WRONGFUL TERMINATION OF EMPLOYMENT CONTRACTS

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This article considers the law of wrongful termination of employment contracts in Hong Kong, and attempts to provide a roadmap of sorts to an understanding of this body of law. The article firstly outlines the means by which employment can be lawfully terminated by an employer, and then proceeds to a consideration of wrongful termination and the implications to which it gives rise, by reference to specific legislative provisions, and by reference to recent case law. Evidence of a pro-worker sympathy on the part of the courts can be identified, putting employers on notice to carefully observe employment termination legislation, and to genuinely respect the rights of employees, in order to avoid an adverse determination in the Labour Tribunal or the courts. At the same time, it can be observed that the less than seamless body of termination-related provisions that has accumulated over the years, and the uncertainty implicit in some recent legislative initiatives, leave ample room for legislative reform in the near, if not immediate, future.

"People build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded on the expectation that their jobs will continue."

* The author acknowledges and wishes to thank the anonymous peer reviewer for helpful comments on the original draft.

Introduction

Hong Kong's policy of non-interventionism and voluntarism in labour relations was a convenient colonial heritage practiced throughout much of the 20th century. This is a policy that is premised on the belief that minimal bureaucratic control will give rise to conditions in which management and labour can work out arrangements for their mutual benefit. It is a convenient policy because it relieves the Government from having to legislate extensively in the field of labour law, and it suits the entrepreneurial classes, who are free to deal with workers on their own terms.

This follows a pattern not unlike that experienced in the United Kingdom over the same period of time, but with a notable difference. In the UK, a strong trade union movement established itself as a force to be reckoned with and was eventually able to negotiate with management on near equal terms. In Hong Kong, by contrast, trade unions have been largely ineffectual, polarised along ideological lines, and until recently functioning more as mutual support societies able to achieve little in the way of rights and protection for workers. This state of affairs eventually necessitated a greater role for the Government than it might have preferred. There is now an established tradition of interventionism in labour law in Hong Kong.

The last three decades have seen the Hong Kong Government engaged in a busy, if piece-meal programme of legislative reform, at least on the individual labour law front. This pattern has continued in the

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3 For a history of the trade union movement in Hong Kong, and an explanation for the failure of trade unions and confederations in achieving the successes of their UK counterparts, see Joe England, Industrial Relations Law in Hong Kong (Hong Kong: Oxford University Press, 2nd edn, 1989), pp 97-119.
4 For an account of the development of legal intervention in Hong Kong's labour law, see K Williams, An Introduction to Hong Kong Employment Law (Hong Kong: Oxford University Press, 1990) pp 2-6.
5 Individual labour law is concerned with the rights of the individual worker, to be contrasted with collective labour law, concerned largely with the rights to organise and to collectively bargain. The latter has not been the subject of legislative attention in Hong Kong in recent years, save for the abortive 1997 Employees' Rights to Representation, Consultation and Collective Bargaining Ordinance (Ordinance No 101 of 1997), repealed weeks after its passage by the Provisional Legislative Council in the post-handover period.
past few years, in particular in issues relating to employment termination, an area that naturally generates much litigation.

This paper will begin by considering the grounds for lawful termination of an employment contract by an employer. Thereafter, those terminations that are not lawful will be identified. Finally, the implications for the employer and employee of unlawful termination will be considered.6 The focus will be on the Employment Ordinance7 and the remedies provided therein, although reference will be made to certain aspects of the Sex Discrimination Ordinance8 relating to discriminatory termination on the grounds of pregnancy.

Legislative changes in the past few years have not been dramatic, indeed, in some cases falling far short of their stated objectives,9 but overall, it can be observed that the plight of the worker has been improved. This has come about in part because of a pro-active judiciary and its instinctual tendency toward an interpretation of labour legislation that achieves its social justice purposes. Purposive judicial interpretation and application of important provisions in the Employment Ordinance and the Sex Discrimination Ordinance have helped make up some of the shortfall in substantive legislative reform.

Employment Ordinance

Although an employment contract is a contract like any other, subject to the general law of contract, its peculiar features attract special attention. An employment contract is a contract for personal services, generally not subject to the remedy of specific performance. Although it

6 This paper is not concerned with the less commonly litigated situation of wrongful termination by employees, but it should be remembered that an employment contract gives rise to mutual obligations, and therefore employee terminations also give rise to remedies on behalf of employers.

7 Cap 57.

8 Cap 480.

9 For example, Part VIA of the Employment Ordinance, introduced in 1997 and intended to improve employment security, has had limited impact on the rights of dismissed employees. See "Employment Protection under the Hong Kong Ordinance - a Toothless Tiger?" in Focus, Johnson Stokes & Master, September 2001. Part VIA is examined in the final section of this paper.
is subject to negotiation and agreement of the parties, in most cases there is little or no opportunity for bargaining. Employment is usually offered on a take-it-or-leave-it basis. For these reasons, close regulation of the employment relationship can be justified.

The Employment Ordinance is the principal piece of legislation governing the employment relationship, including termination. By virtue of section 4, it applies to all employees engaged under a contract of employment, save only a few exceptions. Enacted in 1968, the Ordinance was in large measure a response to civil disturbances in 1966-67 that were inspired as much by political sentiments in mainland China (the period of the “cultural revolution”) as by economic conditions in Hong Kong. The Ordinance has been amended and its coverage expanded over the years. Although it hardly qualifies as a human rights document, it provides a basic floor of rights for workers, in the form of contractual entitlements and protection against employer abuses. Many of its provisions were enacted in order to comply with international standards provided for in International Labour Organisation conventions that Hong Kong has ratified. The Ordinance is lacking

10 A contract of employment is a common law concept that must be distinguished from an independent contract for services. For an elaboration of the distinction in Hong Kong, see Glofcheski, Tort Law in Hong Kong (Hong Kong: Sweet & Maxwell Asia, 2002), pp 350-38 and 400-405.

11 By virtue of s 4(2), and subject to Part IVA, the Employment Ordinance does not apply to a family member who lives in the same dwelling as the employer; an employee as defined in the Contracts for Employment Outside Hong Kong Ordinance (Cap 78); a person serving under a crew agreement under the Merchant Shipping (Seafarers) Ordinance (Cap 478) or on board a ship which is not registered in Hong Kong; or an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance (Cap 47).

12 For an account of the events of 1966-67 and their impact on employment law, see England, n 3 above, pp 14-16.

13 Bluntly described by the Asia Monitor Resource Centre as an “employer’s law”: see Asia Pacific Law Review 1999, p 19.

14 The International Labour Organisation (ILO) is a specialised agency of the United Nations. Its major objective is to improve working conditions throughout the world. It sets labour standards through the adoption of labour conventions and recommendations. The ILO and its conventions provide the most important international source of labour law for Hong Kong. Much of Hong Kong’s labour legislation was enacted in order to comply with obligations undertaken through ILO conventions. Because it is not a State, Hong Kong is not a full member of the ILO. Before 1997 it participated as a Non-Metropolitan Territory, as contemplated in Article 35 of the ILO Constitution. After 1 July 1997, it participates through the membership of the People’s Republic of China by analogy to its former status as a Non-Metropolitan Territory of the United Kingdom. Currently, there are 41 ILO conventions applicable in Hong Kong. For more information on the ILO, see http://www.ilo.org.
in some material respects. There are no provisions governing minimum wage, maximum hours of work, and overtime pay, despite increased lobbying in recent years by trade union groups.  

