CHAPTER 3

CONTRACT OF EMPLOYMENT

1. Introduction

Overview of chapter. The legal relationship between employer and employee has its roots in contract law. Therefore, the fundamentals necessary for any binding contract must be present before any employment relationship can exist. These include offer, acceptance, adequate consideration, certainty as to the terms and the parties' legal capacity to enter into the contract of employment. Not all terms and conditions of employment will be set out in a written contract of employment. Some terms may be implied by reference to the facts and circumstances, the law or because of the very nature of the employment. In recent years legislation has come to play a greater role in governing the obligation of employers and entitlements of employees. The principle employment legislation in Hong Kong, the Employment Ordinance (Cap.57) (EO), sets out certain minimum obligations in respect of a contract of employment. In *Tadjudin v Bank of America National Association,*[1] Stone J observed that the Ordinance did not represent the current high watermark of employee protection. Rather, it constituted an "irreducible minimum" and its terms did not necessarily preclude development of the common law, if ultimately thought appropriate. Further, a term of a contract of employment seeking to reduce any rights, benefits or entitlements conferred upon the employee by the EO, will be of no legal effect.[2] Finally, while there is no collective bargaining legislation in Hong Kong, in certain instances which are discussed below, a collective agreement can still bind the parties as an enforceable contract. 3.001

2. Formation of the Contract

(a) General Principles

Usual contractual principles apply. The fundamentals of an employment contract are no different from any other contract formed under common law. An employment contract can only exist if there is an intention by the parties to create a legal relationship, the parties are legally capable of entering into a binding contract, there is an offer, an acceptance,[3] the transfer of valuable consideration and terms that are sufficiently 3.002

[1] [2010] 3 HKLRD 417.

[2] Section 70 EO. See for example *Yam Yui Wai v Wanchai Sun Kwong Restaurant Co Ltd* [2001–2003] HKCLRT 186 (s.70 applied where restaurant employees had to obtain employer's consent to take leave on statutory rest days).

[3] See, for example, in *Fong Anne v Hong Kong Adventist Hospital* (unrep., HCLA 33/2009, [2010] HKEC 985), where the arrangement was that the claimant would give the Hospital a schedule of her availability to work during a particular week at least two weeks in advance of that week and the Hospital would give the claimant at least two days' notice of the hours during a particular week it required her services. The Court of First Instance found that when the claimant gave the Hospital a schedule of her availability to work in a particular week, she was giving the Hospital an invitation to treat. When the Hospital gave notice of the hours in the week in which the Hospital required Anne's services, it was making an offer of employment. When the claimant agreed to provide her services at the time which was mutually agreeable, she was accepting the offer. In practical terms, acceptance took place when the front desk staff gave the claimant the appointment list the day before. The reality was that each appointment or each series of consecutive appointments was a separate engagement and the claimant was not employed by the Hospital in between patients or when she had no appointments.

certain.[4] In addition, the contract must, in order to be an employment contract, be "of service" (as opposed to "for services").[5]

3.003 **Interpretation of contract: what reasonable person would have understood parties to mean.** In interpreting an employment contract a court will look to the intention of the parties as evidenced by the express words used.[6] In *Leung Ka Lau v Hospital Authority*,[7] in holding that, under their contracts with the Hospital Authority, doctors were not entitled to overtime for being on-call on normal working days, as opposed to statutory rest days or holidays, the Court of Final Appeal applied the well-known *Jumbo King Ltd v Faithful Properties Ltd*[8] principles on interpretation of contracts, namely it was "an attempt to discover what a reasonable person would have understood the parties to mean … having regard, not merely to the individual words [the parties] have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve".

3.004 **Employer has freedom to choose employees subject to certain statutory restrictions.** An employer will have freedom to choose to whom it wishes to make an offer of employment and the terms of such offer subject to any statutory restrictions. These statutory restrictions include:

- the prohibition against unlawful discrimination under the Sex Discrimination Ordinance (480) (SDO), Disability Discrimination Ordinance (Cap. 487) (DDO), Family Status Discrimination Ordinance (Cap. 527) (FSDO) and (Cap. 602) (RDO);[9]
- restrictions under the Rehabilitation of Offenders Ordinance (Cap. 297) (ROO), which provides, among other things, that if an individual has been convicted of an offence where he has not been sentenced to imprisonment exceeding three months or to a fine exceeding $10,000, he had a clean record before the conviction, and three years has elapsed since the conviction and he has not been convicted of another offence, then "that conviction, or any failure to disclose it shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment";
- restrictions under the Immigration Ordinance (Cap 115) (IO) against employing a person not lawfully employable in Hong Kong;[10] and
- the prohibition against an offer of employment being conditional on the offeree not being a member of a trade union.[11]

4 See *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189.
5 For a discussion of this distinction, see Chapter 2.
6 *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189.
7 (2009) 12 HKCFAR 924.
8 (1999) 2 HKCFAR 279.
9 See Chapter 8.
10 Section 17J IO.
11 Section 21C EO.

In practice, there will be little or no genuine bargaining between the parties to a contract of employment as the terms are usually determined by the employer. An employee wishing to obtain employment with the employer will typically have to accept the terms and conditions of employment offered by the employer. This imbalance in bargaining position does not usually vitiate the contract of employment if the offer of employment is accepted by the employee.[12]

3.005 **Must have intention to create legal relations.** The parties must have a mutual intention to create a legally binding agreement. An agreement to agree does not amount to a contract of employment.[13] The courts will be slow to impose legal obligations on parties where they have gone out of their way to make it clear that they do not wish to create such obligations.[14] In *Rogers v Booth*,[15] the English Court of Appeal found that the relationship between the female lieutenant in the Salvation Army and the organisation she worked for was pre-eminently of a spiritual character and the parties did not have an intention to confer upon one another rights and obligations which were capable of enforcement.

3.006 **Mutuality of obligations (to take up and supply work) required only for "umbrella" or "global" contract of employment.** The issue of mutuality of obligations will typically be relevant in the context of determining whether there has been continuous employment under an "umbrella" or "global" contract where the employee is engaged under a number of short-term employment contracts. In *Poon Chau Nam v Yim Siu Cheung*[16] Ribeiro PJ said:

> "On the other hand, it is possible (although uncommon) for the parties to enter into an overall contract whereby they *do* undertake mutual obligations to provide and accept work. Such a contract has been called an 'umbrella' or 'global' contract, to indicate that it is an over-arching and continuous agreement between the parties, encompassing a series of specific engagements within its span. Where an umbrella contract exists, the question may arise as to whether it is a contract of employment (whether or not each specific engagement within its ambit gives rise to its own such contract). Such a question is generally only relevant where a person claiming a particular statutory right needs to establish a period of continuous employment by relying on an umbrella contract and cannot do so merely by showing that he has worked a series of specific engagements".[17]

12 For example, see *Huen Fook Nam v Penthalpha Enterprises Ltd* (unrep., HCA 15860/1999, [2006] HKEC 1069) at [49], where Judge To said: "… the employment market was against the Plaintiff and his position in the Defendant was not strong. He had no bargaining power. The Plaintiff had no choice. The Defendant could at any time give a month's notice to terminate the Plaintiff's employment if the Plaintiff did not accept the new terms. The Plaintiff's choice was either to take it or leave it".
13 *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189 at [27].
14 *Koeller v Coleg Elidyr (Camphill Communities Wales) Ltd* [2005] EWCA Civ 856.
15 [1937] 2 All ER 751 at 755; see also *New Testament Church of God v Stewart* [2007] EWCA Civ 1004.
16 (2007) 10 HKCFAR 156 at [36].
17 See, for example, *Fong Anne v Hong Kong Adventist Hospital* (unrep., HCLA 33/2009, [2010] HKEC 985), where the employment contract expressly provided that the claimant was a casual employee and that she was to provide her services at such times as was mutually agreed with the Hospital which had no obligation to provide work. The Court of First Instance held that there was no obligation on the part of the Hospital to employ the claimant for work and no obligation on the part of the claimant to make herself available for employment, and

However, Ribeiro PJ said at para.45 of *Poon Chau Nam*:

> "It follows that the absence of a mutual obligation to supply and to take up work, while fatal to the existence of an umbrella contract, is irrelevant to the existence of a contract of employment arising out of a specific engagement".

(b) Capacity of Parties

(i) *In General*

3.007 **Parties must have legal capacity to enter into contract.** Whether a person has the power to enter into a contract of employment is governed by the general rules relating to capacity to contract. Certainly companies, partnerships, and individuals can employ individuals. The Government of the Hong Kong Special Administrative Region can also employ individuals as civil servants. An otherwise valid contract of employment may be defeated by the incapacity of a party to such contract. In the employment context the issue of contractual incapacity arises in the context of the employment of minors.[18]

(ii) *Minors*

3.008 **Employment contract with minor not enforceable unless to his benefit.** Minors can enter into a contract of employment. However the contract of employment will not be enforceable against a minor if it is not in favour of the minor or not substantially for the benefit of the minor. If the contract contains a mixture of terms, some favouring the minor and some not, then it is only enforceable if it is beneficial overall.[19] In other words, if the contract is for the benefit of the minor, then it is binding on the minor and is not voidable.[20] On the other hand, if the contract is not for his benefit, then it is voidable and the minor can cancel or repudiate the agreement at any time during his minority or within a reasonable time after he attained the age of majority.[21]

thus the employment relationship was one of a casual nature but not of the nature of a continuous contract of employment.

[18] See also Chapter 2.

[19] See *De Francesco v Barnum* (1890) LR 45 Ch D 430, *Clements v London & North Western Railway Co* [1894] 2 QB 482 and *Sea Wave Hair Designs (WTS) Ltd v Choy Kwong Yiu* (unrep., HCA A2743/1992, [1992] HKLY 451).

[20] See Lord Esher's dicta in *Clements v London & North Western Railway Co* [1894] 2 QB 482: "That raises this question of law – whether this is a contract which he can now repudiate, he being still an infant … the answer … depends on whether … the contract as a whole … was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate". See also *Chaplin v Leslie Frewin (Publishers)* [1966] 1 Ch 71 where the court gave a narrow interpretation to "benefit". The plaintiff-employee, Charlie Chaplin's son, made a contract with the defendant-employer, when he was a minor, to write a book about his life. The plaintiff regretted the decision because of the possible damage to his reputation, and attempted to repudiate the contract after most of the book was prepared. It was held by the Court of Appeal that the contract was, when made, substantially for the employee's benefit and therefore enforceable. The majority of the court took a narrower view of "benefit", taking into account the financial gain but not the moral welfare of the minor. Dankwerts LJ stated that it cannot be right to enable a contract made in good faith to be avoided because it turns out at a later date that the benefits are not as great as the parties anticipated.

[21] *Sea Wave Hair Designs (WTS) Ltd v Choy Kwong Yiu* (unrep., HCA A2743/1992, [1992] HKLY 451).

3.009 **Non-compete term does not prevent the contract from being beneficial overall.** An agreement that the minor will not compete with his employer after his service ceases does not necessarily prevent the contract from being beneficial overall. In *Sea Wave Hair Designs (WTS) Ltd v Choy Kwong Yiu*[22] the defendants, who were minors, were employed by the plaintiff as hairdressers. Their contracts restricted them from working in Tsim Sha Tsui for a period of one year after the termination of their contracts of employment. Deputy Judge Tong found that despite the restriction, the contracts were beneficial to the minors, and cited *Evans v Ware*[23] in support of this. The consideration of the contract as a whole was emphasised, and it was stated that a bargain that the minor would not compete after his service ceased did not prevent the contract from being beneficial overall, as the minor obtained the means of earning by making such a bargain.

3.010 **Statutory provisions dealing with minors.** The age of majority is 18 years under the Interpretation and General Clauses Ordinance[24] and Age of Majority (Related Provisions) Ordinance.[25] There are several statutory limitations affecting the contractual capacity of young persons and children in employment. The Employment of Children Regulations contain a general prohibition on the employment of a child under the age of 13 years.[26] Regulation 5 allows the employment of children who have attained 13 years and completed Secondary Form III education, subject to some restrictions. Children who have attained 13 years but not completed Secondary Form III education are subject to even greater restrictions. The Schedule sets out various employments they are prohibited from engaging in, including premises selling liquor, dance hall and gambling establishments, places of public entertainment except where the net profits of a stage performance is devoted to purposes other than the private gain of the performance promoters, hair-dressing salons and massage parlours. The Employment of Young Persons and Children at Sea Ordinance prohibits children under 15 years from employment on sea vessels. In addition, the Employment of Young Persons (Industry) Regulations restrict the working hours of young persons and prohibits their employment in underground work, such as in mines, quarries or tunnelling operations.[27]

(iii) *Corporations*

3.011 **Capacity of companies, partnerships and individuals to enter into contract of employment with individuals.** A corporation is capable of making contracts, commonly as a registered company. Companies only have capacity to contract in relation to contractual activities falling within its object clauses, as set out in its Memorandum of Articles of Association. Section 7 of the Partnership Ordinance (Cap.38) gives a partner the capacity to enter into an employment contract for the benefit of the partnership. The government has contractual capacity to employ individuals as civil servants.

