees by the EO would not offend s 70 because it would be contained in a contract for service and not of service. The Court of Appeal decision would enable the two employers to neatly side-step the EO. In the circumstances that prompted the plaintiff in *Lam Yau Kuen* to sue, the two employers would be entitled to deny him wages in lieu of notice, the unpaid wages, statutory holiday payments, annual leave payments and, of course, severance payment; as an independent contractor, the plaintiff would be left with his remedy in damages for the contract sum due to him—provided he could prove his loss. The plaintiff could not, in that eventuality, claim statutory holiday payments, annual leave payments and, of course, severance payment.

Employers could also avoid their full liability for sickness days. Under the EO, a "sickness day" means a day on which an employee is absent from his work by reason of his being unfit therefore on account of injury or sickness.⁵⁸ An employer has to pay an employee who has been employed

⁵⁸ EO, s 2.

under a continuous contract for a month or more a “sickness allowance”⁵⁹ generally amounting to four-fifths of his average wages⁶⁰—if he takes four or more consecutive sickness days.⁶¹ A department in a Hong Kong university used to employ lecturers under only successive 11-month contracts. The department did so because of the lecturers’ entitlement to sickness allowance accrues at the rate of two paid sickness days for each completed month under a continuous contract during the first 12 months of such employment and at the rate of four paid sickness days for each such month thereafter.⁶² By successive 11-month contracts, the department ensured that the lecturers were only entitled to two sickness days per month for each contract. Since lecturers are usually healthy young individuals, one wonders whether such a university department would be trying to save the costs of a facility that lecturers hardly, if ever, use.

One may speculate whether the university department’s decision to enter only into 11-month contracts could also be motivated by the desire to avoid the paid annual leave provisions in the EO. An employee who has been in employment under a continuous contract for not less than 12 months shall, in respect of each calendar year of completed service with the same employer, be entitled to paid annual leave.⁶³ The rate of annual leave is seven days for the second and third years of service, eight days in the fourth year, nine days in the fifth year, 10 days in the sixth year, 11 days in the seventh year, 12 days in the eighth year, 13 days in the ninth year and 14 days for each year from the tenth year following.⁶⁴ By entering into successive 11-month contracts with the same individuals, the university department would reduce its expenditure by minimising the number of paid leave days it had to grant each lecturer. This is unlikely to be a university policy and is more likely to be the action of the department head.

In Hong Kong, an employer can dismiss an employee either with an agreed notice or with wages in lieu of notice. In both situations, the employer does not have to assign a reason for such dismissal. Such dismissals are unfair and “especially unfair to ageing employees dismissed through no fault of their own who have served the same employer for several decades”.⁶⁵ What made the dismissal of elderly long serving employees particularly unfair was that the elderly found it more difficult to find alternative employment. The long service payment scheme was introduced on “the premise that the

⁵⁹ EO, s 33(1).

⁶⁰ EO, s 35(2). The employer may pay more but not less than the prescribed rate.

⁶¹ EO, s 33(3).

⁶² EO, s 33(2).

⁶³ EO, s 41AA(1).

⁶⁴ EO, Table to s 41AA(2)

⁶⁵ The Secretary for Education and Manpower moving the second reading of the Employment (Amendment) Bill 1985: *Hong Kong Hansard*, 4 December 1985, p 294.

dismissal of an elderly long service (sic) employee without some form of provision for his future ... (was) itself unreasonable". The quantum of the long service payment that the scheme mandated an employer to make to a dismissed employee was based on the employee's age and length of service.⁶⁶ Shorn of details, an employee who has served the same employer under a continuous contract for not less than five years and is dismissed without notice or payment in lieu of notice, ie for other than "cause"⁶⁷ is entitled to a long service payment. An employee with five years of continuous service who terminates his contract under specified circumstances will also be entitled to a long service payment.⁶⁸ The formula for calculating the quantum of a long service payment is spelt out in s 31V of the EO. By s 31RB, each domestic servant is entitled to a long service payment upon completing five years' continuous service with the same employer. In Hong Kong, domestic servants are usually female. A foreign domestic servant is normally employed on an initial two-year contract. Her second contract is also for two years. Anecdotal evidence abounds of employers denying their domestic servant of a long service payment by simply letting her go after her second contract and hiring a different domestic helper. This practice would, under the decision in *Lui's Case*, now be recognised as perfectly lawful.