The concept of continuous contract under the Employment Ordinance

Proof of a continuous contract of employment is important because many of the benefits and much of the protection under the Employment Ordinance, including the section 6 entitlement to notice on dismissal, depend on proof of a continuous contract. Moreover, for some provisions, including section 31B (severance pay), section 31R (long service pay), and Part VIA (employment protection against unreasonable dismissal), a continuous contract for a minimum number of months is required.

A continuous contract is defined in section 3 of the Employment Ordinance by reference to the First Schedule. In summary, the First Schedule requires the terminated worker to have worked for the same employer for at least 18 hours in each of the previous four weeks. These provisions effectively exclude most part-time workers from the protection provided by the main provisions of the Employment Ordinance.

Continuity of a contract is broken by intervening periods of no work – in effect, a break from work comprising at least one week of less than 18 hours. However, employer abuse of the continuity provisions will not be lightly tolerated. In Lui Lin Kam and Others v Nice Creation Development Limited the employer engaged employees on the basis of a series of 18 month contracts, separated by a few weeks of no work. Upon termination, the employees claimed severance pay, for which an employee qualifies only if he can show that he has been working under a continuous contract of 24 months or more at the time of termination. The employer argued that the breaks in the employment disqualified

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16 This is the interpretation reached by Deputy Judge Lam in Lui Lin Kam and Others v Nice Creation Development Limited (2003) HCLA 106 of 2002 (currently on appeal to the Court of Appeal). Deputy Judge Lam rejected the interpretation put on the provision by Yam J in David Hot Blocking Press Limited v Ho King Yam [1996] 1 HKC 270, which required a break of at least four weeks before continuity could be broken. Deputy Judge Lam’s reading is less favourable to workers, but appears to be more consistent with the wording of the First Schedule.

17 Ibid.
the employees from severance pay. However, the court inferred from the employment history a tacit understanding between the employer and employees that the employees would be re-engaged at the end of each contract. In these circumstances, the court, in a generous reading of the First Schedule, found a "global contract", that is, a continuous contract, in which the employees were "by law, mutual arrangement or the custom of the trade, business or undertaking...regarded as continuing in the employment".

Lawful Termination

The basic requirements for a lawful termination of an employment contract are found in the Employment Ordinance. In general, termination is lawful if effected with appropriate notice or payment in lieu, or for justifiable cause as defined in section 9(1).

Termination with notice or payment of wages in lieu of notice

By virtue of section 5(1) of the Employment Ordinance, a continuous contract is normally deemed to be for a monthly term, in which case it can be terminated on one month's notice (section 6(2)(a)) or by payment in lieu of notice (section 7). If a different notice period is stipulated in the contract, then that period applies, but in any case not less than seven days' notice or payment in lieu is required (section 6(2)(b)).

To avoid the deeming of a monthly term under section 5(1), the contract must be in writing and signed (section 5(2)), in which case the contract period is as stipulated, and the contractual notice period is as indicated, or if not indicated, premature termination gives rise to a claim for the balance of the contract, subject to mitigation by the employee.

The calculation of wages payable in lieu of notice is governed by section 2 of the Employment Ordinance. Section 2 includes a wide range of emoluments going beyond the basic salary to which an employee is

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18 Section 3(2)(b) of the First Schedule.
19 In addition, it may be terminated at any time by mutual consent, and if it is a fixed term contract, by the effluxion of time.
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entitled, and indicates those payments that are not wages. The definition is important, because wages form the basis of the calculation of other terminal benefits under the ordinance, such as long service pay (section 31R) and severance pay (section 31B), and other benefits, such as maternity leave pay (section 14) and end of year payment (section 11D). 20

Termination with notice or payment in lieu is lawful. Therefore, an employer is free to terminate a contract without reason, if the notice requirements are satisfied. However, the Employment Ordinance and two related ordinances create some exceptions to this general rule, in which termination is not lawful, despite the fact that the employer has given notice or made payment in lieu of notice. Moreover, Part VIA, introduced in 1997, places further restrictions on terminations, even where notice is provided.

Section 15 of the Employment Ordinance, enacted in 2001, prohibits termination of a pregnant employee (other than by section 9 summary dismissal). Section 21B prohibits termination for participation in trade union activities. Enacted in 2001, section 33(4B) prohibits termination of an employee on a paid sickness day (other than by section 9 summary dismissal). Section 72B prohibits termination of an employee who has given evidence or information in proceedings or inquiries into a breach of the Employment Ordinance or of a work-related accident. In addition, section 6 of the Factories and Industrial Undertakings Ordinance21 prohibits termination of an employee who has given evidence in proceedings for a breach of that ordinance, and section 48 of the Employees' Compensation Ordinance22 prohibits termination of an injured worker entitled to workers' compensation under that ordinance.

The right to terminate a contract with notice or payment in lieu of notice is now subject to Part VIA of the Employment Ordinance. Part VIA prohibits "unreasonable" dismissal. Under section 32A, termination

20 Note that overtime pay is not included in the calculation of wages for most purposes under the Employment Ordinance (see s 2(2)).
21 Cap 59.
22 Cap 282.
of an employee under a continuous contract of 24 months or more is presumed to be intended to extinguish rights under the Employment Ordinance (eg the right to severance or long service pay) unless a "valid" reason for dismissal (defined in section 32K) can be shown. If no valid reason is shown, the remedies under Part VIA are triggered. Part VIA also prohibits "unreasonable and unlawful dismissal", that is, termination without a section 32K "valid" reason, and for reason of trade union participation, sickness, pregnancy, or for reporting employer violations of specified ordinances. These provisions are discussed in the final section of this paper.

Contract in Writing Signed by the Parties
As noted above, the notice period for lawful termination will be that stipulated under the Ordinance, or under the contract. By virtue of section 5(1) and section 6(2)(a) this will normally be a notice period of not less than one month. Any other contractually agreed notice period will be applied only if the section 5(2) requirement of a contract in writing signed by the parties is satisfied. This requirement will not be taken lightly by the court.

In Law Shiu Kai, Andrew v Dynasty International Hotel Corporation,23 the employee's attempt to prove a contract in writing was rejected, in circumstances where the contract alleged was in the form of various unsigned drafts, and where the only other evidence provided consisted of signed cheques and work-related correspondence. However much the written and signed documentation evidenced an employment relationship, it was not sufficient to qualify under section 5(2) of the Employment Ordinance as a "contract evidenced in writing signed by each of the parties thereto". The employee's allegation of a fixed term contract that entitled him to payment of salary for the unexpired portion of the contract term (subject to mitigation) was therefore rejected, and his contract was deemed by virtue of section 5(1) to be monthly, limiting him to one month's pay in lieu of notice.

An even more creative argument was attempted by the employee in Elizabeth Harrington v Cap Gemini Ernst & Young Hong Kong Limited. In that case the parties had been engaged in negotiations for a contract with a fixed term of two years. Although an agreement appeared to have been reached for such a fixed term contract, with no early termination provision, the contract was never signed. Before the commencement of the contract the employer had a change of heart and notified the employee that it would not go ahead with the employment. The employee commenced legal proceedings and, cognizant of the fact that the section 5(2) requirement of a contract in writing signed by the parties, if activated, would limit damages to one month's wages in lieu of notice, sued for specific performance of what she alleged was a collateral agreement requiring the employer to produce a written contract of employment in the terms agreed, for her signature. In this way, she hoped to circumvent the section 5(2) requirement of a contract signed and in writing, and achieve, in a round-about way, her goal of obtaining damages in an amount to reflect the full two year term.