[22] (Unrep., HCA A2743/1992, [1992] HKLY 451).

[23] [1892] 3 Ch 502.

[24] Section 3.

[25] Section 2(1).

[26] Regulation 4(1)(a).

[27] See para.3.053. See also Chapter 9.

(iv) *Persons with Mental Incapacity*

3.012 **Contracting with persons with mental incapacity.** A person with mental incapacity is bound by his contract unless he can show two elements. First, that owing to his mental condition, he did not understand what he was doing; and secondly that the other party to the contract was aware of his mental incapacity at the time the contract was made. If these two conditions are satisfied, the contract is voidable at the option of the mentally incapacitated person.[28] Likewise, for a drunk (or drugged) person, the contract is voidable if these two conditions are satisfied.[29]

(c) Elements of Contract

(i) *Offer*

3.013 **Offer.** An offer of employment must be communicated before it can be accepted. However, the offer need not be addressed to any particular person[30] and may be made, for example, by newspaper or internet advertisements. An offer of employment will usually be made in writing and following an interview of the candidate. Subsequent negotiations on terms may take place followed by a revised written offer.

3.014 **Offer may be conditional.** An offer of employment may be made subject to certain conditions, for example, the passing of a medical examination[31], the conduct of reference checks and granting of a work visa to work in Hong Kong. Such conditions may be waived by the employer provided that the resulting contract is not an illegal contract.

(ii) *Acceptance*

3.015 **Acceptance.** An offer of employment may be accepted at any time before it lapses or before it is withdrawn by the employer. However, once an offer has been accepted, such offer cannot be withdrawn unilaterally by the employer. Acceptance of an offer must be in accordance with the terms of the offer. So, a verbal acceptance will not suffice if the offer requires written acceptance. While strictly speaking an offer of employment may be withdrawn before it is accepted there may be circumstances in which an employer may be estopped from denying the existence of a contract of employment even where the offer has been purportedly withdrawn before its acceptance.[32]

3.016 **Agreement to agree will not create a binding contract.** An agreement to agree in the future will not create a binding contract[33] and all the material terms of the contract must be agreed for there to be a binding obligation. Deputy Judge Saied summed up the position in *Gilligan v AHK Air Hong Kong Ltd*:[34]

[28] See *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, 601 which was cited with approval in the Hong Kong case of *Knight John Lee v Global Force Ltd* (unrep., DCCJ 5534/2007, [2009] HKEC 1092).
[29] *Matthews v Baxter* (1872–73) LR 8 Ex 132.
[30] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
[31] This condition would be subject to the Disability Discrimination Ordinance (Cap.487).
[32] *Gill v Cape Contracts* [1985] IRLR 499.
[33] *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2005] 3 HKLRD 723.
[34] [1989] 2 HKC 189, [27].

> "This brings to mind *Poley v Classique Coaches Ltd* (1934) 2 KP 1 where Maugham, LJ said:
>
> 'It is indisputable that unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it'".

In *Gilligan v AHK Air Hong Kong Ltd* Deputy Judge Saied said:

> "Besides specifying the term of two years, the letter of appointment stipulated unequivocally such other vital terms, as the job title, the salary package, the date from which it was to commence and the annual leave. The mere fact that the parties had expressly stipulated that a formal employment contract was to follow does not by itself show that they continued merely in negotiation: *Rossiter v Miller* (1877–78) 3 App Cas 1124. Such an agreement, which Mr Tsang himself regarded as an interim measure or a temporary agreement, seems to me to be complete in itself and in no way dependent on the making of a formal contract … the temporary agreement contained in the letter of appointment was binding until the formal agreement was drawn up and signed; the latter was not a condition which had to be fulfilled before the parties were bound".[35]

(iii) *Consideration*

3.017 **Contract must be supported by valuable consideration: typically wages and provision of work.** In *Lui Lin Kam v Nice Creation Development Ltd*[36] Justice Tang JA said at para.30, quoting Sir Christopher Slade in *Clark v Oxfordshire Health Authority*:[37]

> "'There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill'. There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service …".

Typically, in a contract of employment, consideration from the employer will be in the form of payment of wages and provision of other benefits to the employee. An employee's consideration will be the provision of labour or personal services.

[35] *Ibid*, at [31].
[36] [2006] 3 HKLRD 655; see also the first condition of the three conditions required to form a contract of employment mentioned by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515, namely that "the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill".
[37] [1998] 1 IRLR 125.

(iv) *Clarity of Terms*

3.018 **Terms of the contract of employment must be sufficiently clear.** An offer of employment that does not set out sufficiently clear terms will not create a binding contract. The leading authority on this point is *Loftus v Roberts*.[38] In that case an actress was hired by a manager to go on a tour to the suburban theatres at a certain salary, with a provision that thereafter she would go to the London theatres at the West-end. "… at a West-end salary, to be mutually arranged between us". It was held that whilst the first part of the contract was valid, the second part was an illusory contract because no salary was fixed and there was no certainty. The salary was to be agreed between the parties and that gave either party an option out of the contract and as such, was an invalid contract. Vaughan Williams LJ[39] summed up what he saw as the position:

> "… wherever words which by themselves constituted a promise were accompanied by words which showed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In 'Leake on Contracts' 3rd ed, p 3, it was expressed thus:- "Promissory expressions reserving an option as to the performance do not create a contract". … This was not one of that class of cases in which it was said that there was no contract because the words were too vague. This was a case in which it was said there was no contract because the promissory words left a discretion to the alleged promisor".[40]

However, the mere fact that a contract of employment includes a discretionary bonus or incentive scheme that retains a degree of discretion in the employer will not void a contract for uncertainty in its terms.[41] A contract that is made subject to a staff handbook yet to be created[42] or terms[43] to be agreed upon will not necessarily be void for uncertainty. Provided the essential terms for the formation of a contract are sufficiently clear,[44] the contents of the contract may be expanded in various ways beyond the essential terms presented at the time of offer and acceptance. For instance, there are terms that are implied by law[45] and terms that may be incorporated by reference[46] or implied by the facts.[47]

[38] (1902) 18 TLR 532.
[39] This passage was quoted by Deputy High Court Judge Woolley in *Wood v Jardine Fleming Holdings Ltd* [2001] 2 HKC 735 at [15]. See also *Kofi Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243 and *Re Richmond Gate Propery Co Ltd* [1965] 1 WLR 335.
[40] (1902) 18 TLR 532 at 534.
[41] See *Wood v Jardine Fleming Holdings Ltd* (unrep., HCA 12524/1998, [2001] HKLRD (Yrbk) 467) and *Clark v Nomura International Plc* [2000] IRLR 766.
[42] *Post v Nomura International (Hong Kong) Ltd* (unrep., HCA 7259/1997, [2001] HKEC 600), see [27] and [28].
[43] *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189.
[44] In *Gilligan v AHK Air Hong Kong Ltd*, at [31], Deputy Judge Saied held these "vital terms" included "the job title, the salary package, the date from which it was to commence and the annual leave".
[45] See para.3.027 below.
[46] See para.3.022 below.
[47] See para.3.025 below.

(v) *Illegality*

3.019 **Contract unenforceable if vitiated by illegality.** A contract will be unenforceable if it is vitiated by illegality, duress or undue influence.[48] In *Lilik Andayani v Chan Oi Ling*,[49] the appellant, a foreign domestic helper who could not read English, signed a standard form domestic helper contract with the respondent with a salary specified at the statutory minimum of HK$3,860 per month and which had been approved by the Immigration Department. However, the parties separately agreed orally that the appellant would only be paid HK$2,200 per month. Deputy Judge To held that the appellant could not rely on the approved contract as there had never been a meeting of minds between the appellant and the respondent as to the terms of that contract. All along the appellant had been told and understood that her salary would be HK$2,200 per month. Deputy Judge To also held that the oral contract was illegal and unenforceable as the appellant was uninformed of the minimum wage imposed by the Director of Immigration in Hong Kong and the contract was vitiated by fraud. However, Deputy Judge To found that by the fact that the appellant had worked for the respondent, there was a *de facto* employment relationship, and there could be implied a contract of employment on the same terms as the approved contract.

As for awarding compensation to workers who enter Hong Kong to work without the requisite visa to do so, pursuant to the s.2(2) discretion of the Employees' Compensation Ordinance (Cap.282) (ECO) to treat such employees as working under a valid contract, the public policy regarding unemployable persons performing lawful work, was better served by allowing such compensation claims.[50]

(vi) *Form of Agreement*

3.020 **Offer letter can be contractually binding.** It is not uncommon for an employer to make an offer of employment by way of a short offer letter (sometimes only one page long) following the acceptance of which the employee will be provided with a more detailed employment agreement. To the extent that the offer letter satisfies the conditions for formation of a contract[51] such offer letter will be contractually binding. Hence, any proposed term to be included in the employment agreement must be consistent with the terms contained in the offer letter unless the variation falls within the employer's power to vary unilaterally[52] or the employee agrees to such variation. However, where the offer letter is *merely an agreement to agree in the future*, such offer letter will not be contractually binding.[53]

3.021 **No specific form for an employment contract.** Employment contracts can be written or oral. They can contain minimal express terms (the parties, the level of pay[54] and the work to be performed). However, frequently employment contracts in Hong Kong

[48] *Lilik Andayani v Chan Oi Ling* [2001] 2 HKLRD 572 at [12].
[49] *Ibid.*
[50] See *Yu Nongxian v Ng Ka Wing* [2007] 4 HKLRD 159, *Chen Xiu Mei v Li Siu Wo* [2008] 2 HKLRD 211 and *Qadir Sher v Siddiqui Muhammad Faisal* (unrep., DCEC 404/2011, [2012] HKEC 1141).
[51] See paras 3.013–3.019.
[52] See paras 3.082–3.086.
[53] *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189.
[54] Section 44(1) of the EO (Cap.57).

depend upon the facts of each case,[434] but if the employee's remuneration depends upon an employer providing an employee with the opportunity to earn it, such as where the employee's salary is dependent upon commissions or bonuses, the employee's "right to work" is likely to be established more readily.[435]

7.236 **Garden leave clauses that restrict employee from obtaining employment with any other employer likely to be treated as restraint of trade.** Although garden leave clauses have traditionally been seen as a more reliable, albeit a more expensive means of protecting confidential information and preventing competition or solicitation of clients, customers, or other employees, the courts in England have become increasingly astute to the potential for using garden leave clauses as an alternative, back door method for imposing restraints of trade.[436] Thus, where an express term in a contract prohibits an employee from working for anyone else during the term of the employment, a court may treat the restriction, in far as it applies to a garden leave period, as a restraint of trade and therefore potentially unenforceable unless it is considered to be both justified by reference to a legitimate business interest of the employer, and a reasonable restraint by reference to matters such as duration, geography and the nature and scope of the activities sought to be restricted.[437]

[434] In *Provident Financial Group plc v Hayward* [1989] ICR 160, the English Court of Appeal recognised the employee's concern to work as a financial director of an estate agency. Dillon LJ regarded this right as extending to the cases of artists and singers, skilled workmen and "even to chartered accountants".

[435] *William Hill Organisation Ltd v Tucker* [1998] IRLR 313, CA.

[436] *Provident Financial Group plc v Hayward* [1989] ICR 160, CA.

[437] *Symbian Ltd v Christensen* [2001] IRLR 77, CA. In this case, the Court of Appeal found that the garden leave clause to be both valid and justified.

