

# **Asia Pacific Labour Law Review**

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## **Workers' Rights for the New Century**

**Asia Monitor Resource Centre**

**2003**

## **Asia Monitor Resource Centre Ltd.**

AMRC is an independent non-governmental organisation  
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The Center provides information, research, publishing, training, labour networking  
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AMRC's main goal is to support democratic and independent labour movements in Asia and the Pacific.  
In order to achieve this goal, AMRC upholds the principles  
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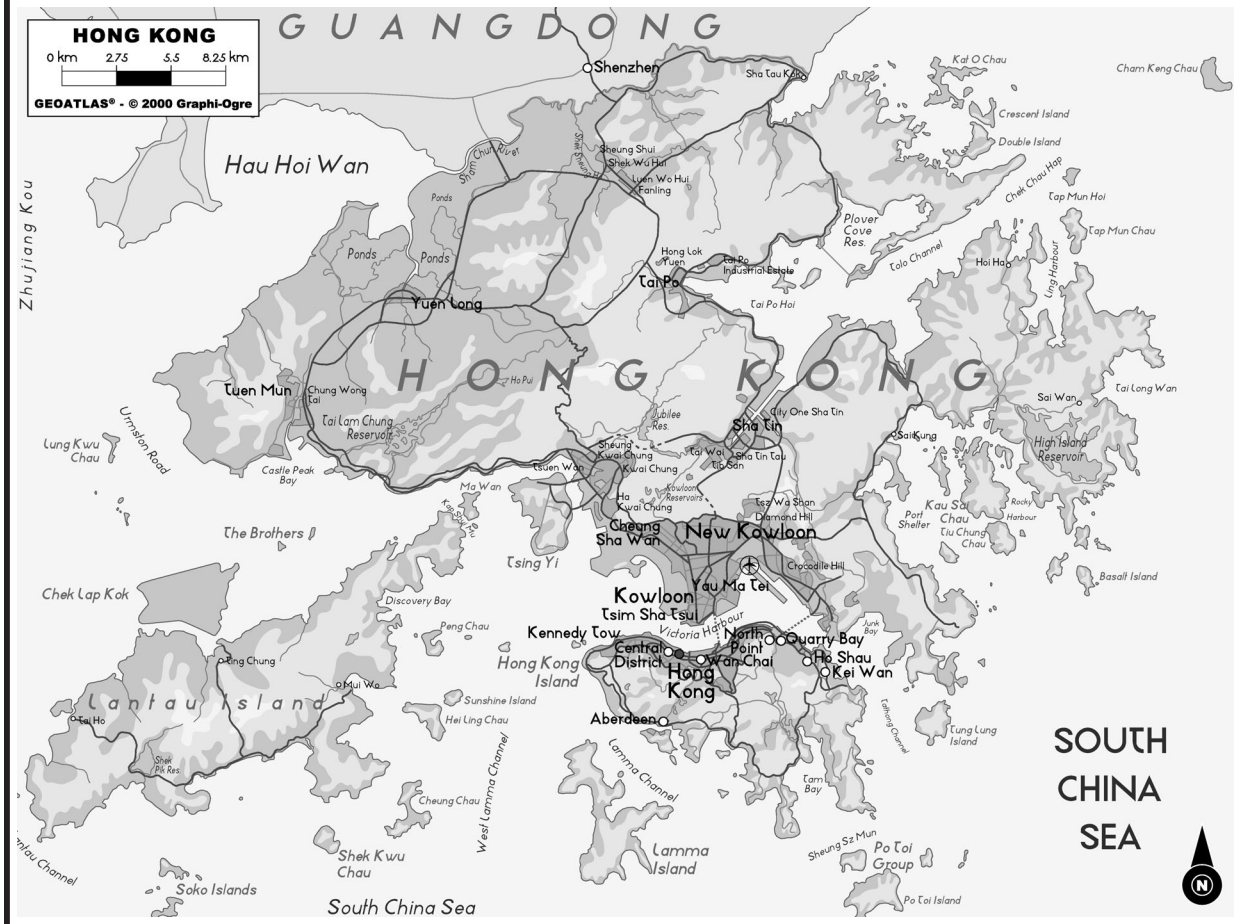
# Workers' Rights in the Hong Kong SAR