Interestingly, the court did not reject this argument outright. In the court's view, such a collateral agreement could, in appropriate circumstances, have the effect argued for by the employee, notwithstanding the purposes of section 5 of the Employment Ordinance. However, without identifying the conditions necessary for such a collateral agreement or, in particular, the consideration needed to support it, and without reference to any case authority, the court ruled that such a collateral agreement could not be made out on the facts.

It is to be regretted that more in the way of reasons for this finding was not provided, but by virtue of its having recognised the plausibility of such an argument, the court appears to have created a possible and significant loophole in the termination provisions of the Employment Ordinance that would effectively circumvent the section 5(2) requirement of a contract in writing signed by the parties. However, it remains unclear what the court will require in the way of proof for such a collateral agreement in the context of negotiations for an employment contract.

Harrington would appear to have been a good candidate for such an argument, given that negotiations were concluded and the terms agreed, including a start date. At any rate, it is surely an argument that will be tested again soon, perhaps in an appeal by Ms Harrington. It certainly would have provided an alternative line of argument to the employee in Law Shiu Kai, Andrew v Dynasty International Hotel Corporation (discussed above), and similar cases.

Summary dismissal
By virtue of section 9 of the Employment Ordinance, summary dismissal is justified for wilful disobedience, misconduct, dishonesty, and neglectfulness in duties. \(^{25}\) In such circumstances, the employer is entitled to dismiss without notice or payment in lieu.

Section 9 summary dismissal triggers the loss of important entitlements and protection under the Employment Ordinance. Not only is the employee deprived of notice of termination or payment in lieu, he will also be deprived of any end of year payment to which he was otherwise entitled (section 11F(1B)), protection against termination for reasons of pregnancy (section 15), severance pay (section 31C(1), 31D), long service pay (section 31(5), 31T(1)(a)), employment protection under Part VIA, protection against termination on a sick day (section 33(4B)), and annual leave pay (section 41D(2)(c)). The only entitlement on summary dismissal is to outstanding wages.

The burden of proof in justifying cause for summary dismissal is on the employer: Li Shuk Man v Ho Wai Ling. \(^{26}\) Justification for summary dismissal is a question of fact. However, it is not enough to make general, unfounded and undocumented allegations, or complaints of a trivial nature. In McGuire v AGW Holdings Ltd and Another, \(^{27}\) the failure to specify details of the alleged wrongdoing (rudeness, lack of cooperation, poor time-keeping), and the absence of written warnings, were fatal. The court found that justification for summary dismissal was not made.

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\(^{25}\) And by virtue of s 9(1)(b), for any other ground for which the employer would be entitled to terminate the contract without notice at common law (eg frustration of contract).


\(^{27}\) [2003] HKEC 1330.
out, and ordered the employer to pay terminal benefits, including long service payment.

Moreover, it is not just any act of dishonesty that will justify a summary dismissal under section 9(1). In Tse Ka Wo v Hong Kong Quality Assurance Agency\(^\text{28}\) the employee, an auditor, attended at a client’s office on instructions from the employer to conduct an audit. On arrival the client was unavailable, and asked that the audit be conducted on another day, a request to which the employee politely acceded. However, in order to avoid having to provide an explanation for the delay, the employee entered the originally scheduled date as the audit date. On discovery of this fact, the employer summarily dismissed the employee. The court held that it is not any dishonest act that justifies summary dismissal, and that the test was whether the act constituted a repudiation of the contract. Here, the falsification of the date was of no particular import, was done in response to the client’s request, did not affect the accuracy of the audit, and did not result in any benefit to the employee. Therefore, summary dismissal was not justified.

By section 9(2), participation in a strike does not qualify as justification for summary dismissal. This provision, enacted in 2000, provides some protection for workers engaged in labour disputes, but it should be noted that this provision does not constitute radical labour law reform. A worker who strikes does so at his peril, because there is nothing in the ordinance to prevent an employer from terminating a striking employee with notice, or payment in lieu, an all too frequent occurrence in the labour-unfriendly environment prevailing in Hong Kong.\(^\text{29}\)

A newly-emerging area of dispute underlines the importance of clearly making an election to summarily dismiss. The question whether the dismissal is summary, or by payment in lieu, is important, because if the latter, the employee retains any entitlement he may have to terminal

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\(^{28}\) [2004] 1 HKLRD 899 (headnote only was available in English).

\(^{29}\) A case in point is that of the Cathay Pacific “49ers”, wherein 49 unionised pilots were dismissed with notice following a protracted period of labour-management disputes and secondary industrial action. See “Union Outrage after Cathay Sacks 49 Pilots”, South China Morning Post, July 10, 2001, p 1. These dismissals were the subject of a complaint to the ILO Committee on Freedom of Association; see Case no 2186 in the 330th Report of the Committee on Freedom of Association (March 27, 2003).
benefits such as long service pay, severance pay, annual leave pay and the like. From recent case law it is apparent that the court is concerned as much about form as it is about substance. Sympathy payments made by a generous employer to soften the blow of the often-unexpected summary dismissal may backfire, resulting in the characterisation of the dismissal as one by payment in lieu.

In *Allidem Mae G v Kwong Si Lin*,\(^{10}\) the employer of a domestic helper notified the helper early one morning that her employment was terminated. The employer gave the employee a cheque for one month’s pay, and asked her to leave immediately. She did so, and when she subsequently made a claim for long service pay, the employer balked, on the footing that the dismissal was summary. Although the employer’s appeal against the Labour Tribunal’s ruling in favour of the employee was allowed on other unrelated grounds and the matter returned to the Labour Tribunal,\(^{11}\) the court was clear that unless dismissal is effected without notice or payment in lieu in accordance with section 9, the employee is entitled to long service pay. This follows from a strict reading of section 31S. An employee with five or more years of service is entitled to long service pay (section 31R) unless, according to section 31S(1), “his employer being so entitled by reason of the employee’s conduct, terminates his contract of employment without notice or payment in lieu in accordance with section 9”. On the court’s interpretation, the payment of one month’s salary meant that the employer had not terminated the employment “without payment in lieu in accordance with section 9”. Therefore, the entitlement to long service pay was not compromised. Somewhat remarkably, this result would follow, according to Deputy High Court Judge Cheung, regardless of the fact that the employer was able to prove grounds for a section 9 summary dismissal. This may appear to be an overly technical reading, but it in fact accords with the wording of section 31S(1). What is important, according to the court, is that a summary dismissal be clear and unequivocal. Any


\(^{11}\) The matter has since been decided by the Labour Tribunal in favour of the employee, but the employer has been granted leave to appeal part of that decision. See *Allidem Mae G v Kwong Si Lin* (2004) HCLA 4 of 2004.
payment made must be unequivocally declared to be gratuitous, in order to avoid the section 31R long service pay obligation.\textsuperscript{12}

Similarly, in \textit{Li Heung Sang, David v Compuware Asia Pacific Limited},\textsuperscript{13} termination of the employee with payment of wages in lieu of notice, without the employer having expressly indicated that payment was gratuitous, barred the employer from arguing for summary dismissal again - despite the fact that section 9 grounds for summary dismissal may have been present. In this case it was clear that at the time of payment, the employer did intend to make a payment in lieu of notice, but later changed its mind. As matters transpired, the cheque provided by the employer as payment in lieu was improperly executed, and was therefore dishonoured on presentation. The employee then brought an action in the Court of First Instance, claiming six months' wages as payment in lieu. In its defence the employer argued that the dismissal was summary, based on financial improprieties in which it alleged the employee had been engaged. If successful, this argument would have relieved the employer of the obligation to pay wages in lieu of notice. However, as in \textit{Allidem Mae G v Kwong Si Lin}, the employer was stuck with the consequences of having elected to pay wages in lieu of notice, albeit with an improperly executed cheque. The employer was now obliged to make good on that payment. The fact that the payment of the cheque was made with full knowledge of the alleged improprieties constituting cause, reinforced the court in finding that the termination must have been made by payment in lieu of notice.