Chapter 8

DISCRIMINATION LAW

1. Overview

Overview of chapter. Hong Kong has four anti-discrimination ordinances—the Sex Discrimination Ordinance (SDO),[1] Disability Discrimination Ordinance (DDO),[2] Family Status Discrimination Ordinance (FSDO),[3] and Race Discrimination Ordinance (RDO).[4] These statutes are broad in scope and together prohibit direct and indirect discrimination on the grounds of: sex, marital status, pregnancy, disability, family status, race, colour, descent and national or ethnic origin in employment and employment-related activities, among other fields. They also provide protection from: sexual harassment, racial harassment, disability harassment, discrimination by way of victimisation and vilification and serious vilification on the grounds of disability and race. This chapter reviews the four anti-discrimination ordinances and their application to the field of employment and also considers discrimination related to pregnancy and trade union activities covered by the Employment Ordinance (EO).[5] 8.001

Anti-discrimination law in Hong Kong. This chapter begins with a review of the background and context in which the anti-discrimination legislation was enacted—and has since been developed and interpreted—including the relevance of human rights standards applicable to Hong Kong. It examines the definition of discrimination, including direct and indirect discrimination, harassment, victimisation, vilification and serious vilification as well as the appropriate test for establishing direct discrimination, the difficulties associated with identifying a "comparator" and determining the cause of discrimination, the possibility of justifying indirect discrimination and the concept of equal pay for equal work or work of equal value. The chapter also considers exceptions including the "genuine occupational qualification" defenses and exceptions for "special measures". It concludes with a review of enforcement mechanisms including the role of the courts and the Equal Opportunities Commission (EOC), the statutory body tasked with overseeing the implementation of the legislation, encouraging conciliation of claims and promoting equal opportunities, and the available remedies for unlawful acts of discrimination in employment. 8.002

2. Background and Context

(a) The development of discrimination law in Hong Kong

The legislative framework. Hong Kong's first two anti-discrimination statutes, the SDO and the DDO, were enacted in 1995 and came into force in December 1996. The third, the FSDO, has been in force since November 1997. The RDO was enacted more than a decade later in July 2008 and came fully into force on 10 July 2009. This legislative framework, along with the relevant case law, forms a limited but expanding body of anti-discrimination law in Hong Kong which prohibits discrimination, harassment and 8.003

[1] Cap.480.
[2] Cap.487.
[3] Cap.527.
[4] Cap.602.
[5] Cap.57.

vilification on a range of grounds in several fields including employment. In addition to these statutes, the EO provides protection from pregnancy and trade union-related discrimination and the Basic Law and Bill of Rights provide for a constitutional right to equality and non-discrimination binding on public authorities.

8.004 **Initial efforts to legislate.** The Hong Kong Colonial Government, supported by business interests, had traditionally opposed the introduction of anti-discrimination legislation.[6] When Anna Wu Hung-yuk, at the time a member of the Legislative Council ("LegCo"), introduced a comprehensive Equal Opportunities Bill (EOB) in 1994—which would have prohibited discrimination on a range of grounds including family responsibility, sexuality, age, religious or political conviction, trade union activities and spent conviction—the government countered with its own compromise Sex Discrimination and Disability Discrimination Bills. These were followed a year later by the Family Status Discrimination Bill. These bills contained a mix of provisions based on UK legislation and Wu's EOB which had been modelled largely on Australian anti-discrimination law.[7]

8.005 **Attempts to provide protection on other grounds.** After the enactment of the three initial statutes, further attempts by members of LegCo to introduce laws which would have addressed discrimination on other grounds, including sexual orientation and age, were unsuccessful. The government responded to these efforts by publishing non-binding guidelines for employers[8] and emphasising publicity and education measures.[9] Some non-governmental organisations ("NGOs") and UN human rights treaty bodies, which monitor the implementation of state parties' obligations under core international human rights treaties, have called for an extension of anti-discrimination legislation to ensure protection from discrimination on a range of grounds.[10] Initially, the Government resisted implementing legislation prohibiting racial discrimination but eventually agreed after a sustained local and international campaign and increasing support from international business organisations based in Hong Kong.[11]

[6] See Petersen, CJ, "Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong" (2001) 5 *Employment Rights and Employment Policy Journal* 627 at 632; and Petersen CJ "A Critique of Hong Kong's Legal Framework for Gender Equality" in Cheung FM and Holroyd E (eds), *Mainstreaming Gender in Hong Kong Society* (Hong Kong: Chinese University Press, 2009) at p.405. Petersen notes that the "colonial government justified its position [not to apply Convention on the Elimination of all Forms of Discrimination against Women to Hong Kong or enact anti-discrimination law] on the ground that it did not wish to interfere with traditional Chinese customs or 'over-regulate' private sector employers".

[7] See Petersen CJ, "Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong" (2001) 5 *Employment Rights and Employment Policy Journal* 627.

[8] Labour Department, "Practical Guidelines for Employers on Eliminating Age Discrimination in Employment", Jan 2006, available at: www.labour.gov.hk/eng/plan/.../Employers/PracticalGuidelines.pdf and Constitutional and Mainland Affairs Bureau, "Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation", http://www.cmab.gov.hk/en/issues/sexual.htm.

[9] See the Constitutional and Mainland Affairs Bureau website: http://www.cmab.gov.hk/en/issues/equal.htm.

[10] For example, see the IDAHO Hong Kong website: http://idahohk.org/2009/home.php. See also "Concluding observations of the Committee on Economic, Social and Cultural Rights, People's Republic of China (including Hong Kong and Macao)", UN Doc. No.E/C.12/1/Add.107, 13 May 2005, para.78(a). Although legislation concerning sexual orientation discrimination has not been enacted, the Hong Kong Court of Final Appeal has confirmed that a constitutional right to equality under the Basic Law (art.25) and Bill of Rights (arts 1 and 22) prohibits discrimination by public authorities on the ground of sexual orientation. See *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903.

[11] See Home Affairs Bureau of the Government of the Hong Kong SAR, "Legislating Against Race Discrimination: A Consultation Paper" (Sept 2004).

8.006 **Legislative models and the application of English law.** The Hong Kong statutes were modelled on older versions of UK legislation, the original 1975 Sex Discrimination Act (SDA) and the 1976 Race Relations Act (RRA), as well as Australian anti-discrimination law.[12] As a result, Hong Kong courts have relied on both English and Australian case law for guidance when interpreting the Hong Kong legislation. In *Chang Ying Kwan v Wyeth (HK) Ltd*,[13] a case involving pregnancy discrimination and discrimination by way of victimisation, the District Court confirmed this approach. It considered that English case law could serve as persuasive authority although it also noted that Hong Kong courts should not blindly follow the English courts' reasoning which may not always be appropriate for the Hong Kong context.[14]

8.007 **Relevance of the Codes of Practice on Employment.** All four ordinances grant the EOC power to issue codes of practice (COPs) which contain practical guidelines for the purposes of the elimination of discrimination, the promotion of equality of opportunity and the elimination of harassment.[15] The EOC has issued four COPs on Employment which are intended to provide guidance to employers on how to comply with their obligations under the anti-discrimination laws.[16] Although the COPs do not create binding duties, employers may be able to avoid vicarious liability for their employees' unlawful acts if they follow the Codes' suggestions.[17] The EOC will also take compliance with the COPs into account when investigating alleged discriminatory acts or conducting a formal investigation.[18] In *Sit Ka Yin Priscilla v Equal Opportunities Commission*,[19] the court rejected the plaintiff's submission that a failure to follow the SDO COP on Employment amounted to unlawful discrimination. It held that this view

[12] The Western Australia Equal Opportunities Act 1984 (No.83) (WAEOA), served as the model for Anna Wu's comprehensive Equal Opportunities Bill (EOB) in Hong Kong. Although the EOB was not ultimately enacted, the Hong Kong Government borrowed certain provisions from the Bill when drafting the Hong Kong statutes. Therefore, the four ordinances contain elements from the WAEOA as well as Federal Australian anti-discrimination legislation, such as the Sex Discrimination Act (SDA) 1984 and the Disability Discrimination Act (DDA) 1992. For example, SDO s.10, which explains how comparisons should be made for the purposes of determining direct discrimination, reflects similar language in the WAEOA (s.8(1)). The SDO also includes protection from discrimination on the grounds of marital status and pregnancy, also covered in the WAEOA, but not in the original UK SDA (1975), although the SDA has since been amended to include the grounds of pregnancy and exercising a statutory right to maternity leave. The employment provisions in the four Hong Kong statutes closely follow similar sections in the Australian legislation. The SDO also defines sexual harassment in the same terms as the Australian Sex Discrimination Act, s.28A. Sexual harassment was not defined in the UK legislation until it was amended to reflect the requirements of the European Equal Treatment Directive (Council Directive 2000/78/EC, 27 Nov 2000).

[13] [2001] 2 HKC 129.

[14] *Ibid* at 134.

[15] SDO s.69(1), DDO s.65(1), FSDO s.47(1), RDO s.63(1).

[16] The texts of all four Codes are available on the EOC's website: http://www.eoc.org.hk/eoc/GraphicsFolder/CoPs.aspx.

[17] SDO s.69(14), DDO s.65(13), RDO s.63(14). It is a defense for an employer to prove that he/she took such steps as were reasonably practicable to prevent the employee from doing unlawful, discriminatory acts. See SDO s.46, DDO s.48, FSDO s.34, RDO s.47. See also SDO Code of Practice (COP) on Employment at para.4.5 and discussion of the vicarious liability of employers at para.8.140.

[18] *Ibid* (SDO COP) at para.4.3.

[19] (Unrep., DCEO 11/1999, [2010] HKEC 208) at 161. The Court of Appeal denied the plaintiff's application for leave to appeal in this case (unrep., DCEO 11/1999, [2011] HKEC 766).

was a misperception and that not implementing the recommendations outlined in the Code cannot lead to an automatic finding of discrimination against the employer.[20]

(b) Influence of human rights and constitutional jurisprudence

8.008 **Human rights context.** The statutes were enacted in response to international human rights instruments which have been extended to Hong Kong and which have been partially incorporated into domestic law.[21] The courts have occasionally relied on these instruments and the materials produced by relevant international bodies when interpreting the ordinances. Although the focus of this chapter is on discrimination law as it applies to the field of employment, the human rights context provides an important backdrop to this discussion and is necessary for a fuller understanding of the purpose of the legislation. This subsection therefore considers the influence and relevance of human rights to the statutes and their development and interpretation in light of Hong Kong's interaction with international human rights standards and mechanisms.

8.009 **Obligation to legislate under international human rights law.** Non-discrimination is a fundamental principle of international human rights law.[22] Hong Kong is bound by seven of the core international human rights treaties[23] several of which obligate state parties to legislate to prohibit discrimination in both the public and private sectors in many fields, including employment. Of these treaties, the most relevant for this discussion of anti-discrimination law include the International Covenant on Civil and Political Rights (ICCPR);[24] the International Covenant on Economic, Social and Cultural Rights (ICESCR);[25] the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)—which was extended to Hong Kong around the same time the SDO came into force in 1996; the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)—which has

[20] *Ibid.* The SDO COP on Employment clarifies that "[a] failure on the part of a person to observe any of the recommendations contained in this Code does not automatically render him or her liable to any proceedings. However, if a person is accused of discrimination, sexual harassment or victimisation, failure to implement the recommendations outlined in this Code could be used as evidence in a court of law" (para.1.4.2). The RDO COP on Employment similarly explains that "[t]he Code provides recommendations for good employment procedures and practices. It should be used to promote racial equality and harmony in the workplace. Following good employment procedures and practices will further have the benefit of promoting racial equality and harmony beyond the workplace … Although the Code is not law, it shall be admissible in evidence and the court shall take into account relevant parts of the Code in determining any question arising from proceedings under the RDO. If, for example, an employer has followed the Code's recommendations on taking reasonably practicable steps to prevent discrimination and harassment, it may help the employer to show that it has complied with the law" (para.1.3.1).

[21] Through the Basic Law, the Bill of Rights, which forms Part II of the Hong Kong Bill of Rights Ordinance (Cap.383), the anti-discrimination legislation and other relevant statutes.

[22] Smith Rhona KM, *Textbook on International Human Rights* (Oxford University Press, 4th edn, 2010), 189.

[23] These include the 1965 International Convention on the Elimination of Racial Discrimination (ICERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), The 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child (CRC), and the 2006 Convention on the Rights of Persons with Disabilities (CRPD).

[24] Articles 2(1), 3 and 26.

[25] Articles 2(2) and 3.

applied to Hong Kong since 1969; and the Convention on the Rights of Persons with Disabilities (CRPD) which came into force in May 2008 and has applied to Hong Kong since August 2008.

