COMMENT

The Sorry State of Hong Kong Labour Law

Trade unions came into existence in the 19th century as a response to the abuses of the capitalist system. They were needed to redress the power imbalance that otherwise existed between employers and individual workers.

Today, trade unions are legal in Hong Kong, their status recognised in domestic legislation,[1] in the Hong Kong Bill of Rights Ordinance (Cap.383),[2] and in the Basic Law itself[3]. Even the right to strike is embedded in art.27 of the Basic Law, making Hong Kong one among a tiny group of nations worldwide with a constitutional right to strike.

The natural function of a trade union is to represent its members in the process of collective bargaining. This function was highly valued in 20th century Britain. During most of that period, very few labour laws were enacted, the Governments adopting a policy of *laissez-faire* non-interventionism in the view that laws were not necessary if trade unions could just as easily secure workers' interests through negotiated agreements.[4] Such agreements have an advantage over labour laws in that they have a fixed term and can be easily amended to adapt to changing conditions.

In Hong Kong, there is no entitlement to collective bargaining, despite multiple chastisements of the HKSAR Government by the International Labour Organization for its failure to provide a suitable legal framework.[5] This leads to an emasculated, not to say frustrated, work force, especially the blue collar work force, who have no entitlement to negotiate with their employers, and therefore no choice but to accept on a take-it-or-leave-it basis whatever conditions of work that are offered, even if that means long hours of work without a break, no toilet facilities, wages that do not keep pace with inflation and a general decline in any sort of dignity at work. This is the reality experienced by countless workers across Hong Kong, including the Hong Kong International Terminals dockers now in the 6th week of their strike.[6]

1 Employment Ordinance (Cap.57) and Trade Union Ordinance (Cap.332).

2 Part II, s.8 art.18.

3 See art.27.

4 See generally O Kahn-Freund, "Legal Framework" in A Flanders and H Clegg (eds), *The System of Industrial Relations in Britain* (Oxford: Basel Blackwell, 1954); and P Davies and M Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993), 8–24.

5 See ILO CFA Case 1942 heard in 1998, concerning the repeal by the Provisional Legislative Council of pre-handover collective bargaining legislation (ILO CFA Report http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:3200970768663525::NO: 50002:P50002_COMPLAINT_TEXT_ID:2904422 accessed 2May 2013); and ILO CFA Case 2186 heard in 2003, concerning mass dismissal of Cathay Pacific pilots (ILO CFA Report http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:3200970768663525:: NO:50002:P50002_COMPLAINT_TEXT_ID:2906947 accessed 2 May 2013).

6 As at the time of writing, 2 May 2013. See P Siu and E Tsang, "May Day Marches Draw Thousands with Hong Kong Dock Strikers Leading the Charge" *South China Morning Post*, May 2, 2013, C3.

This is not to say that the Government has completely ignored labour law. Recent years have witnessed some welcome reforms, in particular a minimum wage law, enacted in 2010.[7] The Government can even point to a credible record of legislative activity over the past decade. Of the 346 bills introduced since the year 2000, 30 were labour-law related.[8] However, all but three of them consisted of the tweaking of older enactments some of which, like the Employees' Compensation Ordinance (Cap.282) and Employment Ordinance, are chronically in need of reform if only to ensure that compensation levels and fines keep abreast of inflation.

The fact is that there continue to be major gaps in the statutory framework, among them working hours and overtime pay laws; rest break laws; age and sexual orientation discrimination laws; pay equity laws; employment protections for part-time workers; family friendly laws such as those for paternity and parental leave; laws to protect foreign domestic workers from the abuses that arise from their appalling work conditions; laws for the recognition of trade unions for collective bargaining purposes; and the recognition of collective bargains for legal enforcement purposes. Moreover, many of the reform initiatives from earlier years have fallen rather short of their objectives, for instance in the areas of job security,[9] and protection against trade union discrimination.[10] Of the many gaps, perhaps none compares to the virtually untrammelled freedom enjoyed by employers to stagger employment contracts to avoid the application of all but the basic provisions of the Employment Ordinance. This is done by employing workers on a sequence of short term contracts so that workers do not acquire continuous employment status, the threshold condition to qualify for the major rights and protections under the Employment Ordinance,[11] a practice embedded in the Employment Ordinance, reluctantly approved by Hong Kong's Court of Appeal.[12]