An irony of these otherwise pro-employee rulings is that they are likely to discourage generosity on the part of employers in future. Employers intent on minimising their statutory obligations are now best advised to take a hard line and to avoid eleventh-hour bursts of sympathy. Those who choose to be generous do so at their peril, but must in any case be sure to clearly indicate that payment is gratuitous, and that dismissal is summary.

\textsuperscript{12} Similar reasoning would apply in respect of the severance pay obligation. Section 31C, restricting the right to severance pay, is worded in almost identical terms as s 31S.

Wrongful Termination

Wrongful termination occurs where no notice or payment in lieu is given, as required by section 6 and section 7 of the Employment Ordinance. A wrongful termination is not remediable by way of injunction or specific performance. The main justifications for this position are that the court cannot supervise performance, and that damages are thought to be an effective remedy. As a practical matter courts are reluctant to force parties to remain in employment relations when one of the parties is reluctant to do so. Therefore, the wrongfully terminated employee is left with a remedy in damages only.

In Semana Bachicha v Poon Shiu Man\(^{34}\) Rebeiro JA quoted approvingly of the general principle found in Chitty on Contracts\(^{35}\) to the effect that for wrongful termination of an employment contract “the normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment”.\(^{36}\)

In cases of wrongful termination a typical damages award consists of an amount equal to the amount payable during the period of notice required under the contract or as stipulated in the Employment Ordinance, together with all terminal benefits to which the employee is entitled under the Employment Ordinance. In other words, given that the employer could have terminated the contract by giving statutory or contractual notice, the damages payable are in general restricted to that notice period, together with any unpaid wages and entitlements, including, where appropriate, long service or severance pay. However, damages are generally not payable for the loss the employee suffers due to the fact that he has been dismissed, or because of the manner of his dismissal.\(^{37}\)

\(^{34}\) [2000] 2 HKLRD 833.
\(^{35}\) 28th edn (1999).
\(^{36}\) Note 34 above, p 843.
\(^{37}\) But the employer may be liable if the loss results from a breach of the implied term of trust and confidence: Malik v BCCI [1998] AC 20, discussed later in this section.
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As with termination by notice or payment in lieu, a wrongful termination is also subject to the Part VIA provisions on unreasonable, and unreasonable and unlawful dismissal (discussed below).

An employer who wishes to avoid an unlawful termination claim must be careful to give clear and unambiguous notice that satisfies the requirements of section 7 of the Employment Ordinance. In Cheung Siu-Ngon and Another v Edge Design Communication Ltd \[^{38}\] the employee received a telephone call from his employer advising that his contract was being terminated. He left the employment forthwith, and later claimed one month’s pay in lieu of notice, and other terminal benefits. However, the employer insisted on a different version of the telephone conversation: that the employee was to continue working for another month, and that proper notice had been given. The employer argued that it was the employee who wrongfully terminated without notice by leaving his employment, thereby disentitling him to these benefits. On this confused state of the facts, the court preferred the employee’s version of events, and ordered payment in lieu.

Constructive dismissal

A wrongful termination, although unintended, can occur “constructively” where the employer varies a fundamental term of the contract, subjects the employee to ill-treatment (section 10) or fails to pay wages (section 10A). Although in such circumstances it is often the employee who quits the employment, the legal position is that the employee can treat the contract as having been wrongfully terminated by the employer, and the employee is entitled to payment in lieu of notice, and other terminal benefits.

In Wong Yuk Ling and Others v East East Food Products and Another, \[^{39}\] the transfer of Kowloon restaurant workers to the employer’s Aberdeen branch was found to be a constructive dismissal, despite the existence of an express mobility clause in the contract permitting the employer to transfer the employees if there was a “need” to do so. The court interpreted “need” to imply a genuine business, administrative or operational

need. The employees, who lived nearby and worked half days for a monthly salary of $2300, would incur travel expenses of $1000 at the new venue. The employer failed to show a genuine need for the transfer. The court took note of the fact that the transfer to the Hong Kong branch coincided with a transfer of some workers from the Hong Kong branch to the Kowloon branch, raising doubts about the genuineness of any need to transfer. For this reason the court found that the transfers were made in order to force the employees to quit, thereby disqualifying them from the long service payment they would otherwise be entitled to. In effect, the transfers were an unreasonable variation of a fundamental term of the employment contract that could not be saved by the express mobility clause.

A unilaterally imposed change of working hours may or may not amount to a constructive dismissal. In Lee Lai Ming v Kam Ming E P Engineering Co Ltd\(^{40}\) the court sent the matter back to the Labour Tribunal for a full hearing on the issue. The court said that an employer's unilaterally change of employee's working hours can in appropriate circumstances amount to constructive dismissal, but this depends on a range of considerations, including the express and implied terms of the contract.

Victimisation and harassment of an employee which has the effect of forcing him to resign can also constitute constructive dismissal. In Semana Bachicha v Poon Shiu Man\(^{41}\) a foreign domestic helper was subjected by her employer to an oppressive and exploitative regime in which she was physically abused and required to do illegal work. The employer decided to terminate the employment, and unsuccessfully tried to force the employee to resign. Shortly thereafter, the employee did leave her employment, and later signed a settlement agreement under the false impression that it was in her interest to do so. The court found the dismissal to be constructive, that the oppressive and exploitative regime justified the employee's early departure, and awarded the employee terminal benefits to which she was entitled under the Employment Ordinance, together with further common law remedies.\(^{42}\)

\(^{40}\) [2003] 2 HKLRD E17.

\(^{41}\) Note 34 above.

\(^{42}\) This case is examined in greater detail in the following section.
Similarly, in Chang Ying Kwan v Wyeth, a case brought under the Sex Discrimination Ordinance (an ordinance which provides its own regime and remedies for discriminatory termination), the employee was subjected to a campaign of harassment after she gave her employer notice of her pregnancy. Her employer withheld a salary increase, and imposed reporting requirements and other additional pressures, all with a view to forcing her to resign. The employee did resign, but the court found the circumstances to constitute constructive dismissal, and awarded damages to the employee under the Sex Discrimination Ordinance.