8.010 **The human rights treaty bodies.** The Hong Kong Government is required to submit periodic reports—which generally form appendices to China's state reports—to the UN human rights treaty bodies, the committees which oversee state parties' implementation of these instruments.[26] The treaty bodies have on several occasions commented on Hong Kong's lack of adequate discrimination law—including the absence of legislation covering sexuality or age discrimination—and weaknesses in the existing ordinances.[27] These comments appear to have had an impact on the decision to introduce draft legislation against racial discrimination in 2006. The RDO—like the other ordinances—does not explicitly state that it is intended to implement Hong Kong's international human rights obligations, but the government clarified that this was a key objective during the legislative process.[28]

8.011 **Constitutional equality provisions.** In addition to international human rights instruments which are applicable to Hong Kong, the discrimination legislation has developed alongside a growing body of constitutional jurisprudence interpreting the right to equality in art.25 of the Basic Law as well as arts 1 and 22 of the Bill of Rights—which essentially mirror arts 2(1) and 26 of the ICCPR.[29]

8.012 **The discrimination statutes reflect the principle of equality.** In *Ma Bik Yung v Ko Chuen*,[30] the Hong Kong Court of Final Appeal (CFA) observed that the anti-discrimination statutes in Hong Kong reflect the principle of equality enshrined in international human rights instruments which shall remain in force and be implemented through domestic law pursuant to art.39 of the Basic Law. It highlighted art.2(1) of the ICCPR (art.1(1) of the Hong Kong Bill of Rights) and art.2(2) of the ICESCR.[31]

8.013 **The statutes should be construed consistently with international standards and constitutional rights.** In *Equal Opportunities Commission v Director of Education*,[32] a case which successfully challenged sex discrimination in the government's secondary school places allocation system under the SDO, the Court of First Instance concluded that the enactment of the SDO had met Hong Kong's obligation under CEDAW to adopt domestic legislation to protect women from discrimination. Therefore, the text

[26] Although bound by the treaties, Hong Kong is technically not a "state party" and thus submits its reports as appendices to China's state reports except in the case of the ICCPR which does not apply to the PRC.

[27] For example, see Committee on Economic, Social and Cultural Rights, UN. Doc. No.E/C.12/1/Add.58, paras 30 and 31 and Human Rights Committee, UN Doc. No. CCPR/C/HKG/CO/2, 21 Apr 2006, para.19.

[28] See Home Affairs Bureau, Legislative Council Brief, Race Discrimination Bill, 29 Nov 2006, para.4.

[29] Article 2(1) obligates states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 26 provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[30] [2002] 2 HKLRD 1 at [5].

[31] Article 2(2) of the ICESCR essentially replicates the language of art.2(1) of the ICCPR (art.1(1) of the Hong Kong Bill of Rights).

[32] [2001] 2 HKLRD 690.

of the SDO should be construed if it is "reasonably capable of bearing such a meaning" as consistent with CEDAW.[33]

8.014 **Broad, purposive approach and generous and liberal interpretation.** In *Wong Lai Wan Avril v Prudential Assurance Co Ltd*,[34] the court agreed with the plaintiff's submission that the SDO and FSDO should be construed consistently with the ICCPR as it applies to Hong Kong since the statutes are aimed at providing comprehensive protection for equality and non-discrimination. As such, courts should adopt a broad and purposive approach and a generous and liberal interpretation of the legislation according to art.25 of the Basic Law and art.22 of the Bill of Rights.[35]

8.015 **The courts can seek guidance from international standards and comparative case law.** The courts have occasionally referred to international instruments and comparative human rights case law when interpreting the discrimination statutes and have used principles borrowed from constitutional law.[36] In *Equal Opportunities Commission v Director of Education*,[37] the court explicitly referred to CEDAW when stating that appropriate measures should be adopted to eliminate stereotyped concepts of men and women (art.10) and in order to clarify the meaning of "special measures" in s.48 of the SDO.[38] It also observed that along with the Basic Law and Bill of Rights, the SDO forms part of a "repository of fundamental rights recognised by free and open societies generally" and therefore the courts can be guided by human rights jurisprudence from other jurisdictions as well as supra-national tribunals.[39] It cautioned, however, that while this jurisprudence provided assistance in articulating general principles it may have more limited value when interpreting domestic legislation.[40]

[33] [2001] 2 HKLRD 690 at [90].

[34] [2009] 5 HKC 494.

[35] *Ibid* at paras 37, 58 and 63 citing *B v Ontario (Human Rights Commission)* [2002] 3 SCR 403 and *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

[36] [2001] 2 HKLRD 690. Article 1(1) of the Bill of Rights (art.2(1) of the ICCPR) was mentioned although not significantly relied upon in *Chan Wah v Hang Hau Rural Committee* [2000] 1 HKLRD 411 with regard to unlawful sex discrimination under the SDO.

[37] [2001] 2 HKLRD 690 at [88].

[38] *Ibid* at [109]–[111].

[39] *Ibid* at [113].

[40] *Ibid*. The courts may follow this approach and refer to the ICERD (fn.23) when interpreting the RDO or the CRPD when interpreting the DDO going forward. Although the CRPD came into force and was extended to Hong Kong twelve years after the enactment of the DDO—and thus did not influence the legislative process—some claimants have attempted to rely on its provisions in disability discrimination cases. In *Tong Wai Ting v Secretary for Education* (unrep., HCAL 73/2009, [2009] HKEC 1367), the applicants argued that they had a legitimate expectation that the government would comply with its Convention obligations (in the context of education policy). In *M v Secretary for Justice* [2009] 2 HKLRD 298, an employment discrimination case, the claimant attempted to argue that the DDO should be interpreted in light of the provisions in the Convention. The Court of Appeal, however, referred to the Convention as "a statement of aspiration" – a position which conflicts with current understandings of international human rights law. The EOC and NGOs have also mentioned the Convention when commenting on policy related to disability. See, for example, Submission from the Equal Opportunities Commission to the Meeting of the Legislative Council Panel on Health Services, Special Meeting on 22 Nov 2007, para.6.

8.016 **Not all distinctions are invidious.** In *Equal Opportunities Commission v Director of Education*,[41] the court cited a General Comment issued by the UN Human Rights Committee, the body responsible for monitoring states' implementation of their obligations under the ICCPR, which notes that equality does not require identical treatment in every instance. This formulation has shaped the courts' development of a justification test when determining whether distinctions are invidious and therefore discriminatory and unconstitutional under art.25 of the Basic Law and arts 1 and 22 of the Bill of Rights.[42]

8.017 **Justification for differential treatment involves three steps.** This constitutional justification test involves three steps: (1) the court must first determine whether the difference in treatment pursued a legitimate aim which requires establishing a genuine need for such difference; (2) next it must be demonstrated that the difference in treatment is rationally connected to the legitimate aim; and (3) finally, the difference in treatment must be no more than is necessary to accomplish the legitimate aim.[43]

8.018 **No general justification for discrimination under the anti-discrimination statutes.** A plain reading of the text of the anti-discrimination statutes, however, indicates that this test is not available when determining direct discrimination under the four ordinances. Although the definition of direct discrimination in the SDO, DDO, FSDO and RDO does not provide for a general justification defense, the legislation does allow for certain exceptions in limited circumstances.[44] A justification test may be applied as a defense in cases involving indirect discrimination, however, and the courts have adopted a 3-part test, similar to the constitutional test.[45]

3. Forms and Definitions of Discrimination

8.019 **Determining unlawful discrimination.** Not all unequal treatment amounts to unlawful discrimination—even when made on one of the grounds covered by the ordinances—and

[41] [2001] 2 HKLRD 690 at [6], citing Human Rights Committee, General Comment No. 18, UN Doc. No. CCPR/C/21/Rev 1/Add 1 (1989). The Human Rights Committee states that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". See also *R v Man Wai Keung (No.2)* [1992] 2 HKCLR 207.

[42] *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, citing *R v Man Wai Keung (No.2)* [1992] 2 HKCLR 207.

[43] *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [20].

[44] Because the definition of direct discrimination—which is the same in all four ordinances—does not allow for the possibility of "justification", the ordinances contain specific exceptions and defenses—such as a genuine occupational qualification defense (see s.6). Due to the different nature of constitutional equality guarantees—which have been articulated in broader and less precise language than the provisions in the discrimination statutes—it may be inappropriate to apply this proportionality test when determining whether direct discrimination has occurred under the ordinances. There is potential overlap, however, since all of the ordinances apply to the government and the SDO, DDO and FSDO explicitly apply to the exercise of government powers and performance of its functions. The discriminatory policy which was challenged in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 contravened the SDO as well as the Basic Law and Bill of Rights.

[45] *Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775 at [59] citing *Board of Governors of St Matthias Church of England School v Crizzle* [1993] IRLR 472. The definitions of direct and indirect discrimination and the relevant tests for proving both forms of discrimination and justifying indirect discrimination are discussed in s.3.

several steps are involved in determining whether the legislation prohibits a particular act. First, the act in question must fall within the scope of the ordinances' application which includes a range of employment-related contexts and activities.[46] The act must have also occurred on the ground of one of the characteristics specified in the statutes which include sex, marital status, pregnancy, disability, family status or race—a broad concept encompassing race, colour, descent or national or ethnic origin.[47] It must also take on one of the forms of discrimination prohibited by the legislation. In other words it must fall within the definition of either direct or indirect discrimination or amount to harassment, discrimination by way of victimisation, vilification or serious vilification as defined in the legislation. In some cases, a particular exception or defense may be applicable.[48] This section considers the forms of discrimination prohibited by the legislation including direct and indirect discrimination, harassment, discrimination by way of victimisation and vilification.

(a) Direct discrimination

(i) *Definition of direct discrimination*

8.020 **Definition of direct discrimination.** The four ordinances each contain essentially the same definitions of direct discrimination which are based on the original UK SDA.[49] Direct discrimination occurs when a person, in any circumstances relevant for the purposes of any provision of one of the ordinances, treats another person less favourably on the grounds of that other person's sex, marital status, pregnancy, disability, family status or race than he/she would treat someone without the specified characteristic (in the case of disability, pregnancy, or family status) or someone with the opposite or different characteristic (in the case of sex, marital status or race).[50]

8.021 **On the grounds of the claimant's own race as opposed to on "racial grounds".** The definition of direct discrimination in the RDO follows the UK SDA and Hong Kong SDO models which stipulate that the less favourable treatment must be on the grounds of the claimant's sex. In doing so, the RDO diverges from the UK RRA, which instead specifies that the treatment must be on "racial grounds".[51] This difference is significant since the term "racial grounds" could encompass claims made by those who face discrimination on the basis of the race of another person or for reasons which could be characterised as "racial." For example, in the United Kingdom this broader language has enabled individuals to successfully claim racial discrimination

[46] Discussed in s.5.
[47] Discussed in s.4.
[48] Discussed in s.6.
[49] UK SDA, s.1(2)(a). The definitions of indirect discrimination (but not direct discrimination) in the UK Acts have been amended in response to the limitations of the original definition and developments in European Law, especially a Directive issued by the Council of the European Union on establishing a general framework for equal treatment in employment and occupation, Council Directive 2000/78/EC, 27 Nov 2000, art.2(2)(b). The Hong Kong statutes do not reflect these changes.
[50] SDO ss.5(1), 7(1) and 8(a); DDO s.6; FSDO s.5; RDO s.4(1).
[51] RRA, s.1(1)(a).

on the grounds that they had been dismissed from their jobs for failing to follow discriminatory instructions.[52]

8.022 **Claims made on the grounds of a near relative or associate.** Despite this more restrictive language in the RDO as compared with the UK RRA, another provision in the RDO extends protection from discrimination to less favourable treatment on the grounds of the race of a person's near relative.[53] The DDO goes further and prohibits discrimination on the grounds of a person's "associate" which includes a relative as well as other relationships.[54] The definition of "disability" also includes a disability that previously existed but no longer exists, may exist in the future or is imputed to a person.[55]

(ii) *Proving direct discrimination*

8.023 **Demonstrating less favourable treatment and causation.** Hong Kong courts have relied on English authority to formulate a test for determining whether less favourable treatment has occurred and whether it has been caused by one of the prohibited grounds—in other words whether the claimant's sex, pregnancy, marital status, disability, family status or race was the "reason why" he/she faced unfavourable treatment.[56]

8.024 **The "but for" test.** The CFA in *Secretary for Justice v Chan Wah* (*Chan Wah*)[57] has confirmed that the appropriate test for determining less favourable treatment is whether "the relevant girl or girls (in the case of sex discrimination) would have received the same treatment as the boys 'but for' their sex". Known as the "but for" test, this approach determines the existence of "unfavourable treatment" since it compares like with like—reflecting an "equal treatment" principle—and may also reveal whether the treatment was caused by one of the prohibited grounds. Although *Chan Wah* was a sex discrimination case, courts have consistently applied the test to claims involving other prohibited grounds since the definitions of direct discrimination in the other statutes are essentially the same and also require a comparison.