Employers are also free to outsource and subcontract their work, even their core activities, in order to avoid the messy business of dealing with workers. In doing so, they abdicate their social responsibilities, reduce labour to a commodity and participate in the infamous "race to the

7 For a history of the Ordinance and the background to its enactment see R Glofcheski, "A Minimum Wage Law for Hong Kong", (2010) 40 HKLJ 531.

8 See Legislative Council website at http://legco.gov.hk/database_leg_pro/english/bills/bills.htm accessed 2 May 2013.

9 Part VIA of the Employment Ordinance, introduced in 1997 to address unfair dismissal, provides very little protection and pales by comparison to the UK model which inspired it: see R Glofcheski, "Job Security Issues in a Laissez-faire Economy" in R Blanpain, W Bromwich and O Rymkevich (eds), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (Kluwer Law International, 2009) 441–458.

10 See Glofcheski (*ibid.*).

11 The notorious "4-18" rule discussed in Glofcheski (*ibid.*).

12 *Wong Man Sum v Wonderland Seafood Restaurant* [2009] 6 HKC 182.

bottom",[13] the spoils of victory inevitably going to the subcontractor with the lowest bid, ensuring a minimum of wage levels and working conditions including safety standards for the workers.

Not surprisingly, in this environment, some workers may turn to industrial action. What is actually surprising is that it doesn't happen more often. The irony is that despite its constitutional status, there is no job protection for striking workers. Strike is not included in Hong Kong's law as a protected form of industrial action.[14]There is nothing in Hong Kong law to prevent the striking worker's dismissal on a month's notice. This is the position of the Hong Kong International Terminals dockers currently on strike.

Some commentators from the business lobby have derided the striking dockers and their leaders as being disruptive of port business and causing damage to Hong Kong's business-friendly reputation.[15] This is a bit laughable, none of those commentators having addressed the undignified and unsafe conditions that have come to light in recent weeks — some of Hong Kong's better-kept secrets — nor the embarrassingly unfavourable comparison of the dockers' wages with inflation rates. The argument that Hong Kong's economy is threatened is beginning to sound a bit tired.

Seen in a broader perspective of the weak labour law regime that governs all workers in Hong Kong (save for the professional classes who through their employment contracts are treated according to international standards), these dockers deserve our respect and admiration. They have put their jobs on the line — not an easy decision you can be sure — to secure better and safer working conditions for themselves and, should they be successful, even their non-striking colleagues. They represent not only their own interests but those of all workers in Hong Kong. Through their actions they have not only brought to the public's attention their scandalous working conditions, they have also exposed the parlous state of Hong Kong's labour laws. One can only hope the Government will, as a matter of urgency, recognise that labour-law reform is a necessary priority and requires immediate attention.[16]

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[13] See eg A Chan, "A 'Race to the Bottom': Globalization and China's Labour Standards" in China Perspectives, No 46, March-April 2003.

[14] As confirmed by the Hong Kong Court of Final Appeal in *Campbell Richard Blakeney Williams v Cathay Pacific Airways Ltd* (unrep., FACV 13 and 14/2011, [2012] HKEC 1311.

[15] See eg John Meredith, "Leave Political Grandstanding Out of Negotiations over Dockers' Dispute", *South China Morning Post* April 30, 2013, p A17.

[16] The dockers' strike was settled on May 6, 2013. See P Siu and P Moy, "Strike ends after 40 days as dockers accept 9.8pc pay rise", *South China Morning Post*, May 7, 2013, A1, at http://www.scmp.com/news/hong-kong/article/1231549/judge-rules-docker-worker-sit-can-continue.