Since the coming into force of the EO, employers have attempted to avoid their statutory obligations to their employees. As we have seen, the attempts have run the gamut—from having the employee renounce in writing his status and rights as an employee; to treating the individual working for them as an independent contractor rather than an employee entitled to the rights, benefits and protections conferred by the statute; to requiring that the employee register a business and contract as a business organisation rather than as an individual; to employing the worker under successive term contracts where each contract was for a shorter term than that required to qualify for a statutory right or benefit such as annual leave, medical leave, a severance payment and a long service payment, to mention a few. And as we have also seen, our courts have tried valiantly to prevent employers from thwarting the intention of the legislature. In attempting to give effect to the legislative intention, the courts have claimed that the statutory definition was different from that signified by the plain meaning of the words in the statute, roped in the concept of a

⁶⁶ This paragraph has drawn liberally from *Hong Kong Hansard*, 4 December 1985, p 295.

⁶⁷ Summary dismissal, ie without notice or without payment in lieu of notice, is a dismissal with cause. Summary dismissal is provided for under s 9 of the EO on the grounds of gross insubordination, misconduct inconsistent with the due and faithful discharge of duties, fraud or dishonesty, habitual neglect of duties and any other ground on which the common law permitted summary dismissal.

⁶⁸ EO, s 31R(1).

global contract, simply brushed aside declarations that the worker was not an employee but an independent contractor or treated as a sham, documentation showing that the contract was between two companies (ie that it was not a contract of employment). In so doing, the courts may have, as the Hon Cheung JA delicately put it, “stretched the limits of adjudication in order to overcome the problem(s)”⁶⁹ created by the employers but it cannot be denied that the judges were trying to serve the needs of justice.

The Need for a Change in the EO

In holding that an employer is perfectly entitled to arrange his/its affairs to avoid his/its liability for the benefits, privileges and protections accorded to employees by the EO, the Court of Appeal may be seen to have granted employers the *carte blanche* to exploit their employees. This may be described as “an undesirable result” of the drafting of the statutory provisions involved. The undesirable result could have been side-stepped if the relevant provisions had been drafted with an eye on the undesirable results. But it may well be that this is a comment made with the wisdom that hindsight confers. Be that as it may, it has to be noted that the provisions of the EO⁷⁰ as presently worded do not admit of any other interpretation under the existing canons of statutory construction. It is respectfully submitted that the Court of Appeal was, in the two cases, confronted by statutory provisions that were poorly drafted in failing to provide against the undesirable result. And, with respect, it is submitted that the Court of Appeal could not have come to any other decision without doing violence to the accepted norms of statutory construction. Would an appeal to the Court of Final Appeal have been salutary? When the Court of Appeal undertakes statutory interpretation, it is bound by the principles laid down by the Court of Final Appeal. An appeal to the Court of Final Appeal is thus highly unlikely to see the Court of Appeal decision herein being overturned.

The foregoing should not leave the impression that the Court of Appeal is unaware of the fact that the consequences of its decisions are undesirable. In *Wong Man Sum*, the Hon Cheung JA observed:⁷¹

⁶⁹ See n 35 above, para 8.

⁷⁰ This is true, at the very least, of s 3 and Sch 1 (regarding a “continuous contract”), s 31B (in respect of severance payments) and s 31R (in respect of long service payments).

⁷¹ See n 35 above, paras 5 and 6. The Hon Yueng JA, at para 11, seems to have concurred with this observation.