8.025 **The "but for" test is objective and intent is not necessary.** The CFA has confirmed that the "but for test" is objective, not subjective, in nature and affirmed that it is not necessary to establish the discriminator's motive or intention although this may be relevant when determining appropriate remedies.[58] It cited Lord Goff in *R v Birmingham*

[52] *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65. For a discussion of the difference between the definition of direct discrimination in the RRA and SDA, see Karon Monaghan, *Equality Law* (Oxford University Press, 2007), 284–285. See also *Redfearn v Serco Ltd* [2006] EWCA Civ 659; *Zarczynska v Levy* [1978] IRLR 532; and *Weathersfield Ltd v Sargent* [1999] ICR 425.
[53] RDO s.2(1) and s.5. See discussion at para.8.157.
[54] DDO ss.2(1) and 6(c). See discussion at para.8.154.
[55] DDO s.2(1). See *K v Secretary for Justice* [2003] 3 HKLRD 777.
[56] *Sit Ka Yin Priscilla v Equal Opportunities Commission* (unrep., DCEO 11/1999, [2010] HKEC 208) at 133 citing Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 7.
[57] [2000] 3 HKLRD 641 citing Lord Goff in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] 1 AC 1155 at 1194 A–C and Lord Bridge applying this test in *James v Eastleigh Borough Council* [1990] 2 AC 751 at 765D.
[58] *Chan Wah* [2000] 3 HKLRD 641 citing Lord Bridge in *James v Eastleigh Borough Council* [1990] 2 AC 751 applying Lord Goff's test in *Birmingham Council* [1989] 1 AC 1155. Lord Bridge observes that the "but for" test "is not subjective but objective". See discussion of intention in relation to remedies at para.8.176.

City Council who stated that it is possible to imagine cases of discrimination in which the defendant had no such motive.[59]

8.026 **The need to identify a similarly situated comparator.** Establishing less favourable treatment on the basis of a prohibited ground is a relative exercise. Applying the "but for" test to prove direct discrimination, therefore, requires the identification of a real or hypothetical comparator without the specified characteristic (i.e. not disabled under the DDO or not pregnant under the SDO) or with the opposite or different characteristic (i.e. a man, if the claimant is a woman and alleges sex discrimination under the SDO, or a person of a different race if the claim involves race discrimination under the RDO) but who is otherwise similarly situated.

8.027 **The relevant circumstances must be the same.** All four ordinances require that when making a comparison, the relevant circumstances in both cases be the same, or not materially different.[60] The purpose of finding a comparator is to isolate the prohibited ground in the discrimination analysis—by equalising all other relevant factors—in order to clarify whether the treatment would have occurred "but for" the prohibited ground.[61] If not, then the treatment is less favourable.

8.028 **Difficulties applying the "equal treatment" principle and finding a comparator.** Identifying the correct comparator is not always straightforward in practice and often hinges on determining which conditions of the claimant's situation are material and must therefore be similarly attributed to the comparator. This process sometimes exposes problems with formal definitions of direct discrimination. Direct discrimination provisions reflect a concept of equality which is based on an "equal treatment" principle derived from Aristotle's dictum that "like cases should be treated alike".[62] The comparator analysis becomes especially challenging when the prohibited grounds in the legislation are asymmetrical. Asymmetry in the context of anti-discrimination law means that only individuals who exhibit the protected characteristic—such as having a disability or being pregnant—are able to make claims. Those without the characteristic (i.e. those not having a disability or who are not pregnant) are not protected by the legislation. The SDO's provisions on sex discrimination and the RDO, by contrast, are symmetrical in nature since individuals of both sexes and from any racial group may make a claim of sex or race discrimination.

[59] *Chan Wah* [2000] 3 HKLRD 641 at 656 citing Lord Goff in *Birmingham Council (ibid)*. Also cited in, for example, *Lam Wing Lai v YT Cheng (Chingtai) Ltd* [2006] 1 HKLRD 639 and *Yuen Wai Han v South Elderly Affairs Ltd* [2002] 3 HKLRD 621.

[60] SDO s.10, DDO s.8, FSDO s.7, RDO s.8(5). In the case *Sunny Tadjudin vs Bank of America, National Association* (unrep., HCMP 691/2012, [2012] HKEC 1162), the Hon Kwan JA quoted Lord Hoffman in *Watt v Ahsan* [2008] 1 AC 696 that: "This is an ordinary question of relevance, which depends upon the degree of similarity of the circumstances of the person in question (the 'evidential comparator') to those of the complainant and all other evidence in the case. Whether certain persons qualify as such 'evidential comparators' would depend on the materiality of the differences between the comparators and the complainant (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)".

[61] For a helpful overview of the uses of comparators in anti-discrimination law and related difficulties see Aileen McColgan "Cracking the Comparator Problem: Discrimination, Equal Treatment, and the Role of Comparisons" (2006) 6 *European Human Rights Law Review* 650.

[62] Sandra Fredman, "The Future of Equality in Britain", Equal Opportunities Commission Working Paper No.5 (2002), 4; and Aristotle, *Ethica Nicomachea*, V.3 1131a–1131b (trans. into English by Ross W, 1925).

8.029 **Asymmetry signals recognition of past discrimination.** Asymmetry often signals recognition that certain groups—due to past or ongoing discrimination and disadvantage—need greater protection on the grounds of the relevant group characteristic. As a result, when a person from a disadvantaged group—such as a person with a disability—claims that he/she has experienced discrimination it may be difficult to locate a non-disabled comparator who is otherwise similarly situated. This is true since members of a marginalised group will be less likely to be in comparable circumstances to those who are more advantaged.[63] For example, if women have traditionally been overrepresented in certain lower-paid professions, it may not be possible to find a similarly situated male comparator to demonstrate that the lower pay received amounts to direct sex discrimination.[64]

8.030 **Need for a causal link between the treatment and the proscribed ground.** In *L v Equal Opportunities Commission*,[65] the applicant alleged that the defendant employer had subjected him to direct disability discrimination, harassment and victimisation in employment after he had experienced an accident at work causing several conditions which he claimed amounted to a disability. When considering whether the treatment he faced constituted direct discrimination, the court affirmed that it was necessary to find a "causal link" between the disability and the less favourable treatment.[66]

8.031 **Different approaches to determining unfavourable treatment and causation.** In some cases the courts have focussed on identifying an appropriate comparator when deciding whether direct discrimination has occurred since the "reason why" may become clear by way of comparison. In others, the courts have de-emphasised the comparator analysis and concentrated on whether discrimination can be inferred from the factual circumstances.[67] In others, the courts have taken both approaches and confirmed that determining discrimination involves a two-part test.[68]

8.032 **Two-part test to demonstrate less favourable treatment and then causation.** In *M v Secretary for Justice*,[69] a disability discrimination case, the Court of Appeal distinguished between: (1) making a comparison in order to prove less favourable treatment; and (2) determining whether the reason why a person faced such treatment is because of his/her sex, pregnancy, marital status, disability, family status or race. The court cited a two-part test which requires first a determination—by identifying a comparator—of whether less favourable treatment has occurred: the "comparator question". If the comparator analysis reveals less favourable treatment, then the court

[63] *Ibid* (Fredman).

[64] The comparator often reflects the dominant norm or characteristic in society (male, non-disabled, etc.). Fredman notes that "[u]nless the claimant conforms to this norm, she cannot surmount the threshold requirement of demonstrating that she is similarly situated to the comparator. The result is to create powerful conformist pressures". *Ibid* Fredman at 4.

[65] (Unrep., DCEO 1, 6/1999, [2002] HKEC 1390).

[66] See Driver, Federal Magistrate, in *Chung v University of Sydney* [2001] FMCA 94, affirmed on appeal by Spender J at [2002] FCA 186, as cited in *ibid*. The court held that "to substantiate a complaint of discrimination it is not sufficient for you to show that you have a disability and that you have suffered unfair treatment. It is necessary to show that at least one reason for being treated less favourably than other students is based on your disability".

[67] For example, *Sit Ka Yin Priscilla v Equal Opportunities Commission* (unrep., DCEO 11/1999, [2010] HKEC 208).

[68] For example, see *M v Secretary for Justice* [2009] 2 HKLRD 298.

[69] *Ibid* at [45] citing Hayne and Heydon JJ in *Purvis v State of New South Wales* [2003] 217 CLR 92 at 231.

CHAPTER 15

GOVERNMENT EMPLOYMENT CONTRACTS

1. Introduction

Overview of chapter. The Government is the single largest employer in Hong Kong, employing approximately 4 to 5 per cent of the total labour force at any one point in time.[1] Not surprisingly, a significant and diverse body of employment case law has developed to regulate and govern public officers' employment rights, privileges and obligations. This body of case law is in part the product of the courts' struggle to reconcile the private employer-employee relationship[2] between the Hong Kong Government and its civil servants and public officers[3] with the legal fiction that such persons holding such public offices are liable for dismissal at "pleasure", an idiosyncratic divide not unlike that between private and public law generally. This chapter aims to provide an overview of the framework in which the legal principles concerning this area of law operate and to highlight distinctions and similarities between the rights and obligations of public sector employment *qua* the private sector. 15.001

(a) An intention to create legal relations

Dismissal at pleasure not inconsistent with the intention to create legal relations. Like any valid and binding contract, a contract of employment requires both parties to enter into such an agreement with an intention to create legal relations. Therefore, a colonial practitioner attempting to find such an intention would have looked to the Letters Patent, the Colonial Regulations and the Government Regulations to determine whether a relationship of employment existed.[4] As there was a rule at common law that servants of the Crown were dismissible at pleasure, it was almost impossible to find such an intention.[5] This view was challenged in *Kodeeswaran v AG for Ceylon*[6] where the Privy Council held that the rule of being dismissed at pleasure did not preclude the existence of a contractual relationship. It was apparent to the Privy Council that the dismissal at pleasure rule was a well-established 15.002

1 As of 31 December 2008, the Civil Service including civil servants working in government departments, those who have been seconded or posted to subvented or public-funded bodies, e.g. Hong Kong Monetary Authority and Hospital Authority, Judges and Judicial Officers, Independent Commission Against Corruption (ICAC) officers and locally engaged staff working in Hong Kong Economic and Trade Offices numbered 155,840 strong. For other figures, see *Civil Service Branch, Civil Service Bureau, Civil Service Reform Consultation Document* - Annex B Statistics, Government Secretariat, Mar 1999, http://www.info.gov.hk/archive/consult/1999/reforme.pdf.

2 *Kennedy-Skipton v AG* (1951) 35 HKLR 55.

3 Interpretation and General Clauses Ordinance (Cap.1) (IGCO) makes no distinction between civil servants and public officers (in the Chinese language as ... respectively). However, those holding public office in Hong Kong SAR such as members of the judiciary enjoy rights enshrined in the Basic Law that would suggest a public element to their appointment.

4 *Kodeeswaran v AG of Ceylon* [1970] AC 1111 (PC); *R v Lord Chancellor's Department, Ex p Nangle* [1992] 1 All ER 897. See also *Lau Kwok Fai v Secretary for Justice* (unrep., HCAL 177, 180/2002, [2003] HKEC 711).

5 Colonial Regulation 55 provided that: "An officer holds office subject to the pleasure of the Crown, and the pleasure of the Crown that he should no longer hold it may be signified through the Secretary of State, in which case no special formalities are required". See also *Lam Yuk Ming* at [1980] HKLR 815 below where the Court of Appeal observed that art.XVIA of the Letters Patent excluded the common law rule in relation to judges.

6 (1970) AC 1111 (PC). The Privy Council also established that such an officer can recover, on a *quantum meruit* basis, pay which was due to him before his dismissal became effective: *Choi Sum v AG* [1976] HKLR 609. Cf *Kennedy-Skipton v AG* (1951) 35 HKLR 55.

constitutional theory. However, citing *Reilly v R*,[7] Lord Diplock held that the power to determine a contract at will was not inconsistent with the existence of a contract until so determined.[8] Therefore, it followed that the dismissal at pleasure rule would prevent a contractual claim for wrongful dismissal but would not preclude the existence of a contract or a *quantum meruit* claim arising from the termination of such a contract.