**Implied Term of Trust and Confidence**

Exceptionally, damages for wrongful termination can include more than the remedies provided for in the Employment Ordinance. A contract of employment includes terms implied by the common law. One such important term is that the employer “shall not without reasonable cause conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee.” This principle has been further developed in a recent line of cases beginning with the House of Lords decision in Malik v BCCI. In that case, former employees of the bankrupt Bank of Credit and Commerce International claimed that their employment prospects were damaged by virtue of their having been employed by a bank that was now, after inquiries and litigation, exposed as having been operated in a fraudulent and corrupt manner. Their claim succeeded on the basis of an implied term of the employment contract identified by the House of Lords, “not to conduct a dishonest or corrupt business”. Lord Nicholls said that this was part of the longstanding and wider implied obligation “not to engage in conduct likely to undermine the trust and confidence required if the employment contract is to continue in the manner the employment contract implicitly envisages”. The House of Lords distinguished

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41 [2001] 2 HKC 129.
46 Ibid., p 34.
47 Ibid., pp 34-35.
Addis v Gramaphone Company,\textsuperscript{48} which was long thought to stand for the principle that an employee could not recover damages for the manner in which the dismissal took place. Lord Nicholls said that at any rate Addis was decided before the implied term of trust and confidence on which the plaintiffs relied had been developed, and so need not be considered further on this point.\textsuperscript{49}

In Semana Bachicha v Poon Shiu Man,\textsuperscript{50} discussed above, the employee, a foreign domestic helper was subjected by her employer to a campaign of physical and emotional abuse, including a requirement that she do additional, in fact illegal, work on top of her regular duties. Wishing to terminate the employment contract, the employer tried to force the employee to sign a notice of termination. Two days later, out of fear of further ill-treatment, the employee did leave her employment, never to return. Later, the employee signed a settlement agreement prepared by her employer, in which she relinquished further claims in exchange for a payment of HK$975. The employee signed the agreement, before a Labour Department conciliation officer no less, on the mistaken understanding that as she had left her employment prior to the expiry of the one month notice period, she had incurred a net liability to the employer from which she was now, by virtue of the settlement agreement, being released.

In the action brought by the employee for damages for wrongful termination, the court set aside the settlement agreement as unconscionable. The court found the termination to have been constructive and wrongful. As for remedies, the employee sought damages in an amount to compensate her for the period of time during which she was prevented from obtaining further employment, by virtue of strict Immigration Department rules prohibiting employment pending the outcome of her litigation. This represented an amount not contemplated by the Employment Ordinance, which limits the award to the amount of any payment in lieu of notice (one month's salary) and any unpaid wages and terminal benefits. The trial judge awarded damages under this head from the period of her termination until the date of the judgment, a period of 18 months.

\textsuperscript{48} [1909] AC 288.
\textsuperscript{49} Note 45 above, p 39.
\textsuperscript{50} Note 34 above.
Wrongful Termination of Employment Contracts

On appeal to the Court of Appeal, Rebeiro JA cited the House of Lords decision in Malik to the effect that damages for a breach of an employment contract are “not restricted to damages for wrongful dismissal. The general measure of damages rules in the law of contract is applicable to other types of breaches giving rise to other types of pecuniary loss”. 51 Rebeiro JA continued:

“Where the breach does not relate merely to unlawfulness in the termination but involves a breach of some other obligation causing the employee loss going beyond the ‘premature termination losses’ that usually flow from a wrongful dismissal, damages may properly be recovered in respect of such different or further losses, provided they are causally attributable to the breach and not too remote”. 52

The court held that the employee did suffer additional damages affecting the chance of further employment, and therefore additional damages should be awarded to reflect that lost chance. In this case additional damages were awarded to reflect the lost chance of employment suffered as a result of the difficulties that would be encountered obtaining Immigration Department approval for further employment. These damages were not too remote in view of the fact that the Immigration Department rules applying to foreign domestic helpers were well-publicised and widely known amongst employers. Damages for the lost chance were calculated as 50 per cent of the wages for the period of the employment disability. 53

A question that arises on a close reading of Bachicha relates to causation, and by implication, the nature of the implied duty of trust and confidence. Rebeiro JA emphasised that the principle from Malik requires proof that the breach of the implied term of trust and confidence resulted in damages going beyond the usual wrongful dismissal losses such as payment in lieu of notice. He also made clear that in the

51 Ibid., p 844.
52 Ibid., p 847.
53 This constituted a reduction of the trial judge’s award. The trial judge awarded damages based on the full period of employment without taking into account the notion that what was lost was a chance of employment, as opposed to guaranteed employment.
instant case the breach of the implied duty of trust and confidence consisted of the oppressive work regime, and the physical and psychological abuse.\textsuperscript{54} Yet a few pages later, when discussing the damages question, Rebeiro JA said that “an employer’s accusation that a foreign domestic helper has walked out on her job in breach of contract is likely to militate against that helper obtaining Immigration Department permission to seek fresh employment”.\textsuperscript{55} This last statement places in doubt whether it was the physical abuse or the false accusation that the employee walked out of her employment that constituted the breach of the implied term of trust and confidence. Indeed, it is hard to see how the physical abuse can be said to have led to these damages. The employee would have suffered the damages anyway, in the absence of physical abuse, in an ordinary wrongful termination.

The question is important because, if the damages are based on the wrongful accusation, there is no reason why any other employee wrongfully terminated under a cloud of suspicion or accusation that is not grounded in fact (a not uncommon scenario) should not be awarded similar damages. Such an employee will also incur re-employment difficulties, arising from these ungrounded accusations. If so, the ruling in Bachicha signals a huge development in the law of wrongful dismissal damages, one that may not have been appreciated by the court. This may explain the remarks of Judge Li in Lee Pik Shan v Healthy Children (Hong Kong) Fund Ltd.\textsuperscript{56}

In Lee Pik Shan a kindergarten teacher under a one year written contract was dismissed without notice and without proof of cause. Her claim for damages based on the balance of the contract period was successful. Although Judge Li did not think that Bachicha was relevant to the instant case, he remarked “I do not really see how the maid in Bachicha’s case can be distinguished from that of any other employee who after wrongful dismissal had difficulty finding alternative employment due to general economic recession despite all diligence in job searching.”\textsuperscript{57} This may be going too far, as Bachicha is more naturally restricted to

\textsuperscript{54} See n 34 above, p 849.
\textsuperscript{55} Ibid., p 851.
\textsuperscript{56} [2001] 3 HKLRD L12.
\textsuperscript{57} Ibid., para 20.
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re-employment difficulties caused by the breach of trust and confidence duty, and not poor economic conditions, but it underlines the potential for Bachicha to have application in wider circumstances, including those where an employee stigmatised by an apparent but unfounded dismissal for cause brings a claim for damages beyond the notice period.58

The decisions in Malik and Bachicha are likely to provide fertile ground for further such actions in Hong Kong, given the uncertainties in the limits of the principle developed in those cases. In a number of cases since the decision in Bachicha, Hong Kong courts have accepted the validity of the new principle, although the cases have met with limited success, in most instances because of a failure to prove damages going beyond those that normally flow from a wrongful dismissal.59

Hong Kong courts have yet to hear cases concerning non-economic loss damages (eg psychiatric injury) flowing from wrongful termination. However, such claims are now being recognised in UK courts, where, loosened by the decision in Malik, the contract of employment is increasingly being characterised as a contract like any other, with the possibility of an award for any damages flowing from the breach being recoverable, subject to remoteness principles.60 Hong Kong courts are sure to experience such cases in the near future.

Statutory Prohibitions on Termination

There are a number of statutory provisions, principally in the Employment Ordinance, that prohibit termination in the circumstances contemplated by the provision in question, usually under threat of a fine, and in some cases, further civil remedies. These provisions

60 Johnson v Unisys Ltd [2001] IRLR 279 (HL); Dunnachie v Kingston-upon-Hull City Council [2004] All ER (D) 185.
apply even where notice or payment in lieu of notice is provided to the employee on termination. These provisions require careful observance by employers. They are based on general public policy and/or human rights considerations, and for this reason are strictly interpreted and applied. They have been alluded to earlier in this paper, but will now be considered in more detail.

Section 15 of the Employment Ordinance prohibits termination of a pregnant employee, unless the employer can show that the dismissal was a section 9 summary dismissal. According to section 15, if the employee has served notice of the pregnancy, the employer may not terminate the employee, even with notice or payment in lieu. Section 15(2) provides for civil remedies (payment in lieu, a further one month's wages, and ten weeks' maternity pay if she qualifies for that under section 14), and section 15(4) provides for the imposition of a fine at level 6.

