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THE EMPLOYMENT
LAWS OF HONK
KONG AND CHINA

By R.B.E. Price

Foreword

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Those who go before face the most challenging task. They must find the path that effectively decides the journey for most later travellers. They must see its beginning and ending; its chief features; its attractive and unattractive byways; and they must demonstrate why it is worth making the journey at all.

In this trail-blazing work on employment law, the author has achieved a great deal by these standards. His analysis of the employment laws of Hong Kong bears the marks of his academic scholarship and experience with the relatively developed legislative and common law principles applicable in the Hong Kong SAR. Taking as his text, the remarks of Yeung J in *Chow Wai Yee v Fong's National Engineering Co. Ltd.*¹, "In Hong Kong there is no collective bargaining. There are no 'standard conditions' set down by trade unions or enacted by legislation. There is

* Justice of the High Court of Australia (Retd) 1996-2009; President of the Institute of Arbitrators & Mediators Australia 2009-

¹ [1996] 2 HKLR 52 at 55; [1996] HKCFI 33 at [13].

no statutory meaning of ‘normal working hours’”, he observes that this is only part of the full story:

“... [E]mployees in Hong Kong do have a range of minimum standards of employment under the Ordinance from which no employer is free to depart. It need also be observed that standards in the Ordinance constitute bare minima and are not comprehensive in nature when compared with those in other developed economies”.

A careful reading of the first part of this text demonstrates that there are several Ordinances and other laws applicable in the Hong Kong SAR (including the *Basic Law* itself) which bear upon the employment conditions of employees (and the duties of employers) in Hong Kong. In fact, the network of such laws is actually quite extensive. And, as we all know, in a common law system, there is never ultimately a gap in the law. If no enacted law touches upon a controversy, a principle of the unwritten law will commonly be available to help resolve it. That principle will be derived from the common law: by processes of analogous reasoning from earlier decisions containing discussion of broadly stated rules, based on notions of fairness and reasonableness as perceived by succeeding generations of judges.

So that is what the first part of this book is about. The collection of statutory and case law that gives guidance to the rights and obligations of employees and employers in a jurisdiction which has flourished, in part, literally because of its frontier character. A jurisdiction, born of colonial rule, growing on the back of the enterprise, innovation and hard work of transient populations, which lacked some of the protections put in place elsewhere by more settled, assertive and questioning societies, such as my own.

The book bears witness to the growing impact on Hong Kong society of many protective notions derived from common law decisions in other jurisdictions, supplemented by an ever-increasing number of enacted laws aimed at stamping out the worst forms of abuse that can arise in the labour conditions of significantly unregulated economies.

The author takes us through the general Hong Kong law on employment conditions; on workplace safety; on the power to terminate employment; on remedies for wrongful dismissal; on special features of the law that have evoked specific legal responses (racial discrimination; sexual discrimination; victimisation and harassment) and the particular needs for protection of foreign domestic employees.

The laws on these subjects may not be as detailed and developed as in jurisdictions such as the United Kingdom, Australia, Canada and New Zealand, whose cases are cited. But the principles expressed seem familiar enough. In part, this is because of the shared legacy of the common law of England.

It is the second part of the book that constitutes the truly major challenge for the author, when he turns to explain, and to outline, the major features of the emerging employment laws of the People's Republic of China. As he points out in his preface, those who examine the key laws on such subjects in the PRC "take both caution and heart: while the law is extremely formative, the rule of law is tentatively but unmistakably taking hold on the mainland". This book is fascinating both for the specialist and generalist lawyer because of the descriptions that are offered of the emerging employment laws of China. The difficulties are candidly acknowledged, including problems of translation; apparent

inconsistencies of applicable rules; and seemingly haphazard application of those rules. Yet it is here that we feel somewhat like the poet Keats *On First Looking into Chapman's Homer*. Here is a realm of gold now undergoing an admirable process of replacing the unpredictable dictates of 'men of virtue', under the Confucian ethic, by the rule of objective laws upheld by freshly minted courts.

This new Chinese revolution is as astonishing and daring as its predecessor. In parallel with the amazing changes in the Chinese economy, in little more than a generation, it seeks to graft onto a somewhat alien landscape a rule of law notion that is in many ways novel, unexpected and still fragile. That there should be problems, difficulties and inconsistencies is unsurprising, given the novelty of the enterprise. However, as the author points out, the foundations for basic national laws on employment conditions, prohibited employment features, minimal protective contents, protection for workplace injuries, safeguards from discrimination and provisions for civil liability in the employment context are all growing up.

As well, detailed provisions are emerging in China with respect to the termination of employment, with quite specific enactments governing the entitlements of employees and the obligations of employers in the event of termination, including by dismissal. With the growth of the Chinese economy has come widespread access to new technology. Millions of Chinese citizens now visit and admire countries that have replaced the rule of money, guns and power by the rule of law. Through the internet, and other means of telecommunications, most young citizens now have access to the world as it is. With the unstoppable ideas that come from such technological advances have come civic notions that lie deep in the

hearts of most men and women. That arbitrariness shall be replaced by order. And that order shall normally be just, rational and impartial in the event of a dispute.

Whatever differences may arise about other attributes of human rights, it was virtually inevitable that those human rights concerned with employment would emerge fairly quickly, both in Hong Kong and the PRC, as a consequence of their rapid economic advancement. That advancement is the combined product of generally benign administration; skilful and adventurous entrepreneurship; and the committed activities of employed labour. The Chinese economic miracle, with its overflow and reflections in Hong Kong, could not have happened (and would not have been sustained) without the ongoing concurrence of this trinity of forces.