15.003 **Contractual relationship between public officers and government.** The legal relationship between government and its public officers was considered in *Lam Yuk Ming v AG*[9] by the Hong Kong Court of Appeal. In *Lam Yuk Ming*, the Government attempted to suspend civil servants who took industrial action using powers contained in Civil Service Regulation (CSR) 611. All the appellants concerned were appointed prior to the enactment of CSR 611. The appellants argued that they were employees for the purpose of their appointment and that the government as employer could not therefore unilaterally alter their terms of employment by passing a new regulation. The Court of Appeal held that the nature of the legal relationship between the civil servants and government was capable of being a contractual one, holding that the power to determine a contract at will (dismissal at pleasure) is not inconsistent with the existence of a contract. On the facts of the case, the Court of Appeal found that there was an intention on both sides to enter into binding contract with mutually enforceable terms. As the memorandum of appointment contained an express contractual clause to vary the terms of service, the court, deciding on contractual principles, dismissed the appellants' claim.[10]

15.004 **Normal principles of contract apply to public officers and government**. In the years following the decision in *Lam Yuk Ming*, the courts have come to hold the position that normal principles from the law of contract apply to persons who are employed by the government or public authorities[11] and the mere fact that public officers hold public office does not in and of itself confer any more rights than those enjoyed by private sector employees.[12] Moreover, the increased judicial recognition of the importance of procedural fairness and accountability has relegated the fiction of being dismissible at pleasure to the annals of legal history.[13]

(b) Basic Law

15.005 **Statutory framework before 1997.** Prior to 1 July 1997, the principal provision in the Letters Patent dealing with the civil service was art.14(1) which provided that the

[7] [1934] AC 176, per Lord Atkin at p.180.
[8] (1970) AC 1111 (PC) at 1118.
[9] [1980] HKLR 815.
[10] See also Trade Unions at para.14.061.
[11] *Fung Yiu Bun v Commissioner of Police* [2002] 4 HKC 15; *Chan Tak Keung v Commissioner of Police* (unrep., HCAL 315/2000, [2002] HKEC 880).
[12] *R v East Berkshire Area Health Authority Ex p Walsh* [1984] 3 WLR 818 at 826, per Sir John Donaldson MR, "Employment by a public authority does not *per se* inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'".
[13] *Khan v AG of Hong Kong* [1987] HKLR 250; *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234; *Rowse v The Secretary for Civil Service* [2008] 5 HKLRD 217; *Lam Siu Po v The Commissioner of Police* (2009) 12 HKCFAR 237.

Governor may constitute and appoint judges, justices of the peace and other public officers as may be lawfully appointed, and who hold such office at Her Majesty's pleasure. This power enabled the Governor to make rules of administration for the civil service but such rules remained subordinate and inferior to the Colonial Regulations.[14]

15.006 **The Basic Law framework.** The Basic Law enshrined the common law framework essential for the creating of economic relationships between parties. All laws previously in force, including the ordinances, the common law, rules of equity and legal relations created prior to 1997 are preserved insofar as they are compatible with the Basic Law and the Bill of Rights.[15] Letters Patent art.14(1) was supplanted by art.48 of the Basic Law which provides that the Chief Executive may appoint or remove holders of public office in accordance with legal procedures thereby maintaining the legal effect of the government regulations previously in force. It has however been suggested that the previous system has not been faithfully replicated under the Basic Law.[16] Whereas Colonial Regulations were issued by Britain through the legislature to direct and guide the Governor in making rules of administration, the Provisional Legislative Council subsequently conferred the Chief Executive with general powers to regulate the civil service.[17]

15.007 **Labour laws that bind the HKSAR Government.** Under the Basic Law, the Hong Kong Special Administrative Region (HKSAR) is vested with full control over its labour resource and retains the autonomy to formulate laws and policies relating to labour. The Employment Ordinance (EO), which regulates labour relations in the private sphere, does not bind the Government and its employees.[18] Legislation such as the Sex Discrimination Ordinance (SDO),[19] Disabilities Discrimination Ordinance(DDO),[20] Family Status Discrimination Ordinance (FSDO)[21] and the Race Discrimination Ordinance (RDO)[22] expressly bind the Government and require the Government to

[14] See fn.5.
[15] Basic Law art.8.
[16] Wesley–Smith P, *Legal Control of the Public Service in Hong Kong*, Asian Journal of Public Administration, Vol.21, No.1 (June 1999), 145–553.
[17] The Provisional Legislative Council on 1 July 1997 passed the Hong Kong Reunification Ordinance (Cap.2601), *HKSAR* v *David Ma Wai Kwan* [1997] HKLRD 761 where the Court of Appeal upheld the constitutionality of the Provisional Legislative Council's actions in passing the Hong Kong Reunification Ordinance. Section 23(3) expressly maintained the continuity of the public service, and s.24(2) vested the Governor's prerogative powers to the Chief Executive including the power to regulate the civil service. On 9 and 11 July 1997 respectively, the Chief Executive promulgated the Public Service (Administration) Order 1997, the Public Service (Disciplinary) Regulation. It is unclear to this day whether the Executive Orders are executive or legislative in nature, see *Association of Expatriate Civil Servants of Hong Kong v Chief Executive* [1998] 1 HKLRD 615 whereby Keith J held that the Executive Orders are nonetheless valid and do not violate the separation of powers doctrine between the Legislature and the Executive.
[18] Basic Law art.147. Section 66 of the IGCO provides that no ordinance should be binding on the State unless it is expressly provided for or unless it appears necessary by implication. Section 4 of the EO does not expressly bind the government. It is not necessary to imply the EO as binding on the government as the Civil Service Regulations provides a comprehensive code for public servants. Employees employed by the government under the Non-civil service scheme are contracted to enjoy equal rights as set down in the EO.
[19] Cap.480, discrimination against men (s.6) and women (s.5), against the married (s.7) or the pregnant (s.8) in the hiring or retention of employees is unlawful as well as contract workers (s.13).
[20] Cap.487.
[21] Cap.527.
[22] Cap.602. The Bill was passed by the Legislative Council on 10 July 2008 but is not yet in force as of the date of publication but should be effective sometime in late 2009. The Bill also makes discrimination on the basis of language unlawful.

ensure its employees' terms of employment and service are in compliance with the Basic Law and the laws of Hong Kong.

15.008 **Constitutional duty of public officers.** Public officers are constitutionally accountable to the Government of the HKSAR[23] and must be permanent residents of Hong Kong.[24] Moreover, the public offices of the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise may only be held by Chinese citizens among permanent residents of Hong Kong with no right of abode in any foreign country.[25] Article 100 of the Basic Law however preserves the employment positions of all public officers who were serving in all Hong Kong Government departments before the establishment of the HKSAR including rank, pay, allowances, benefits and conditions of service. The pay and allowances, system of appointment, assessment, discipline, training and pension rights of public officers are also guaranteed by the Basic Law.

For the purpose of the Basic Law, teachers in government aided schools,[26] university lecturers,[27] doctors employed by the Hospital Authority[28] and doctors employed by statutory corporations[29] do not hold public office.[30] However, for employees who fall within the meaning of a "servant of the Government" under the Crown Proceedings Ordinance,[31] their terms and conditions of employment are protected by the Basic Law.[32]

[23] Basic Law arts 99, 104 whereby the Chief Executive, his principal officials, members of the Executive Council and Legislative Council, judges of the courts at all levels and other members of the judiciary must swear to uphold the Basic Law and allegiance to the HKSAR.

[24] Basic Law arts 3, 99.

[25] Basic Law art.101. Cf The Political Appointment's System scheme where two additional layers of senior political appointments on non-civil servant terms were created between politically appointed ministers (also on non-civil servant terms) and permanent secretaries who are civil servants. When undersecretaries and political assistants with right of abode in foreign jurisdictions were appointed, a political row over the compliance with the Basic Law over such appointments erupted. The legality of such appointees who retain their foreign right of abode remains at large. For the Chief Executive's official position on the legality of the appointments, see http://news.gov.hk/en/category/administration/080604/html/080604en01002.htm.

[26] *Ko Hon Yue v Liu Ching Leung* (unrep., HCA 3494/2003, [2008] HKEC 1314). See also *Chan Chi Loi v Cheng For* (unrep., CACV 243/2003, [2004] HKEC 1575).

[27] *Leung Chak Sang v Lingnan University* [2001] 2 HKC 435; *Jill Spruce v The University of Hong Kong* [1991] 2 HKLR 444; [1993] 2 HKLR 65; *Re The University of Hong Kong* (unrep., HCMP2332A/1990, 3 October 1990) (the court has jurisdiction to stay any ancillary matters that may overtake the proceedings to ensure proceedings determining the final rights of all parties are not prejudiced; courts will balance the risks between parties). Cf *John Ho Hung Chiu v The University of Hong Kong* [1996] 2 HKLR 426 (remedies in judicial review are well recognised but applicants cannot seek a remedy by way of "judicial pronouncement". See also *Ng Ai Kheng, Jasmine v The Open University of Hong Kong* [2006] 2 HKLRD 228.

[28] *Cheng Chun Ngai Daniel v Hospital Authority* (unrep., HCAL 202/2002, [2004] HKEC 1375).

[29] *Matilda & War Memorial Hospital v David Henderson* [1997] HKLRD 356.

[30] *Beeston and Stapleford UDC v Smith* [1949] 1 KB 656 at 663; [1949] 1 All ER 394 at 396, (DC Eng), per Lord Goddard CJ, where it was held that the meanings of "public office" and "public officer" vary according to the context in which the terms are used. The IGCO s.3 defines a public office as any office or employment the holding or discharging of which by a person would constitute that person a public officer.

[31] Cap.300.

[32] Basic Law Ch IV s.6 (arts 99–104). See also *Secretary for Justice v Lau Kwok Fai* [2005] 3 HKLRD 88.

(c) Statutory rights

15.009 **Employment contract terms prescribed by law.** The terms and conditions of the employment contract between public officers and the Government are set out in the laws of Hong Kong, which include the Basic Law, primary legislation and secondary regulations only. Therefore, unless otherwise directed by such laws, public officers (save and except for non-civil service contract workers) cannot rely on external sources to imply contractual rights which purport to confer special or different status regarding their terms of employment.[33] The only employment-related statutes that expressly bind the Government in Hong Kong are the Employees' Compensation Ordinance (ECO),[34] the Personal Data (Privacy) Ordinance,[35] the FSDO,[36] the DDO,[37] the SDO[38] and the RDO.[39]

(i) *Labour Tribunal*

15.010 **Jurisdiction of the Labour Tribunal.**[40] Until *Ho Chee Sing James v Secretary for Justice*,[41] it was not entirely clear whether the Labour Tribunal had jurisdiction over labour disputes between civil servants and the government. The Labour Tribunal being a statutory creature of the Labour Tribunal Ordinance (LTO)[42] is necessarily limited in its jurisdiction and powers by legislation, and the Ordinance does not expressly apply to the Government.[43] A further challenge to the constitutionality attacking the constitutionality of the exclusive jurisdiction of the Labour Tribunal failed.[44]

15.011 **Contractual disputes between public officer and government within the jurisdiction of the Labour Tribunal.** In *Ho Chee Sing James*, the presiding Labour

[33] *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594, where it was held by a majority in the House of Lords that a written provision should be taken to have exhaustively stated the basis on which an employee could be dismissed. Cf *Fonua v Tonga Communications Corp Ltd* [2008] TOCA 2 (AC 04/2008, 25 July 2008) (Tonga CA) where the Togan Court of Appeal held that primary statutes imply certain conditions into contracts of employment of public sector employees. See also *Lam Yuk Ming* [1980] HKLR 815.

[34] Cap.282 s.4(1) which provides that application of the Ordinance is subject to the exclusion of members of the armed forces and other employees of the Hong Kong government who may become entitled to a statutory pension or gratuity as a result of injury.

[35] Cap.486 s.3.

[36] Cap.527 s.17.

[37] Cap.487 s.5.

[38] Cap.480 s.3.

[39] Cap.602 s.3.

[40] See also Chapter 17, Dispute Resolution.

[41] *Ho Chi Sing v Secretary for Justice* [2008] 3 HKLRD 319. See also *Tjong Kee Ming v Secretary for Justice*, (unrep., LBTC 7064/2003) where the Labour Tribunal heard a claim between a civil servant and the Secretary for Justice without considering the question of jurisdiction.

[42] Cap.23.

[43] This position is distinct from that in England and Wales where the civil service there is protected by virtue of s.191 Employment Rights Act 1996. See IGCO s.66 which provides that no ordinance enacted prior or after 1 July 1997 shall bind the Government unless the ordinance expressly provided or unless by necessary implication that the Government is bound. See also para.15.011 below where the High Court held that by necessary implication, the Labour Tribunal had the jurisdiction to hear employment dispute cases concerning public officers.

[44] *Ho Chi Sing v Secretary for Justice* [2008] 3 HKLRD 319 where applicant sought so commence proceedings in the High Court on the basis of various claims based on breach of constitutional rights, and statutory duty under the Prisons Ordinance and Hong Kong Bill of Rights Ordinance. Court rejected that those claims were claims other than contractual matters arising from the contract of employment and that they were mere window dressing and did not oust the exclusive jurisdiction of the Labour Tribunal.

