

Why Rights Are Not Enjoyed: The Case of Foreign Domestic Helpers

In the past few months, foreign domestic helpers have been in the headlines. In May, an employer was found guilty and sentenced to 18 months imprisonment for causing grievous bodily harm when she placed a hot iron on the hands of her domestic helper.¹ The following month, the Court of First Instance convicted a police sergeant of indecently assaulting his domestic helper.² In July, a prominent solicitor was sentenced to seven years imprisonment for raping and indecently assaulting his domestic helper.³ While this rape trial was in its closing stages, two cases of physical abuse were reported by the media, one in which a domestic helper alleged that her employer had scalded her arm with hot water, and the other where it was claimed that the employer had branded the helper's arm with a hot iron.⁴

These reports represent the more serious and dramatic abuses against domestic helpers. They should not, however, distract us from the more routine and widespread forms of abuse that in the aftermath of *HKSAR v Liu Man-kuen*,⁵ were discussed in the press. In particular, the plight of domestic helpers from Indonesia was highlighted.⁶ In response to these articles, the government, through its Commissioner for Labour wrote to the *South China Morning Post* newspaper stating categorically that 'Indonesian domestics working in Hong Kong enjoy the same rights and benefits as local workers do under labour legislation.'⁷ On the face of it this statement is accurate, yet in reality it is also callously incomplete and therefore misleading.

The Employment Ordinance and the domestic helper contract

It is true that domestic helpers, along with local employees, have rights under the Employment Ordinance (Cap 57). For example, section 17 makes it mandatory for every domestic helper to be given at least one rest day — defined as 'a continuous period of not less than 24 hours during which an employee is entitled ... to abstain from working for his employer' — in every period of seven days. Section 39 entitles a domestic helper to the same number of statutory

¹ *HKSAR v Liu Man-kuen*, ESCC 1228/2000; reported in *South China Morning Post*, 25 May 2000. On appeal to the Court of First Instance, Hon Lugar Mawson J upheld the sentence of 18 months imprisonment (HCMA 604/2000).

² *South China Morning Post*, 13 July 2000.

³ *HKSAR v Tang Kwok-wah*, HCCC 29/2000; reported in *South China Morning Post*, 21 July 2000.

⁴ *South China Morning Post*, 20 July 2000 and 21 July 2000.

⁵ Note 1 above.

⁶ *South China Morning Post*, 7 and 8 June 2000.

⁷ *South China Morning Post*, 11 June 2000.

holidays as other employees. She has annual leave provisions under Part VIII A of the Ordinance and, unless there are grounds for lawful dismissal, her employment can only be terminated after notice or with payment in lieu of notice. Domestic helpers also have other employment protection such as the right not to be dismissed when pregnant or when sick. The protection offered by the Employment Agency Regulations (Cap 57A) which stipulates that an employment agency may not charge a successful job-seeker an agency fee of more than 10% of the first month's wages,⁸ are as applicable to the migrant worker as they are to any other worker.

Indeed, given that the minimum wage⁹ applies only to foreign domestic helpers, they are, arguably, better protected than other workers at the bottom end of the wage ladder. It is also probably no exaggeration to say that domestic helpers in Hong Kong have better legal protection than in other parts of Asia. Few other Asian countries have a minimum wage or such clearly stated entitlements to rest days. However, the real situation faced by most domestic helpers also needs to be taken into account. Whilst the Employment Ordinance applies to foreign and local workers equally, foreign domestic helpers suffer significant discrimination in a variety of ways, not least through other regulatory provisions. They may have the same rights but these are often no more than paper rights given their experience in Hong Kong.