In *Sun Min v Hong Kong Ming Wah Shipping Co Ltd and Others*, the section 15 prohibition against termination of a pregnant employee was strictly interpreted and applied, even where the decision to terminate was made before the employer was aware of the pregnancy. The important fact remained that when notice of termination was actually effected, notice of pregnancy had already been served on the employer. Judgment was entered for section 15(2)(b) and (c) entitlements. The further Part VIA claim for unreasonable and unlawful termination was remitted to the Labour Tribunal for consideration.

Section 21B of the Employment Ordinance prohibits termination for participation in trade union activities. The employer may not terminate an employee, even on the giving of notice or payment in lieu, for reasons of the employee's participation in trade union activities, unless he is prepared to pay a fine, again at level 6. Trade union activities protected by section 21B are restricted to those taking place outside working hours, or those agreed by the employer during working hours. Therefore, a striking worker is not protected by section 21B. There is no civil remedy for a violation of this provision, other than the usual

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63 Section 21B(3).
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entitlement to notice or payment in lieu, and terminal benefits. Unlike the section 15 prohibition against termination for reasons of pregnancy, there is no exception provided for section 9 summary dismissal.

Section 33(4B) of the Employment Ordinance prohibits termination of an employee on a paid sickness day otherwise than by section 9 summary dismissal. An employer who contravenes this provision shall be liable to pay wages in lieu of notice, a further seven days' wages, and is guilty of an offence, punishable by fine at level 6.

Section 72B of the Employment Ordinance prohibits termination of an employee who has given evidence or information in proceedings or inquiries into a breach of the Employment Ordinance or of a work accident. An employer in breach of this provision is guilty of an offence punishable by fine at level 6, and the court may also order appropriate compensation.

Section 6 of the Factories and Industrial Undertakings Ordinance prohibits termination of an employee who has given evidence in proceedings for the employer's breach of the Factories and Industrial Undertakings Ordinance. An employer found in breach of this provision is guilty of an offence and liable to a fine of $50,000.

Finally, and similarly, section 48 of the Employees' Compensation Ordinance prohibits termination of an injured worker entitled to compensation under the provisions of that ordinance. An employer found in breach of section 48 is guilty of an offence punishable by fine at level 6.

A feature of the foregoing provisions is that, although they concern matters of important public interest worthy of special protection, they do not in all instances provide the aggrieved employee with a substantial, or any civil remedy. An employee who chooses to participate in trade union activities, or who gives evidence in proceedings for an employer's violation of provisions under the Factories and Industrial Undertakings Ordinance, or the Employment Ordinance, does so at his peril. If he is dismissed, the employer may be required to pay a fine, but the employee is out of a job. All that he can expect to receive is compensation covering the required notice period, and any terminal benefits due.

64 Introduced in 2001.
65 Cap 59.
66 Cap 282.
The Part VIA employment protection provisions, introduced in 1997, fill this lacuna to some extent by providing for the possibility of re-instatement, or more likely, the payment of compensation, in cases of dismissal for reasons identified in the foregoing specified provisions. However, as will be seen, the Part VIA provisions on so-called "unreasonable and unlawful dismissal" have yet to be judicially interpreted and applied, and the extent to which they will have an impact on these invidious employment practices remains to be seen.

The Sex Discrimination Ordinance provides its own remedies for pregnancy discrimination. Indeed, pregnancy discrimination constitutes the most common form of complaint filed under the Sex Discrimination Ordinance. The remedies are more extensive than under the Employment Ordinance, and include the possibility of a declaration regarding the employer's conduct, an order for re-employment, an award of damages including injury to feelings, and exemplary damages. For this reason a victimised employee may wish to bring her claim in the District Court under the Sex Discrimination Ordinance.

The first such case heard under the Sex Discrimination Ordinance was Chang Ying Kwan v Wyeth. In that case, the employee, a product manager, gave notice of her pregnancy to her employer. Thereafter, the employer unsuccessfully attempted to force her resignation, ostensibly on the basis of her unsatisfactory performance. She then filed a complaint under the Sex Discrimination Ordinance, which had the effect of escalating the campaign of harassment against her, including the imposition of reporting requirements and other pressures. After returning from maternity leave, the situation did not improve, and the employee resigned, giving rise to her pregnancy discrimination claim under section 8(a) of the Sex Discrimination Ordinance. She also made

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68 Note 8 above, s 76.
69 Note 43 above.
70 Section 8(a) reads: "A person discriminates against a woman...if - (a) on the ground of her pregnancy he treats her less favourably than he treats or would treat a person who is not pregnant...". Section 11 expressly states that in the case of a woman it is unlawful to discriminate against her by dismissing her.
a victimisation claim under section 9 of the Sex Discrimination Ordinance,\textsuperscript{71} to the effect that her filing of the complaint to the Equal Opportunities Commission triggered the harassment campaign that eventually forced her resignation. In effect, the employee argued that she was constructively dismissed because of her pregnancy. In its defence, the employer argued that the monitoring and the reporting requirements were routine steps taken to ensure the quality of the employee’s work, because she did not have the appropriate competence for the position.

The court held that for the employee to succeed in the pregnancy discrimination claim it was sufficient for the employee to establish that one (only) of the reasons for the treatment that she received was pregnancy,\textsuperscript{72} and to make out the claim for victimisation, she need only establish that the fact that she had made a complaint to the Equal Opportunities Commission was within the employer’s knowledge and that there had been no adequate or satisfactory explanation for that treatment. Moreover, the intention to discriminate is not a necessary condition of liability. It is sufficient if the employee shows that she would have been treated as others but for her pregnancy. The court held that the employee had established the necessary conditions for both claims, and awarded damages to the employee under the Sex Discrimination Ordinance.

Similarly, in Yuen Wai Han v South Elderly Affairs Ltd,\textsuperscript{73} the employee was a social worker who had been employed as the supervisor of a sanatorium. She was then hired by the defendant employer, an operator of a home for the elderly, as its supervisor. The employer was aware that the employee was four months’ pregnant at the time of hiring. Before commencing work, the directors of the employer, who had not been consulted in the appointment of the employee, decided against her appointment and terminated her contract. Again, the employer argued that the reason for the termination was her lack of competence, in this

\textsuperscript{71} By s 9(1) less favourable treatment following a complaint to the Equal Opportunities Commission is treated as discriminatory victimisation.

\textsuperscript{72} By virtue of s 4 of the Sex Discrimination Ordinance, if an act is done for two or more reasons and one of the reasons is pregnancy, then the act shall be taken to be done for reasons of pregnancy.

\textsuperscript{73} [2002] 3 HKLRD 621.
case, her inexperience regarding applications for social welfare. However, there was also evidence, in the form of a letter from the employer to the Equal Opportunities Commission, to the effect that the directors were concerned that the employee, being pregnant, would be unable to participate in moving elderly people around the grounds of the employer's institution for their daily activities and exercises. As in Ying Kwan v Wyeth the court stated that pregnancy need be only one of the reasons for the termination of the contract, and that the intention to discriminate is not a necessary condition of liability, however much it may be a factor in determining remedies. A simple "but for" test, that the relevant woman would have received the same treatment as a man but for her sex, was applicable. The court was satisfied that the employee had proved her case, and awarded damages for lost income, injury to feelings, and punitive damages.\(^7^4\)

**Employment Protection**

Weeks prior to the July 1 1997 handover, the legislature introduced Part VIA of the Employment Ordinance. Part VIA has two main objectives. Firstly it seeks to provide some protection to employees who are dismissed unreasonably, that is, not for reasons of the employee's performance, or for redundancy, but at the employer's convenience, perhaps to avoid the payment of some benefit, such as long service pay, which would accrue if the employment continues for a longer period. Secondly, Part VIA includes provisions protecting employees from termination in circumstances in which the termination is unlawful by virtue of provisions elsewhere in the Employment Ordinance and other related legislation (so-called "unreasonable and unlawful" termination).