- “5. The Employment Ordinance is clearly in the nature of a social legislation. Its aim is to provide some minimum benefits to workers who, more often than not, do not have equal bargaining powers as their employers. This disparity is even more intense in Hong Kong when there is no system of collective bargaining between employers and workers’ unions.
6. The situation is clearly unsatisfactory when employers are able to adopt devices which relieve them of their obligation towards their employees. The consequence is that a large sector of the labour force is being deprived of the entitlement intended by the legislature for their benefit. This is not conducive towards social harmony.”

Evidently, the hands of the Court of Appeal are tied by the statutory provisions.

The need for a change in the statutory regime which permits employers to relieve themselves of their statutory obligations to their employees was enunciated in *Wong Man Sum* by the Hon Cheung JA as follows:⁷²

- “9 I for one, would very much like to see changes being introduced along the lines ‘The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002’ of the United Kingdom which implemented the European Union Directive on Fixed Term Work (1999/70/EC). The Regulations provide for, among other things, a maximum limit of four years for fixed term contracts so as to prevent the abuse of the use of successive fixed term contracts. Obviously any change in Hong Kong must cater for local conditions.”

The foregoing was endorsed by the Hon Yeung JA.⁷³ Their Lordships made the above observation in the context of a case on severance payment, a pre-condition for which is 24 months’ service under a continuous contract of employment. Their Lordships’ proposed change is limited to just severance payment. And in relation to severance payment, it should work. This may be seen as a “surgical strike” meant to target the avoidance of severance payment. It does not address the possible avoidance by employers of a whole host of other statutory benefits, privileges and protections conferred upon employees. To prevent avoidance from continuing or becoming even more pervasive than it already is, it is respectfully submitted that what is required is a statutory provision prohibiting employers from avoiding their statutory obligations to their employees. Such a prohibition would render

⁷² See n 35 above, para 9.

⁷³ See n 35 above, para 11.

any measure meant to “avoid” an employer’s obligation to an employee void.

The advantage of statutory intervention is that the courts would not have to “stretch the limits of adjudication in order to overcome” the arrangements that employers and their legal advisers may devise to avoid their statutory obligations to their employees. To this end we propose that the EO be amended.

The Proposed Amendment

The first question that arises is where, in the EO, should such an amendment be located? Section 70 now voids any contract term that purports to extinguish or reduce any right, benefit or protection conferred upon any employee by EO. It would be logical for the anti-avoidance provision to be inserted immediately after the existing s 70. Since a section 71 already exists, we would have the proposed provision numbered “s 70A” and be headed, “Avoidance and Evasion of any right, benefit or protection”. Our proposed provision will hereafter be referred as “s 70A”.

We envisage s 70A as having six subsections. We have seen that avoidance is independent of the contract of employment because any contract term purporting to extinguish or reduce any right, benefit or protection conferred upon an employee by the EO is void under s 70. Avoidance usually takes the form of something other than a contract or a contract term. It is an agreement (short of a contract) or an arrangement or a plan or an understanding that (the employer reaches with an employee) that is designed to and does deny, in full or in part, some right, benefit or protection conferred upon an employee by the EO. Section 70A(1) will thus be a definition section setting a description of the devices that an employer may design to avoid his liability under the EO. Although a contract or a contract term would be within the remit of s 70, we act *ex cautella abundanti* to incorporate a contract and a contract term in our definition. Thus, our s 70A(1) will read:

- “(1) For the purposes of this section ‘arrangement’ means any contract, contract term, agreement, plan, transaction, operation, scheme or understanding (whether enforceable or unenforceable) including all steps by which it is carried into effect.”