The foreign domestic helper's experience in Hong Kong¹⁰

Typically, domestic helpers arrive in Hong Kong from poorer Asian countries such as the Philippines, Indonesia, Sri Lanka, India and Thailand. They come to Hong Kong either because they cannot find work in their home countries or because of the higher wages in Hong Kong. This wage differential makes it predictable that wages below the minimum are a common occurrence. Using the example of the increasing numbers of Indonesian domestic helpers, they typically are not informed of the minimum wage nor are they shown their contracts. They will probably have been told, falsely, that there are two types of contracts for Indonesian domestic helpers in Hong Kong: category A, for which the monthly wage is \$3,670, applicable to those with previous working experience in Hong Kong; and category B, relevant to those with no previous experience of working abroad. Wages for category B can be as low as \$1,000 a

⁸ Regulation 10 (2) and Schedule 2, Part II.

⁹ The minimum wage, presently set at HK\$3670 per month, is determined by the Government from time to time.

¹⁰ Information in this and other sections of this Comment regarding the experience of domestic helpers in Hong Kong is based on the author's personal interviews with domestic helpers and other work in connection with domestic helpers at a para-legal advice centre for migrant workers. For a case study of Indonesian migrant workers see Asian Migrant Centre, *Nowhere To Turn To* (Hong Kong: Asian Migrant Centre, 1994).

month, though more commonly it is \$1,800. Since the wage of a domestic helper in Jakarta is in the region of \$75 a month, even category B wages sound good enough to make the family sacrifices to work abroad.

The Indonesian helper will have signed her contract in Indonesia, usually without being given an explanation of its contents. The standard form contract issued by the Labour Department comes without any translation into the language of any of the main nationalities making up the domestic helper population in Hong Kong and there is no evidence of translations having been made by agencies abroad. When the contract signing takes place, the domestic helper is usually prevented from looking at the figure stated as the wage. The contract is typically given to the domestic helper only as she boards the aircraft for the flight to Hong Kong. Even if the helper has the presence of mind to look at the contract and query the higher salary stated, she will be told not to worry about the discrepancy.

Once in Hong Kong, the newly arrived helper is taken to the agency's premises where she will stay for a few days in order to receive some rudimentary instruction in Cantonese cookery. Whilst at the agency, the helper is told to sign either blank receipts or blank sheets of paper. These receipts are usually in English. The minimum wage and dates are later entered by the agent or the employer. The signed receipts make it difficult for the domestic helper to prove subsequently that she has not been paid or has not been paid in full. Other more devious means of avoiding the minimum wage include taking the employee to the bank to open an account and subsequently withholding the bank card so that withdrawals can be made by the employer a few days after the full wage is deposited into the account. Without video cameras at most cash machines, it is impossible to prove that the withdrawals were made by the employer.

After being transferred to her employer, the Indonesian domestic helper is usually deprived of her rest days for several months. Without rest days, there are few opportunities to meet other helpers and compare salaries and conditions or to seek assistance from counselling and advice centres. She is also deprived of her wages for six months or so. This has the effect of constraining the helper's choice. Even when she knows that she has been wronged under the law, there is pressure to continue working for the same employer. If she gives up this employment, she will have no means of repaying her agent. Furthermore, finding another employer will only mean that she has to serve out another six months or so without a salary. For the Indonesian migrant worker, the problem is made routine by the Indonesian government's insistence that the worker must only find an employer through an agency.¹¹ Agencies routinely charge six

¹¹ At the time of going to press, the Indonesian Consulate in Hong Kong announced that Indonesian domestic helpers renewing contracts with their employers would no longer be required to pay agency fees ('Fees victory lifts helpers' campaign,' South China Morning Post, 7 January 2001, p 2). However, this announcement does not appear to deal with agency fees upon change of employer, nor with initial or first contracts.

months' wages, arranging with the employer to divert to them the helper's wages. Other methods involve making the employee take out a loan amounting to the agency fee, with the loan company paying off the agency fee. This is probably done to avoid fees greater than the maximum of 10% of the first month's wages being detected.