Despite these laudable goals, it was apparent that the package of reforms did not go as far as the UK provisions on unfair dismissal, and falls short of the International Labour Organisation’s Recommendation.

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\(^7^4\) The damages for injury to feelings and punitive damages were awarded because, subsequent to the filing of the complaint to the Equal Opportunities Commission, the employer had falsely reported to the police that the employee had obtained a pecuniary advantage by deception. As a result, the employee was arrested, interrogated and cautioned by the police.
119. Moreover, Part VIA certainly did not satisfy the concerns of trade unionists, who during the same legislative session put forward their own more ambitious legislative proposal for unfair dismissal protection. Part VIA provides for a remedy of re-instatement, but unlike the comparable UK provisions, re-instatement will only be ordered if the parties agree, an unlikely scenario in the best of circumstances. Moreover, damages for unreasonable dismissal appear to be addressed principally to attempts by unscrupulous employers to extinguish the rights to severance payments and long service entitlements that accrue on two and five years’ continuous service respectively, and such payments can now be set off by the employer against any employer contributions to a mandatory provident fund scheme. In result, an aggrieved employee can only expect to receive those terminal benefits that he is already entitled to by virtue of other provisions of the Employment Ordinance (eg payment in lieu of notice). One of the only benefits, if it can be described as such, that may accrue from a successful Part VIA application is a court ruling that there was no valid reason for the termination. It is a fair observation that Part VIA has not had significant impact on the law of wrongful dismissal, and will hopefully be the subject of amendment when the political climate and conditions are ripe for further reform.

Unreasonable dismissal
The term “unreasonable dismissal” is not used in Part VIA, but is a convenient term to use to describe the form of dismissal intended to extinguish rights, benefits or protection conferred elsewhere in the Employment Ordinance.

75 Recommendation 119 was adopted June 26, 1963 at the 47th session of the International Labour Conference. As with other ILO recommendations, Recommendation 119 cannot be ratified and does not give rise to any legal obligation other than to ensure that it is brought to the attention of the relevant competent authority with a view to giving effect to its terms. Unlike Part VIA, Recommendation 119 is not restricted to terminations intended to extinguish benefits, has no restrictions on compensation that can be awarded, and permits re-instatement by order of the court.

76 Employment (Amendment) (No 4) Ordinance (Ordinance No 98 of 1997), passed into law but was repealed shortly after the handover by the Provisional Legislative Council. The repeal of this ordinance was the subject of censure in the 311th Report of the ILO Committee on Freedom of Association, Case No 1942, November, 1998.

77 Note 7 above, s 311 and s 31Y.
Section 32A(1)(a) of Part VIA applies to all terminations (other than lawful section 9 summary dismissals) where the employee has been employed under a continuous contract for not less than 24 months. By section 32A(2) all terminations (other than those under section 9), even those with notice or payment in lieu, are deemed to be intended to extinguish a right, benefit or protection conferred by the Employment Ordinance (eg benefits and rights such as section 31B severance pay and section 31R long service pay) unless the employer can show that the termination was for a valid reason under section 32K (conduct of employee, capability or qualification of employee, redundancy, statutory requirements (ie where it would be contrary to law to allow the employee to continue in that work), or other substantial reason). Such valid reasons can be less serious than section 9 justification for summary dismissal, their purpose being merely to rebut the statutory presumption of the employer's intention to extinguish rights. For this purpose dismissal includes the non-renewal of a fixed term contract that has expired (section 32B(1)(b)).

The determination of whether or not the dismissal was for a valid section 32K reason shall take into account the length of time that the employee has been employed as compared to the length of qualifying service required for the right, benefit or protection to accrue (section 32L(2)). However, there is nothing in Part VIA requiring the employee to be close to the point in time where benefits such as long service payment would be triggered. Part VIA remedies could be available to any employee with 24 months of continuous service who is dismissed in circumstances where no valid reason for his dismissal under section 32K is proven by the employer.

If the tribunal finds that the dismissal was intended to extinguish rights, the tribunal can order re-instatement (if agreed by parties), or payment of all terminal benefits (section 32O(3)), including any pay in lieu of notice, together with a pro-rata amount of benefits that would have accrued if the contract had not been terminated (eg long service payment). This latter amount is important as being the main, if not the only substantial remedy added by virtue of Part VIA, for unreasonable termination. The terminated employee is already entitled to the other amounts by virtue of provisions elsewhere in the ordinance, and the introduction of the possibility of re-instatement is unlikely to have
any impact, given the improbability of the two parties agreeing on re-engagement.

In *Thomas Vincent v South China Morning Post Publishers Limited* it became apparent that, unlike the comparable UK provisions, "valid" reasons under section 32K need not be scrutinised for fairness of process. In that case a journalist used copyrighted material in breach of express instructions received from his employer some time earlier. For this reason, he was dismissed with payment in lieu of notice, just weeks before he would have attained five years of continuous service, the period necessary to trigger section 31R long service payments. The trial judge ruled that Part VIA required the employer to take into account all of the circumstances in making the decision to terminate, including the seriousness of the violation. The trial judge was of the view that, taking into account the proximity of the termination with the five year period of service about to be attained, the lack of a formal disciplinary process, the fact that the offence had caused no immediate loss to the employer, the violation of the copyright instructions, being a first offence, was not sufficiently serious to qualify as a valid reason ("conduct of the employee") under section 32K(a). It was not within the "band of reasonable responses which a reasonable employer might have adopted" (borrowing language from the UK jurisprudence).

However, the decision was reversed by the Court of Appeal. That court ruled that the use of the term "valid" in section 32A and section 32K does not permit an inquiry into the reasonableness or fairness of the decision. This follows from a comparison with the UK Act on which Part VIA is based. The UK Act expressly incorporates a two-stage process to review fairness of process, and the Hong Kong provisions do not. The Court of Appeal refused to accept that, by use of the word "valid", the Hong Kong legislature intended to import the more elaborate two-stage process adopted in the UK.

Moreover, the expression "conduct of the employee", which constitutes a valid reason under section 32K(a), on which the employer in *Vincent* relied, does not mean any trivial conduct. Rebeiro JA in the Court of Appeal ruled that the reason must be one of "substance".

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echoing the use of that word in section 32K(e). Although Rebeiro JA did not elaborate on the meaning of a reason of substance, he ruled that breach of copyright instructions by the journalist was such a reason. It did not matter whether such a reason was insufficient to justify a summary dismissal under section 9, because section 32K does not require such a serious offence.

Rebeiro JA's judgment makes clear that the threshold for a section 32K valid reason to justify a termination which is made in close proximity to the attainment of long service sufficient to trigger benefits, is not very demanding, and certainly does not have to approximate the kinds of reasons necessary to justify a section 9 summary dismissal.