The device that brings about avoidance is, as we have seen, usually activated, *inter alia*, before the contract of employment commences. For example, in the case of a benefit requiring a qualifying period of 24 months’ continuous employment, the employer might limit the contract term to

only 18 months. Or, it may occur during the currency of an employment contract as when an employee is denied his right to annual leave. Interestingly, in a Hong Kong university, a lecturer was granted maternity leave as well as maternity leave pay for the prescribed period. However, on reporting for work after her maternity leave, the employee was told that her workload for the rest of the teaching year would be doubled to ensure that she taught as much as she would have if she had not been granted maternity benefits. That is to say, the employee had to “pay back” her maternity leave.⁷⁴ In *Leung Ka Lau v Hospital Authority*,⁷⁵ the Court of Final Appeal held that a “holiday” meant a day on which an employee was entitled to abstain from working for his employer. For an employer to grant an employee a week’s holiday and the following week require the employee to complete his normal work as well as the work he would have done if he had not been granted the leave cannot be right as it reduces to a sham, the “holiday” purportedly granted to the employee. Although the EO is silent on whether leave is the same as a holiday, it is respectfully submitted that it is. For an employer to require an employee returning from maternity leave to double up and complete the work she would have done during her maternity leave demonstrates two dimensions of avoidance.⁷⁶ The first is avoidance during the course of a contract and the second is indirect avoidance.

The words with which the proposed s 70A(2) concludes, ie “regardless of whether or not the employee assented to the same”, are meant to preclude the defence that “the employee agreed to this” or that “the employee acquiesced to this by not expressing any objection to it”. Our proposed s 70A(2) would read:

⁷⁴ An employee reporting for work after her maternity leave and being required, in addition to her normal work, to perform the work she would have done during the period of her maternity leave would have a cause of action under the Sex Discrimination Ordinance (Cap 480). Relief under the latter may, in addition to compensatory damages, include aggravated and exemplary damages as well as damages for injury to feelings. But not all avoidance devices come within the purview of other statutes or statutes that provide relief.

⁷⁵ (2009) 12 HKCFAR 924 at 952, para 95, *per* Ribeiro PJ. “While it is true that there is no definition of ‘holiday’ along the lines of the ‘rest day’ definition, it is my view that the word ‘holiday’ in the present context should be construed as bearing the same meaning, that is, as a day on which an employee is entitled to abstain from working for his employer and is free to spend as he sees fit. That, in my opinion, is the natural and ordinary meaning of the word ‘holiday’.”

⁷⁶ The Labour Department when contacted by phone on this matter refused to consider this as avoidance or evasion; instead, it held that this was a case of a “unilateral variation” of a term of contract. The latter position would be scant comfort to an employee especially where contract are widely drafted to require the employee to “perform such duties as may be assigned to you by your Head of Department or his designate”.

- “(2) Any arrangement designed or implemented by an employer, whether before or during the term of a particular contract of employment, to directly or indirectly avoid or mitigate his liability for any right, benefit or privilege conferred upon the employee by this Ordinance shall be void regardless of whether or not it is assented to by the employee.”

Tax law alerts us that one of the defences that tax evaders or avoiders use is to deny the intention to evade or cheat—as the case may be. The defence is that even if the scheme has the effect that led to their being hauled into court, that was not its intention or not its dominant or primary intention. This is clearly unacceptable. For that reason, we provide that so long as avoidance or evasion is one of the purposes or effects of an arrangement, avoidance shall be made out. Thus, our s 70A(3) shall read:

- “(3) Where an arrangement made or entered into, whether before or after the coming into force of this section, has two or more purposes or effects, and one of its purposes or effects (not being a merely incidental purpose or effect) is avoidance or mitigation of any right, benefit or privilege conferred upon the employee by this Ordinance, the arrangement shall be void.”

The proposed s 70A(3) is meant to catch any avoidance device to which the employer may resort whether before or during the currency of a contract of employment.