Structural and other disadvantages

Immigration law and policy exacerbate the situation for the helper who has been underpaid or maltreated. If a contract is terminated early (either by the employer or the employee) and she lacks good advice or cannot summon the courage to bring a claim, she will have no more than two weeks in which to leave Hong Kong. After that she remains in the SAR as an overstayer. Domestic helpers are also usually required to return to their country of origin to apply for a visa in order to work with another employer. This rule has been the subject of much complaint by NGOs. The rule was introduced in 1987 in order to deter job-hopping and to protect the interests of employers. In a comment in this journal in 1983,¹² Andrew Hicks observed that, since it is usually the employee rather than the employer who pays the agency fees, the employer's interests are not as great as might have been thought. Assuming the helper is sufficiently robust to bring a claim in the Labour Department, she will be barred from taking up employment until the case is either settled or otherwise completed, often several months later. If she works during this period, she does so illegally. The spectre of being an illegal worker is, however, only one of several factors guiding her actions. Other factors include her family's needs, the costs of multiple visa applications to extend her visa and, since even most shelters charge a small daily fee, the cost of accommodation. If she wins her claim, she will rarely be given her costs, and awards for opportunity costs are never made.

Unequal enforcement

The unequal enforcement of employment laws and regulations is in itself deplorable. When the employee is a foreign domestic helper, however, lopsided enforcement has the added effect of constraining her ability to seek redress. For instance, domestic helper contracts specify both for whom and at which address the domestic helper must work. Working either for a non-contractual employer or in premises other than the contractual place of work constitutes a breach of the domestic helper's conditions of stay,¹³ for which she

¹² Andrew Hicks, 'Admission of Foreign Domestic Helpers: Some Legal Issues' (1983) 13 HKLJ 194.

¹³ Under section 41 of the Immigration Ordinance (Cap 115), the maximum penalty is a fine of HK\$50,000 or two years imprisonment.

can be prosecuted and deported. Despite this, some domestic helpers are compelled by their employers to work, for example, at the home of a relative, or to help out in the business premises of the employer. The immigration rules which insist that she cannot find a new employer without going back to her country of origin often leads the helper to put up with the demands made of her for fear of losing her job. She may know that the extra work is unlawful, but economic realities will cause her to take the risk. When caught by the immigration authorities or the ICAC, legal sanctions against the employee are more certain to follow than the prosecution of the employer.

Cases of helpers working in ignorance of the fact that they are not working for their contractual employer are also not uncommon. Sometimes a helper finds out the true identity of her contractual 'employer' only at the first conciliation meeting at the Labour Department when a complete stranger appears as defendant. In this situation she has little choice but to settle her case as quickly as possible, since a hearing would expose her to investigation and prosecution. Domestic helpers are also sometimes transferred from one employer to another without completing the necessary procedures, thus causing them, unknowingly, to work illegally. Here too enforcement is lop-sided.

The law prohibiting underpayment is similarly unequally enforced. If there is suspicion that the domestic helper agreed to be paid a wage lower than the minimum, it is she, more than her employer, who is likely to be investigated and prosecuted. Experience of the practice of the Labour Tribunal suggests that knowledge of the minimum wage as a legal requirement triggers the procedures that lead to investigation and prosecution by the immigration authorities. Mere knowledge that there was a discrepancy between her contract salary and her actual salary means that the domestic helper is less at risk of prosecution. The exact legal position is not clear. Since ignorance of the law is not normally treated as an excuse, the likelihood is that domestic helpers can be prosecuted even when they are unaware of the minimum wage. Earlier this year the Immigration Department issued a press release¹⁴ expressing its concern over press reports of the underpayment of foreign domestic helpers and encouraged domestic helpers to contact them through their hotline number or by fax or through their branches if they suspected they were being underpaid. This press release contained no assurances that the domestic helper would not be prosecuted, though it stated that the Immigration Department *might* exercise its control to allow the domestic helper to remain in Hong Kong while applying to work for a new employer.