The large gap between the degree of egregiousness of employee conduct required by these two provisions was underlined in the case of Karchoud v The Incorporated Trustees of the Islamic Community Fund of Hong Kong,79 heard before the Court of Appeal decision in Vincent was rendered. In that case a kindergarten headmistress was dismissed, on payment in lieu of notice, for reasons of her incompatibility with colleagues. According to the evidence the employee had frequent disputes with other teachers. The court held that such incompatibility satisfies the section 32K(e) expression “any other reason of substance…”, even in the absence of a finding of the employee's fault or blame for the incompatibility. Her claim for remedies under Part VIA was dismissed.

In Thomas Vincent v South China Morning Post Publishers Limited Rebeiro JA provided further elaboration on the benefits that are awardable under Part VIA. Although an award of benefits can include long service payment even though the qualifying period had not yet accrued, which would be assessed pro-rata (section 32(4)), it cannot include wages after termination, and up to qualifying period, as was awarded by the trial judge here.

The Court of Appeal decision in Vincent makes clear that Part VIA remedies for unreasonable termination will not be lightly granted. Although Rebeiro JA's decision goes some way to clarify the meaning and impact of the Part VIA provisions on unreasonable dismissal, he has introduced a test for section 32K(a) "conduct of employee", namely,

a reason "of substance", that is no less vague than the term it purports to define. As a result, the conditions for a successful claim for Part VIA unreasonable dismissal are uncertain, and the outcome of future cases difficult to predict.

A further point not taken up by Rebeiro JA, and one that he should have at least adverted to, relates to the effect of the section 32A(2) provision to the effect that an employer who terminates an employee's contract is presumed to have intended to extinguish rights, unless he can show a section 32K valid reason for the termination. There can be no doubt that proof of a section 32K valid reason has the effect of rebutting the presumption of an intention to extinguish rights, but there is nothing in Part VIA that prevents proof of an employer's intention to extinguish rights by reference to other evidence. Rebeiro JA seems to have assumed that once a section 32K reason has been made out, that is the end of the matter. However, it should have been left open to the plaintiff to prove that condition, required by section 32A(1), by reference to other evidence.

Part VIA has not given rise to extensive litigation in the courts or the Labour Tribunal, underlining the limited impact that Part VIA has made on the law of wrongful termination.

**Unreasonable variation**

Part VIA also embraces the situation where an employee is employed under a continuous contract of any length, and the employer varies the terms of contract, for example, by converting the employment to a series of short term contracts in order to avoid the triggering of severance or long service pay. Section 32A(1)(b), like section 32A(1)(a), deems the variation to be intended to extinguish a right, benefit or protection conferred by the Employment Ordinance unless the employer can show that the variation was for a valid reason under section 32K. Under section 32O(5), where no order for reinstatement is made, such a variation may be treated as an unreasonable dismissal.

**Unreasonable and Unlawful Dismissal**

The term "unreasonable and unlawful dismissal" is not used in the Ordinance but again is a convenient term to use to describe the claim
that a dismissed employee can make under section 32A(1)(c) of the Employment Ordinance. Such a claim can be made where termination is for a reason other than a valid reason under section 32K, and is “unlawful” by virtue of section 32A(1)(c). Under section 32A(1)(c) a termination is unlawful if effected for reasons of a violation of section 15(1) (termination during pregnancy), section 21B(2)(b) (termination for participation in trade union activities), section 33(4B) (termination on a paid sickness day), section 72B(1) (termination because the employee gave evidence against the employer in proceedings for a violation of the provisions of the Employment Ordinance), section 6 of the Factories and Industrial Undertakings Ordinance (termination because the employee gave evidence against the employer for a violation of the Factories and Industrial Undertakings Ordinance), or section 48 of the Employees' Compensation Ordinance (termination before employees' compensation for injury has been agreed), all of which provisions have been considered in earlier sections of this paper. Section 32A(1)(c) is potentially important because, in conjunction with section 32P, it introduces the possibility of a substantial damages award for violations of the important employee rights protected by these provisions.

The remedies to which an employee may be entitled are re-instatement under section 32N (again, only if agreed by the parties), or the payment of terminal benefits as the Labour Tribunal or court considers just and appropriate (section 32O), including any outstanding payment in lieu of notice, and an award of compensation up to $150,000 as the Labour Tribunal or court considers just and appropriate (section 32P).

According to section 32P(3), assessment of compensation will take into account the circumstances of the employer and employee, the duration of the employment, the manner in which the dismissal took place, any loss sustained by the employee attributable to the dismissal, the possibility of the employee gaining new employment, any contributory fault, and any payments, including terminal payments, that the employee is entitled to receive.

Hong Kong courts have yet to hear a case for section 32A(1)(c) unreasonable and unlawful termination.  

80 Sun Min v Hong Kong Ming Wah Shipping Co Ltd and Others (n 62 above) was remitted to the Labour Tribunal for consideration of Part VIA remedies for unreasonable and unlawful dismissal.
Conclusion

A pro-active judiciary has ensured that many of the key provisions triggering employee rights and protections will be interpreted robustly. Employers are put on notice to the effect that attempts to circumvent the application of the Employment Ordinance, for instance, through the use of short term contracts to avoid the creation of a continuous contract, will not be lightly tolerated. Where it is intended that a contract of employment be terminated with notice, it is now evident that clear and unambiguous notice must be given. Where the dismissal is intended to be summary, the employer must be unequivocal in the form of the dismissal, and will be put to strict proof to justify the dismissal. An employer seeking to down-size for what may be genuine business reasons must be careful to ensure that the termination does not co-exist with provisions safeguarding important interests such as the right to bear children, to participate in trade union activities, to be paid workers' compensation, or to give evidence in proceedings under safety legislation. In such circumstances, the employer must exercise self-restraint in termination decisions, in order to respect these rights, and in order to avoid a fine and/or an award of damages. The concept of constructive dismissal, and the developing doctrine of the implied duty of trust and confidence demonstrate, if proof was needed, that employers must play fair, and treat employees with the respect due to them, or pay the consequences. Although the limits of the implied duty of trust and confidence are unclear, the recognition of this duty by the courts of Hong Kong is sure to strengthen the position of workers, particularly in smaller, more intimate work settings, and is likely to be an area of considerable litigation in the future.

On the other hand, employees are not guaranteed a handout by the court, as is evident in the line of cases requiring strict adherence to the requirement that the contract be signed and in writing if a longer notice period or payment in lieu than is provided under the Employment Ordinance is sought.

It is to be regretted that the legislature backed away from a more ambitious model for employment protection than that finally adopted in the form of Part VIA. Part VIA is a complicated mechanism that
requires considerable effort to understand. Although it holds out the promise of reward, it adds little to the existing remedies available under the Employment Ordinance, leaving little scope to achieve the objective of employment security as envisaged by ILO Recommendation 119. The unsuccessful attempt by the trial judge in *Thomas Vincent v South China Morning Post Publishers Limited* to read more into the legislation than it could reasonably stand evinces a judicial sympathy that employees have come to rely on, but there is only so much that can be done, as demonstrated by the pragmatic reading of Part VIA by the Court of Appeal.

At the end of the day, the law of employment termination remains heavily tipped in favour of the employer. Employees are still vulnerable to the prospect of the fateful termination notice arriving in the inbox at any time. Valid reasons under section 32K of Part VIA have a low threshold, and can be interpreted flexibly, and even if none can be shown, the most that the employee can expect to receive, given the need for agreement as a condition for an order for re-instatement, is payment in lieu of notice and those basic terminal benefits that he is statutorily entitled to anyway. The goal of reasonable employment security is an as yet unrealised goal. Employment protection, or more precisely, unfair dismissal legislation, is surely a subject that should be revisited by the legislature at the earliest possible opportunity.