An employee who is the victim of avoidance (necessarily by his employer) and who is forced to resort to legal proceedings for relief suffers more than loss of just the value of the right, benefit or protection; he also incurs emotional distress and the stress flowing from the uncertainty of outcome inherent in all legal proceedings. In addition, there are legal costs. Although legal representation is not permitted in the Labour Tribunal, it is the rare employee who can mount legal proceedings without first obtaining legal advice—which is not free. The employee who establishes his claim must necessarily be compensated in the value of the right, benefit or protection avoided (whether fixed by the EO or where the EO is silent on this matter, by the court). However, we believe that to be adequately compensated and to deter other employers from resorting to avoidance, the employee should be paid double the value of the sum avoided or where the value is not prescribed by the EO, such amount as will compensate the employee and simultaneously serve as a deterrent to other employers. Thus, the proposed s 70A(4) will read:

“(4) An employer who is held to have attempted to execute or implemented an arrangement to avoid or mitigate his liability for any right, benefit or privilege conferred upon the employee by this Ordinance shall pay twice the value of the right, benefit or protection prescribed by the Ordinance, or where the Ordinance is silent on this matter, such amount as will compensate the employee and simultaneously serve as a deterrent to other employers.”

The remedy we propose may be viewed as a form of exemplary damages. Although anathema to Hong Kong contract law,⁷⁷ we note that in Hong Kong employers are among those already liable to pay employees punitive or exemplary damages for discrimination under the Sex Discrimination Ordinance (Cap 480),⁷⁸ Disability Discrimination Ordinance (Cap 487),⁷⁹ Family Status Discrimination Ordinance (Cap 527)⁸⁰ and Race Discrimination Ordinance (Cap 602)⁸¹ which create statutory torts. Be that as it may, we draw our inspiration from the Inland Revenue Ordinance (Cap 112) which seems to have inspired employers to adopt avoidance devices. Section 82A specifies circumstances that make a taxpayer liable “to additional tax of an amount not exceeding treble the amount of tax which has been undercharged in consequence of specified conduct of the taxpayer”.⁸² An employer found to have adopted an avoidance device can hardly complain that this amounts to a penalty. In any event, if the proposed s 70A(4) amounts to exemplary damages, there is no impediment to the Legislature providing for exemplary damages where it deems the same to be appropriate relief.

At common law, the breach of a contract of employment does not create criminal liability. The common law has, however, been abrogated, in part, by the EO making certain breaches of the type it spells out attract criminal liability. The best known examples are perhaps those relating to the payment of wages (see ss 63C, 63CA and 63D). But even where criminal sanctions are provided, they do not benefit the employee. It is therefore necessary to provide compensation to the employee denied the

⁷⁷ We are aware that except for Canada and the United States, other common law jurisdictions (including Hong Kong) do not countenance exemplary damages in contract and restrict the same to tort. See Abdul Majid and Krishnan Arjunan, “Exemplary Damages for Tort and Breach of Contract in Selected Common Law Jurisdictions” (2007) 3 *MLJ* xcvi–cxxxii.

⁷⁸ Section 76(3A)(f).

⁷⁹ Section 62(4)(f).

⁸⁰ Section 54(4)(f).

⁸¹ Section 70(4)(f).

⁸² Section 82A applies only where a decision is made not to prosecute the taxpayer.

rights, privileges and protections conferred upon him by the EO by his employer's breaching or evading the same. This goal may be achieved by a suitably worded provision in s 70A. To this end, we propose that the remedies provided by s 70A be extended to encompass evasion. Thus we propose that s 70A(5) shall read:

“(5) This section shall apply to any arrangement designed or implemented to evade, as it does to any arrangement meant to avoid, any liability for any right, benefit or protection conferred upon the employee by this Ordinance.”