¹⁴ 28 February 2000. This is available at <http://www.info.gov.hk/gia/general/200002/28/immi-e.htm>.

Settlement outside the Labour Tribunal

If the claim is not settled during the conciliation meeting, the domestic helper may find herself in a hearing at the Labour Tribunal. Here, the parties cannot be represented, even in the negotiations for settlement urged upon them by the Presiding Officer. Throughout these proceedings, including the negotiations, each party will often be assisted by an interpreter. Without legal representation, such bargaining is often done in ignorance of the domestic helper's rights under the law. In other words, the employer and employee do not necessarily bargain in the shadow of the law. Their negotiation depends on the degree to which they have both received sound legal advice and if they have not, which is usually the case, the rights of foreign domestic helpers will play, at best, a very minor role.

Lack of sympathy

In general, the foreign domestic helpers' cause is not a popular one. In the past, there have been calls for their wages to be taxed, and complaints of their overcrowding of public spaces, particularly in Central, have been rife. During the recession, there were calls for the minimum wage to be further reduced. It is possible that, within the processes of the Labour Tribunal, the level of sympathy for foreign domestic helpers' claims is also decreasing. There is a feeling, shared by NGOs, that, in the grey areas of law and policy, there has been an increasing harshness in the treatment of illegal work and working for less than the minimum salary. Claimants are now more at risk from investigation than ever before. It is a saddening thought that this increasing intolerance may have been caused by the fact that domestic helpers have become more aware of and more willing to enforce their rights. This familiarisation with legal processes has not been uniform across the different nationalities of domestic helpers and indeed the knock-on effect, it is feared, is that the nationalities who assert their rights are gradually replaced by domestic helpers of other nationalities as preferred employees. At present and for some time now, Indonesian domestic helpers have been learning about their rights and how to enforce them. Amongst employers, the perception is that they are becoming increasingly difficult to control. This may lead to employers preferring other nationalities. These other nationalities will be newer to the scene and less well served by their own support and advice networks. Just as Indonesian helpers are now preferred to helpers from the Philippines, Sri Lankan, Indian and other domestic helpers may well displace Indonesian helpers as employees of choice.¹⁵ Until attitudes

¹⁵ For articles highlighting the plight of domestic helpers from India see 'Indian Maids Denied Rights', South China Morning Post, 27 February 2000 and 'Hidden from Sight', Asiaweek, 13 August 1999.

change, docility, malleability, and dependency are the attributes sought after in a domestic helper. The litigious, the assertive (and the physically attractive) need not apply.

Social attitudes towards foreign domestic workers are, of course, not easily legislated but changes in the law can be made to counteract the disadvantages currently experienced as a result of structural and other inequalities. As noted by the magistrate when sentencing the defendant in *Liu Man-kuen*: 'domestic helpers are vulnerable to abuse within the confinement and privacy of a home.'¹⁶ Privacy demands a greater, rather than a lesser, response from law and policy. Moreover, privacy is only one of several disadvantages the domestic helper faces. Her position in Hong Kong society puts her into the weakest place where privacy, gender, race and class intersect. At the risk of repeating calls already made by others over the years, the following changes in the law are likely to remove the more obvious obstacles in the way of a foreign domestic helper who wishes to exercise her rights. These are, (i) allowing the domestic helper to work while her claim is pending or awarding the income she would have earned while awaiting the resolution of her claim; (ii) abolishing the two-week rule; (iii) providing translations of the standard form contract; and (iv) consistently prosecuting employers for forcing their helpers to work outside their home and for underpayment of wages. In addition, the government should encourage the Indonesian government to stop requiring their nationals to use agencies. Until legal reforms such as these are made, foreign domestic helpers will not enjoy their rights in Hong Kong.

Carol G S Tan*

¹⁶ Note 1 above.

* Lecturer in Law, University of Newcastle; formerly Research Fellow, Faculty of Law, University of Hong Kong.