So this is where the subject matter of this book brings together the dual elements of economic advancement and fundamental human rights. At the beginning of the modern era of human rights, it was recognised that the respective entitlements of employers and employees were primary features of the core necessities of human existence, required for a successful and functioning modern nation state. It is no coincidence that the oldest agency of the United Nations, created originally by the *Treaty of Versailles* of 1919 in the League of Nations, was the International Labour Organisation (ILO). Amidst the many mistakes of that post-Great War settlement, at least the victors correctly understood that economic justice in the employment relationship, was central to the avoidance of civil unrest and perilous wars and the creation of a harmonious society whose people felt secure in one of the most essential activities of their lives: work.

In the efforts after the Second World War to establish universal principles of human rights initially in the form of the *Universal Declaration of Human Rights* (UDHR) of 1948, several key provisions recognised the importance of fundamental employment rights that now find their reflections in the laws of Hong Kong and China, described in this book. Thus, Article 23 of the UDHR provides a framework for the particular employment laws that are described in this book:

“23.1 Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

23.2 Everyone, without any discrimination, has the right to equal pay for equal work.

23.3 Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

23.4 Everyone has the right to form and to join trade unions for the protection of his interests.”

Article 24 goes on to provide that:

“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay”.

The detailed laws described constitute an attempt, both by the procedures of enactment and of judicial elaboration (including in the PRC) to spell out, in greater detail, the foregoing fundamental rights. When the *International Covenant on Economic Social and Cultural Rights* (ICESCR) was adopted by the General Assembly of the United Nations in 1966, it too contained elaborations of the core principles of employment human rights, foreshadowed in the UDHR. Along with the rights to the equality of the sexes (Art 3), to a democratic society (Art 4), to social security (Art 9), to family support (Art 10), to food, clothing and

shelter (Art 11), to health (Art 12), to education (Art 13) and to participation in cultural life (Art 15), the ICESCR specifically provided recognition of “the right of everyone to the enjoyment of just and favourable conditions of work”. This must include minimum remuneration, safe and healthy working conditions, equal opportunity for all workers, and rest leisure and reasonable limitation of working hours, with periodic and remunerated holidays (Art 7) and the right to join trade unions of choice (Art 8).

It is sometimes said that many countries of the Asia-Pacific region feel more comfortable with the notions of human rights as expressed in the ICESCR than in the companion document, the *International Covenant on Civil and Political Rights* (ICCPR). That latter is occasionally viewed as presenting more Western concepts of universal human rights. However that may be, it is not without significance that employment rights were amongst the fundamentals recognised at the beginning of the modern era of human rights. So it is unsurprising that they should be early recipients of legal attention, both in Hong Kong and China. This book spells out the detail of the applicable rights. And it shows the priority that has been given to them in each of the societies studied.

If the law on employment conditions (and on human rights more generally) is now undergoing much more fulsome elaboration and study, both in the Hong Kong SAR and in China, this should cause no surprise. A similar evolution has occurred in other major economic settings in the world. Most notably, it has occurred in the European Union. As Dr. Paul Kearns has remarked recently²:

² P. Kearns, “The EU and Human Rights: An Unlikely Evolution” (2009) 79 *Amicus Curiae* (Soc Advd L Studies) 3 at 3-4.

“... [T]he EU began as a totally economically-oriented body of six states concerned with primarily coal and steel, and the enhancement of their trade in these areas. It was only very gradually that the EU moved towards political initiatives as well as economic ones, having made changes from the EEC to the EC to the EU. At its inception, therefore, the organisation did not have reason to believe that it would need to involve itself with human rights issues. Moreover, the Council of Europe, in Strasbourg, was specifically developed to regulate human rights in the contracting states ... So it was not self-evident that the EU would begin replicating this remit itself (all the EU states are now party to the Convention) ... Another reason why human rights did not feature as a EU concern at its beginning is that the founding states were disoriented after World War II and did not wish to give up significant power to an international body, such as the EU. Human rights ... are now a highly topical concern, but that was not the case in 1945, when the *Universal Declaration of Human Rights* had not even been born.

As Dr. Kearns explains, the foundation for human rights in Europe came through the early development of principles in the employment field concerned about labour discrimination, such as the principle of “equal pay for equal work”. From these early and special aspects of human rights protection, topical for a rapidly growing economic zone arising from conditions of serious disruption, the broader movement for the protection of a wider range of universal rights grew steadily, inexorably and with growing power.

The interesting question which is left by a reading of this book is whether a similar evolution is now occurring in Hong Kong (where a start was made in the fundamental rights expressed in the *Basic Law*) and in the PRC of China. Once it is recognised that individuals must enjoy enforceable local manifestations of universal rights in the employment sphere, it will become increasingly clear that the same people should enjoy such rights in other spheres of life, beyond employment.

That is why the journey that is begun in this book is at once prescient and important. In law, context is critical. And the context of the subject matter of this book is the way in which two disparate legal jurisdictions have been grappling with the detailed provision of laws to regulate, in a just way, the relations between their employees and employers.

I congratulate the author and the publisher on an innovative book, published in a world of global markets and trade. Its subject matter will be of interest far from China and Hong Kong. And the key to understanding that subject matter is provided by the context of the universal instruments of human rights. Those instruments insist that basic principles of justice must be observed in the employment relationship. And that relationship will itself be a paradigm for others, in respect of which still broader protections will eventually emerge.

Sydney

1 December 2009

A handwritten signature in black ink, appearing to read 'Michael Kirby', written in a cursive style.

MICHAEL KIRBY