Both the Minor Employment Claims Adjudication Board⁸³ and the Labour Tribunal⁸⁴ have jurisdiction over claims arising out of a contract of employment. Both the Board and Labour Tribunal are specifically granted the jurisdiction to decide the right of an employee to a severance payment and the quantum thereof.⁸⁵ Section 5(3)(a) of the Minor Employment Adjudication Claims Board Ordinance (Cap 453) and para 1(3) of the Schedule to the Labour Tribunal Ordinance (Cap 25) are similarly worded to deny the Board and the Tribunal the jurisdiction to enquire into, hear or determine any “claim for a sum of money, or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of duty imposed by a rule of common law or by any enactment”. To prevent enterprising counsel from even raising this section to defeat the relief incorporated in the proposed s 70A, our proposed s 70A(6) would read:

“(6) By virtue of this subsection and notwithstanding s 5(3)(a) of the Minor Employment Adjudication Claims Board Ordinance (Cap 453) or paragraph 1(3) of the Schedule to the Labour Tribunal Ordinance (Cap 25) or any other law, the Minor Employment Adjudication Claims Board and the Labour Tribunal shall have jurisdiction to hear and determine any proceedings under this section and shall have all such powers as are necessary or expedient for it to have in order to provide or grant any remedy enacted in this section.”

⁸³ Minor Employment Claims Adjudication Board, s 5(1) read together with para (b) of the Schedule thereto.

⁸⁴ Labour Tribunal Ordinance, s 7(1) and the Schedule to the Ordinance.

⁸⁵ Schedule to the Labour Tribunal Ordinance, para 4; and the Schedule to the Minor Employment Claims Adjudication Board Ordinance, para (b)(iv).

It is conceded that the proposed s 70A(6) is in the nature of a proactive strike. The whole of the proposed s 70A is at Appendix A.

Conclusion

We began this article by quoting a remark by Martin Luther King Jr that eloquently describes the need for legislation to constrain “the heartless”. While the intention of the Hong Kong legislators to protect employees against heartless employers is clear, a challenge to the legislation in the courts was upheld revealing that even well-intentioned laws may be inadequately drafted to discharge their function of providing just protection to the employees. Notwithstanding the intention of legislators to afford protection to employees, the presiding judge was constrained by legally accepted principles to rule in favour of the employers. We recommend that the legislation in question be amended to incorporate anti-avoidance provisions which will not frustrate the legislative intention to protect employees.

APPENDIX

The Proposed Amendment**Section 70A** *Avoidance and Evasion of any Right, Benefit or Protection*

- 1 For the purposes of this section, “arrangement” means any contract, contract term, agreement, plan, transaction, operation, scheme or understanding (whether enforceable or unenforceable) including all steps by which it is carried into effect .
- 2 Any arrangement designed or implemented by an employer, whether before or during the term of a particular contract of employment, to directly or indirectly avoid or mitigate his liability for any right, benefit or privilege conferred upon the employee by this Ordinance shall be void regardless of whether or not it is assented to by the employee.
- 3 Where an arrangement made or entered into, whether before or after the coming into force of this section, has two or more purposes or effects, and one of its purposes or effects (not being a merely incidental purpose or effect) is avoidance or mitigation of any right, benefit or privilege conferred upon the employee by this Ordinance, the arrangement shall be void.
- 4 An employer who is held to have attempted to execute or implemented an arrangement to avoid or mitigate his liability for any right, benefit or privilege conferred upon the employee by this Ordinance shall pay twice the value of the right, benefit or protection prescribed by the Ordinance, or where the Ordinance is silent on this matter, such amount as will compensate the employee and simultaneously serve as a deterrent to other employers.
- 5 This section shall apply to any arrangement designed or implemented to evade, as it does to any arrangement meant to avoid, any liability for any right, benefit or privilege conferred upon the employee by this Ordinance.
- 6 By virtue of this subsection and notwithstanding s 5(3)(a) of the Minor Employment Adjudication Claims Board Ordinance (Cap 453) or para 1(3) of the Schedule to the Labour Tribunal Ordinance (Cap 25) or any other law, the Minor Employment Adjudication Claims Board and the Labour Tribunal shall have jurisdiction to hear and determine any proceedings under this section and shall have all such powers as are necessary or expedient for it to have in order to provide or grant any remedy enacted in this section.