Tribunal Officer transferred a contractual dispute between a correctional services department officer to the High Court after finding that although the nature of the claim was within the jurisdiction of the Labour Tribunal (being a claim for a sum of money arising from a breach of contract), the jurisdiction of the Labour Tribunal was limited to disputes arising from the EO. Since the Government was not bound by provisions contained in the EO,[45] the Labour Tribunal lacked the jurisdiction to preside over employment disputes between the public officers and the Government. The Court of First Instance allowed the appeal and held that while the LTO did not expressly apply to the Government, jurisdiction could be necessarily implied from the Ordinance. Section 23(1)(f) of the LTO conferred rights of audience to "a public officer, not being a barrister or solicitor, who appears on behalf of the Secretary for Justice, if the Secretary for Justice is a claimant or a defendant". Further, under s.13(1) of the Crown Proceedings Ordinance, all civil proceedings against the Government are to be instituted against the Secretary for Justice,[46] and *a fortiori* s.27 which provides that the Government may sue or be sued by its servants in the Labour Tribunal. There are currently no statistics available as of the date of this publication as to the number of claims being brought to the Labour Tribunal by public officers.

It has also been held that the Labour Tribunal does have jurisdiction over cases of tortious liability arising from industrial action by public officers.[47] Likewise, a fixed term contract employee under the "Non-Civil Service Scheme" ought to take their dispute to the Labour Tribunal.[48]

(ii) *Employees' Compensation Boards*

15.012 **Employees' Compensation Ordinance.**[49] The Ordinance provides for the payment of compensation to all employees who suffered injury or death in the course of their employment. The amount of compensation payable is to be first decided by the Commissioner for Labour, upon which a right of appeal lies against the Commissioner's decision to a court under s.6H of the Ordinance.[50]

15.013 **Procedures for the recovery of compensation.**[51] Before a public officer can recover compensation under the Ordinance, s.14(1) requires proper notice of the accident to be given to the Government on or behalf of the public officer, within 24 months but as soon as practicable after the accident and before the public officer voluntarily leaves his office. In cases where notification has lapsed, the District Court has held that a public officer was able to rely upon s.14(4) to invoke the jurisdiction of the court to hear the application notwithstanding that it was not made on time. The Court

45 *Leung Ka Lau v Hospital Authority* (2009) 12 HKCFAR 924 where it was held that the EO had no application to doctors who were still employed in the public sector as civil servants and whose rights were instead governed by the CSR. See also s.31F and U of EO.

46 [2008] 3 HKLRD 319, at 325 [19]; *Ho Chi Sing v Secretary for Justice*.

47 In cases of industrial action, all civil servants will be deemed to have contracts of employment for the purpose of tort liability arising out of industrial action, e.g. *Barretts & Baird Ltd v Institution of Professional Civil Servants* [1987] IRLR 3. See *Lam Yuk Ming* at [1980] HKLR 815, at 821.

48 See para.15.020. It is also expressly stated that such employees would enjoy benefits no less favourable than the provisions of the EO (Cap.282).

49 See Chapter 11 above for detailed commentary on the ECO (Cap.282).

50 The court has discretion to extend time for appeal beyond the stated 42-day limit under ECO s.6H(2).

51 See Chapter 11 above for more details.

was satisfied in *Chan Man Lap v Secretary for Justice*[52] that there was a reasonable excuse for the failure to make the application within the two year limitation period as the superior officers had informed the plaintiff that he was not eligible for statutory compensation when in fact he was.

Once the Commissioner (or the relevant court) has determined liability[53] and decided on the level of compensation, the employer must, pursuant to the statutory scheme, provide lump sum[54] or periodic payments[55] either by agreement or by an order of the court. Pursuant to s.26(1) of the Ordinance, any award granted under the provisions must be credited in the event of separate proceedings by way of common law action.[56]

(iii) *Courts*

15.014 **Contracts between sovereign and subjects.** Historically, under the common law, a sovereign could "do no wrong". As a matter of procedure, the sovereign could not be impleaded in its own courts.[57] Further, the sovereign enjoyed privileges in relation to civil liability as compared to a private person. Notwithstanding immunity from tortious liability, as no action could lie against a sovereign personally (or by extension, its ministers and civil servants), actions against the sovereign for a breach of contract and restitution of property could only be brought by a petition of right which required the prior consent of the sovereign.[58] This position was amended by the Crown Proceedings Act 1947 which removed such privileges and placed the Crown in a similar position as an ordinary defendant to a civil action.[59] The Crown Proceedings Ordinance[60] (modelled upon the UK version) was enacted in Hong Kong in 1957.[61]

15.015 **Civil Procedure to claim against the government.** Detailed provisions governing the procedure to make a claim against the Government are set out in the Crown Proceedings Ordinance and the rules made thereunder. The principal rules are found in Rules of the High Court,[62] Order 77 for claims in the High Court, and Rules of the District Court,[63] Ord.77 for claims in the District Court. Civil proceedings instituted

52 (Unrep., DCEC 261/1998, [2001] HKLRD (Yrbk) 462). The District Court held that the applicant, an officer in the Correctional Services Department, had a reasonable excuse as he was lowest rank in the Correctional Services Department who was told several times by his commanding officers that he did not have an eligible claim, despite the fact that the applicant could have sought independent legal advice but did not. Cf *Wong Tak Man v Shaws & Sons Ltd* [1957] HKDCLR 85; *Yan Hon Kam v Man Hung Concrete Moulding Construction* (unrep., DCEC 133/2001, [2001] HKEC 1197).

53 *Chan Man Lap v Secretary for Justice* (unrep., DCEC 261/1998, [2001] HKEC 1357) whereby it was held that a Correctional Services Officer who was using his own motorcycle and upon return from dinner to High Island Detention Centre from the staff canteen was acting in the course of or incidental to his duties.

54 Applicable for compensation for fatal or permanent total incapacity, and permanent partial incapacity, see ss.6, 7–9. Also relevant for cases where employee requiring attention, see s.8.

55 Applicable for cases for compensation where employee requires attention or suffers from temporary incapacity, ss.8, 10(3) and 20.

56 *Chan Wing Fai v Wong Hon Kwong* (unrep., HCPI 675/2001, [2002] HKEC 1019).

57 Crown Proceedings Bill, Hansard 1957, First Reading of the Bill.

58 Petition of Right Act 1860 (repealed).

59 *Chitty on Contract*, Vol.1 (30th edn), 10.001.

60 Cap.300.

61 *Tang Chai On v AG* [1970] HKLR 209.

62 Cap.4A.

63 Cap.336H.

under the CPO should be made by or against the Secretary for Justice.[64] If there is more than one claim as between the party and the Secretary for Justice representing different departments, the Secretary for Justice may not set-off one claim against another.[65] The claim may be in respect of contractual disputes, tortious liabilities or damages under the relevant discrimination ordinances.[66]

2. Government Employees

(a) Structure and scheme of management

15.016 **Generally.** Persons in the employment of the Government may be divided into three categories, each enjoying different rights and obligations in their relationship with their employer. First, there are those who are appointed as contract workers under the Non-Civil Service Scheme.[67] Secondly, there are those who hold public office whose terms of appointment and termination are governed by the Basic Law but not on civil-service terms.[68] Thirdly, there are public officers and civil servants who are in a contractual relationship with the Government but whose conduct is governed by the Basic Law, legislation, sub-legislation and executive orders. The latter category forms the majority of government employees and includes public officers (but not the heads) of the 12 policy bureaux and the disciplined forces.[69] Furthermore, art.99 of the Basic Law requires that all public servants are responsible to the Hong Kong Government.[70]

(i) *Non-Civil Service Scheme*

15.017 **Contract workers employed under Non-Civil Service Scheme (NCSC) are employees for the purpose of the Employment Ordinance.** The NCSC scheme of employment was introduced in 1999 as a response to a hire-freeze of public officers during the Asian financial crisis, as a measure to alleviate

[64] *Fu Lok Man James v Chief Bailiff* [1999] 1 HKLRD 581; [1999] 2 HKLRD 835, where the courts held that there is no question of vicarious liability. See also *Hahn-Shin Micheline, Suckhi v The Government of HKSAR Bailiff (Operation Section)* (unrep., HCA 1499/2006, [2007] HKEC 232).

[65] *Paul Y Construction Co Ltd v AG of Hong Kong* [1992] 2 HKLR 120.

[66] *K v Secretary for Justice* [2000] 3 HKLRD 777, discrimination against potential schizophrenia, *M v Secretary for Justice* [2009] 2 HKLRD 298, dismissal from the Civil Service as an Administrative Officer for general anxiety disorder, *X v Commonwealth of Australia* (1999) 167 ALR 529, dismissal from the army.

[67] The Non-Civil Service Scheme expressly provides terms that are equal to the protections afforded to the private sector under the EO.

[68] Includes offices of the Chief Executive and principal officials under the Principal Officials Accountability System and political appointees chosen by the Chief Executive.

[69] The bulk of civil servants are further sub-divided into two different classes, namely generalist grades as Administrative Officers and Executive Officers and departmental grades such as Architects, Engineers, Social Workers and members of the disciplined forces. Generalist grades are transferable based upon administrative needs whereas departmental grades are comprised of employees with specialised skills. The grade structure of the civil service has not undergone major revision since the hand-over. See Burns, John P, *Government Capacity and the Hong Kong Civil Service* (Hong Kong: Oxford University Press, 2002) at p.40.
Members of the judiciary and the Independent Commission Against Corruption and disciplined forces are public officers but are employed on terms that are distinct from the general body of public officers.

[70] *AG v De Winton* [1906] 2 Ch 106 (Ch D) where it was held that public servants are not obliged to obey instructions which are unlawful and cannot avoid personal liability by so doing.

labour shortages on more a flexible basis.[71] Some 16,000 to 17,000 employees have been employed under the scheme at any one point in time since the launch of the scheme.[72] Under the scheme, department heads are able to determine the terms and conditions of fixed-term contract workers for up to three years subject to guidelines issued by the Civil Service Bureau. Employees under this scheme must be provided with benefits including rest days, statutory holidays, annual leave, maternity leave and paid sick leave as may be provided in line with the provisions of the EO. Terms however may not be more favourable than civil servants of comparable rank. Under the issued guidelines, the pay offered to such employees should not exceed the mid-point salaries of comparable civil service ranks or ranks of comparable levels of responsibilities. As such employees are not considered public officers, they are not bound by the statutory pay adjustments that occur from time to time.

15.018 **Unequal employment terms.** The scheme was launched with a view to meeting service needs which were short-term, part-time or under review and not to replace the civil service. However, openings that required professional qualifications such as lawyers, accountants, architects, engineers and surveyors have also been made available under the scheme.[73] Further, many NCSC employees have had their fixed-term contracts continuously renewed despite the policy aims. This raised and continues to raise a very real concern over inequality of employment benefits in the civil service and has become a source of discontentment[74] especially since the NCSC employees are remunerated consistently lower than at comparable or equivalent civil service grades.[75]

Due to the large discretion afforded to heads of department over the appointment and termination of such employees, detailed information on the employment situation of NSCS staff in individual departments is not made accessible and available to the public.[76] Further, there is no guarantee that where a NCSC position is converted to a civil service position the employee under the NCSC scheme will be offered the same position as a civil servant. All candidates must go through the official appointment system and any term of service as a NCSC employee does not feature in any calculation of subsequent service as a civil servant.

[71] Prior to the introduction of the NCSC scheme, all temporary staff were employed as civil servants of the lowest grade and limited to 12 months only. The hire-freeze on civil service (save and except for disciplinary forces) recruitment commenced from April 1999 to April 2007.

[72] Legislative Council Panel on Public Service, *Employment of Non-Civil Service Contract Staff*, 17 Dec Apr 2007, LC Paper No. CB(1)377/07-08(03).

[73] HKSAR Government, Press Releases, *LCQ6, Non-Civil Service Contract Staff Scheme,* 21 Nov 2007.

[74] This has led to certain positions being converted to civil service positions. Legislative Council Panel on Public Service, *Review of Employment Situation of Non-Civil Service Contract Staff*, LC Paper No. CB(1)471/06-07(03), Dec 2006.

[75] The Government has been requested to make a review regarding discrepancies in treatment between employees on civil service contracts and those employed under the NCSC. Legislative Council Panel on Public Service, *Updated Background Brief on employment of Non-Civil Service Contract Staff*, LC Paper No. CB(1)784/08-09, Feb 2009.

[76] Legislative Council Panel on Public Service, *Employment of Non-Civil Service Contract Staff*, 19 Apr 2004, LC Paper No. CB(1)1505/03-04(04).

(ii) *Office holders*

15.019 **Office Holders.** The concept of office holders as a special category of persons who are not employed by virtue of a contract of employment with certain privileges attached to their position still exists in the HKSAR today.[77] Categories of such persons who can be truly described as office holders are however declining.[78] Under the Basic Law, public offices include the Chief Executive's office, the executive authorities comprising of the civil service and the disciplined forces and the judiciary. Officials in the Executive Council and Heads of Bureaux are no longer part of the civil service since the commencement of the Accountability System for Principle Officials, and such persons are employed under contract.

15.020 **Chief Executive.** The Chief Executive is head of the HKSAR. Provisions in the Basic Law govern the terms of his or her appointment to office. The Chief Executive must be a Chinese citizen of not less than 40 years of age and a permanent resident with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years. Once assuming office, the Chief Executive must declare all of his or her assets[79] and serve a five-year term, subject to a maximum of two consecutive terms.[80] The Chief Executive must resign if he or she is unable to discharge his duties as a result of serious illness or other reasons, when the Chief Executive has lost the confidence of the Legislative Council in circumstances prescribed under art.52.

15.021 **Principal Officials.**[81] Principal Officials are members chosen by the Chief Executive to head the 12 civil service bureaux. Members who were civil servants and accept appointment to the office of principal officials become full time political employees employed on contract; the new employment packages are separate from the civil service pay scale but are reviewed from time to time at the discretion of the Chief Executive. Under the scheme,[82] the principal officials are accountable to the Chief Executive for the success or failure of their policy initiatives and where necessary, the Chief Executive may terminate the contracts of the principal officials. Further, the terms of such officials are limited to five-year terms and must not exceed that of the Chief Executive who nominated them. Pursuant to their terms of service, principal officials are required to follow the Code for Principal Officials under the Accountability System.[83]

77 Letters Patent art.16 provided that, subject to arrangements protecting judicial tenure, the Governor may, subject to such instructions from the Secretary of State of the Colonies upon sufficient cause, dismiss or suspend from the exercise of his office any person holding any public office within the Colony, or take other disciplinary action as may seem desirable.

78 *R v BBC Ex p Lavelle* [1983] 1 WLR 23, whereby Woolf LJ commented that the distinctions which previously existed between pure cases of master and servant and cases where a person holds an office are no longer clear. See also *Percy v Church of Scotland Board of National Mission (Scotland)* [2006] 2 AC 28; and *McMillan v Guest* [1942] AC 561.

79 Basic Law art.47.

80 Basic Law art.46.

81 In the pre-political appointees' era, certain posts were explicitly removed from the civil service, e.g. the Director of Audit and the Director of the ICAC to strengthen their independence and make clear their direct line of accountability.

82 No primary legislation was used to effect the change. The functions and office exercised formerly by civil servants were transferred by virtue of Interpretation and General Clauses Ordinance (Cap.1) s.54A.

83 Code for Principal Officials Under the Accountability System, 28 June 2002, GN 3845.

(iii) *Judiciary*

15.022 **Independence of judiciary enshrined in Basic Law.**[84] The independence of the judiciary is enshrined in the Basic Law[85] and is protected by the method and criteria of their appointment. Judges are chosen on the basis of their judicial and professional qualities and appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, members of the legal profession and eminent persons from other sectors.[86] Unlike the legislature and the Chief Executive, there is no requirement for judges to be permanent residents of Hong Kong as they can be recruited from other common law jurisdictions save and except for the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court.[87]

15.023 **Security of tenure for judiciary.** Judges are provided with security of tenure.[88] The appointment or removal of the judges in the Court of Final Appeal and the Chief Judge in the High Court must follow procedures prescribed in the Basic Law and require the endorsement of the Legislative Council.[89] It is a criminal offence to attempt to influence the Judicial Officers Recommendation Commission.[90] Further, a judge may only be removed for inability to discharge his or her duties or for misbehaviour by the Chief Executive upon the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal consisting of no less than three other judges.[91] Any recommendation to terminate the appointment must be endorsed by the legislature.

The same rights protecting security of tenure preserves and protects the pension rights of judges in employment during the handover and those who had retired by then. However, there are no express provisions in the Basic Law preventing the reduction of or other benefits of subsequent appointees.

(iv) *Ministers of religion*

15.024 **Intention to create legal relations for religious office holders in England & Wales.** Traditionally holders of religious office have an awkward status at law; the position of

84 While magistrates hold public office in the traditional sense, they are expressly not mentioned in the Basic Law and hold office on terms renewable by contract every three years in Hong Kong: cf the position in *Knight v AG* [1979] ICR 195 where it was held that justices of peace and magistrates are office holders.

85 Basic Law art.2.

86 Basic Law art.88. Judicial Officers Recommendation Commission Ordinance (Cap.92) s.3 provides that the Chief Justice shall be the chairman of a committee that consists of the Secretary for Justice, seven members appointed by the Chief Executive which must include one barrister and one solicitor holding valid practicing certificates and three lay members. Section 3(1A) also prescribes that the Chief Executive must consult the Bar Council and Law Society for the appointment of members to the Commission. Section 4 also provides that no member of a pensionable office (other than a judge) or receiving emoluments from the public revenue may be a member of this commission.

87 Basic Law arts 2 & 90.

88 Basic Law art.93.

89 Basic Law art.90.

90 Judicial Officers Recommendation Commission Ordinance (Cap.92) s.12.

91 Basic Law art.89, the Chief Justice may be investigated and such tribunal must be appointed by the Chief Executive consisting of no less than five local judges.

a minister of religion is the position of a person who holds an ecclesiastical office,[92] and not the position of a person whose duties and rights are defined by contract.[93] They are neither civil servants nor are they private employees, but their employment relationships are nonetheless governed by public and not private law.[94] However, there are clear indications that in common law jurisdictions, courts are moving away from the previously strict presumption held in England & Wales that ministers of religion are incapable of being appointed under a contract of employment.[95] In *New Testament Church of God v Stewart*,[96] the English Court of Appeal held that an employment tribunal was not required to consider the relationship between a minister and his church with the presumption that there was no intent to create legal relations. Whether such intent exists depended on the facts of each and every individual case, e.g. whether the beliefs of the religion entitled legal relations to be presumed.

15.025 **Churches and temples regulated as statutory incorporations in Hong Kong.** While there are no cases to date deciding the status of ministers of religion in Hong Kong, churches and temples are regulated under statute as statutory incorporations.[97] In Hong Kong, the office of the … or temple keeper is either directly appointed by the Chinese Temples Committee[98] or by way of tender. The appointment may also be terminated on one month's notice in writing. However, the same committee may also delegate the administration of a temple and its revenues to an agent; in such a case, it is unlikely that there will be an intention to create legal relations or a contract in employment. It is clear, however, that most religious organisations[99] in Hong Kong are capable of creating legal relations with their employees. In *Lok Suk Ling v The Methodist Church Hong Kong*,[100] the Court of Appeal considered a dispute over compensation for outstanding leave of an employee of the Church[101] who held the position of Director responsible for the management of a Church centre until the centre closed down. The court held that such cases were within the jurisdiction of the Labour Tribunal.

[92] *Marshall v Graham* [1907] 2 KB 112. Phillimore J held that an established church is not made a department of the State but that the process of establishment means that the State has accepted the church as the religious body and that such body has important links with the state. However, such links provide the church with a unique position but not that of a department of state.

[93] *Re Employment of Church of England Curates* [1912] 2 Ch 563.

[94] *Diocese of Southwark v Coker* [1998] ICR 140. See *Percy v Church of Scotland Board of National Mission (Scotland)* [2006] 2 AC 28 at [15] where Lord Nicholls explained the distinction between public office and an employment of contract.

[95] The underlying principle is based on a belief that religious ministers are called to their profession by spiritual motivation and the nature of the work does not lend itself to an intention to create legal relations. *President of the Methodist Conference v Parfitt* [1984] QB 368; *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 at 329, per Lord Templeman who held that a pastor does not devote his working life but his whole life to the church and his religion and that his duties are dictated; cf *Diocese of Southwark v Coker* [1998] ICR 140. See also *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309 where it was held by the English Court of Appeal that a Granthi (priest) at a Sikh temple was not employed under a contract of service.

[96] [2008] ICR 282.

[97] See e.g., Chinese Temples Ordinance (Cap.153) and China Congregational Church Ordinance (Cap.1009).

[98] Chinese Temples Ordinance (Cap.153) s.10.

[99] Unlike other organisations and perhaps for historical reasons, the Church of England Trust Ordinance (Cap.1014) does not expressly provide powers for the trustees to employ any person. It is unlikely that the Bishop of Victoria, Hong Kong is under a service of contract.

[100] (Unrep., CACV 355/2001, [2001] HKEC 1563).

[101] The Methodist Church Ordinance (Cap.1133) s.4 provides the Church corporation with residual power to do other things as may appear to be incidental or conducive to the aims and objects of the church.

(v) *Disciplined forces*

15.026 **Disciplined forces capable of a contractual relationship with government.** Unlike England & Wales,[102] Hong Kong police officers do not hold a unique common law office but are employed by the Government[103] under terms set out in the Police Force Ordinance[104] and the Police Force Guidelines. Like with civil servants, the Government is vicariously liable for wrongful acts by police officers.[105] Likewise, the same principles apply to officers of the correctional services,[106] fire-fighters[107] and the Independent Commission Against Corruption.[108]

(b) Civil servants

15.027 **Public officers capable of a contractual relationship with government.** The fact that one holds public office is not inconsistent with having the status of an employee under a contract of employment.[109] The English Court of Appeal has held that it is possible for prison officers to be employed under a contract of employment; whether they have in fact been so employed depends on whether elements of a contract have been made out, namely was there an offer and an acceptance of that offer with consideration and the intention to create legal relations.[110]

15.028 **Composition of the Hong Kong Civil Service.** The entire Hong Kong Civil Service consists of 12 policy bureaux and 67 departments and agencies.[111] Public officers do not have contracts of service with the government *per se* but are deemed to be in a contractual relationship. Their employment conditions are not regulated by the

[102] Police forces in the United Kingdom are neither part of the civil service nor local government officers. They hold a unique common law office under the Crown and therefore the ordinary rules of employer and employee or master and servant do not apply to the police who are not subject to principles of ordinary employment law. See *AG for New South Wales v Perpetual Trustee Co Ltd* [1955] AC 457 (PC); *Fisher v Oldham Corp* [1930] 2 KB 364 (KBD).

[103] *Fung Yiu Bun v Commissioner of Police* [2002] 4 HKC 15; *Chan Tak Keung v Commissioner of Police* (unrep., HCAL 315/2000, [2002] HKEC 880).

[104] Cap.232.

[105] *Kimmy Suen King On v AG* [1987] HKLR 331, at 333, per Silke JA who held that when considering the liability from wrongful actions of an officer in the Police Force, references to police cases in other jurisdictions may well be of little use as the method by which they are given authority differs considerably. In Hong Kong such a person is a Crown servant and his authority derives from the Crown. Crown Proceedings Ordinance (Cap.300), s.4 makes clear the liability of the Crown in respect of tortious acts committed by its servant.

[106] *Shau Lin Chi v Secretary for Justice* [1998] 4 HKC 562; [1999] 2 HKC 585.

[107] *R (on the application of Dunbar) v Hampshire Fire & Rescue Service* [2004] ACD 38 where Elias J held that although fire-fighters were subject to employment contracts, such contracts were superimposed by a statutory regulatory framework. Where the issue concerned whether the government was acting lawfully and in accordance with statutory rights conferred upon such employees, judicial review was appropriate.

[108] Civil servants are not precluded from going on tours of service with the ICAC, see CSR 176(7).

[109] *Kodeeswaran v AG of Ceylon* [1970] AC 1111; *Ranaweera v Ramachandran* [1970] AC 962 (PC) (members of income tax board of review were not Crown servants or "public officers" because they were analogous to independent arbitrators); *Suttling v Director General of Education* (1985) 3 NSWLR 427. See further *R v Civil Service Appeal Board, Ex p Bruce* [1988] 3 All ER 68 (affirmed [1989] 2 All ER 907; *R v Lord Chancellor's Department, Ex p Nangle* [1992] 1 All ER 897 (civil servant had contract of employment with the Crown and therefore should challenge the fairness of disciplinary procedures by way of a private law action rather than by way of judicial review).

[110] *McClaren v Home Office* [1990] COD 257, in England, prison officers were employed on a purely statutory basis. See also *Shau Lin Chi v Secretary for the Civil Service* (unrep., HCAL 4/1999, [2000] HKEC 374) where *McClaren* was considered.

[111] As of May 2015.