Gerard Greenfield

## Section one

### Introduction: a certain kind of freedom

Shortly after the Hong Kong Special Administrative Region (SAR) of the People's Republic of China marked the fifth anniversary of its founding on 1 July 1997, it was accredited by the Wall Street Journal and the Heritage Foundation as being 'the freest economy in the world' in 2002 – once again ranked No.1 in the global Index of Economic Freedom.<sup>1</sup> Long promoted as a model of free market prosperity by agents of neo-liberal globalisation such as the International Monetary Fund (IMF), the territory combines overt state-capital collusion with restrictions on trade union rights and the systematic denial of basic social protection for working people. The IMF's on-going praise for 'the world's freest economy' both before and after Hong Kong's reunification with China reflects a fundamental continuity in the territory's transition from a British colony to SAR. Big business inter-



venes directly in the formulation of government policies and laws to secure economic freedom for capital, while actively suppressing organised labour and broader democratic movements.<sup>2</sup>

The nexus of power between the Beijing elite and Hong Kong's billionaires was consolidated by the appointment of Tung Chee-hwa, a shipping tycoon, as the

SAR's first Chief Executive in 1997. Over the past five years 'rule by tycoon' has seen members of the pro-Beijing business elite appointed to more than 75 percent of positions in legislative and advisory bodies.<sup>3</sup> Following his re-appointment by Beijing for a second five-year term (effective from 1 July 2002), Tung Chee-hwa used his unchecked executive power to inaugurate a new ministerial system – a circle of 14 political appointees who are accountable only to the Chief Executive himself. Again the interests of the pro-Beijing business elite were predominant.<sup>4</sup>

While legislative reforms are used to further institutionalise state-capital collusion, the Government continues to reject calls for statutory minimum wages, unemployment benefits, and public pensions on the basis that such measures interfere with the interplay of 'free market forces.' As unemployment reaches the highest levels seen in the past three decades (registering 7.7 percent or 264,000 people in June 2002), wages are falling sharply. According to surveys conducted by the Hong Kong Confederation of Trade Unions (HKCTU) in March 2002, the number of workers earning less than HK\$5,000 per month was 114,500, an increase of 17.3 percent over the previous year.<sup>5</sup> A similar study by the City University of Hong Kong showed that an estimated 449,000 families (28 percent of the total number of households) are living below the poverty line.<sup>6</sup> Despite this, the Government maintains its position of 'non-interference' in the labour market. In April 2002, the Secretary for Education and Manpower, Fanny Law Fan Chiu-fun, rejected a minimum wage proposal put forward by HKCTU legislators on the grounds that there should be no interference in the free market. The problem, she claimed, was the "oversupply of workers".<sup>7</sup>

The combination of direct business intervention in determining government policies and laws and the enforcement of the 'free market' for labour epitomises the dynamic of the pre- and post-1997 policy of 'positive non-interventionism'. This policy was strongly criticised by the United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) in its report released on 11 May 2001. The report concluded: "The economic policies of HKSAR, based essentially on the philosophy of 'positive non-interventionism' ... have had a negative impact on the realisation and enjoyment of the economic, social, and cultural rights of Hong

Box 1

**The Hong Kong government's failure to fulfill its obligations under the International Covenant on Economic, Social, and Cultural Rights**

"The Committee reiterates its recommendation that the HKSAR review its policy in relation to unfair dismissal, minimum wages, paid weekly rest time, rest breaks, maximum hours of work and overtime pay rates, with a view to bringing such policy into line with the HKSAR's obligations as set forth in the Covenant."

"It is the Committee's view that the HKSAR's failure to prohibit race discrimination in the private sector constitutes a breach of its obligations under article 2 of the Covenant. The Committee calls upon the HKSAR to extend its prohibition of race discrimination into the private sector."

"The Committee also urges the HKSAR to prohibit discrimination on the basis of sexual orientation and age."

"The Committee urges the HKSAR to enact legislation on equal pay for work of equal value as provided for in the Covenant."

"The Committee urges the HKSAR to adopt a comprehensive pension system that provides adequate retirement protection for the entire population and in particular for housewives, self-employed persons, older persons and persons with disabilities."

"The Committee recommends that the Public Order Ordinance be reviewed with a view to amending its provision to ensure freedom of trade union activities as provided for under article 8 of the Covenant."

Source: *Concluding Report on the Hong Kong Special Administrative Region of the People's Republic of China*, United Nations Committee on Economic, Social and Cultural Rights on the Implementation of the Covenant on Economic, Social and Cultural Rights, Geneva, 11 May 2001.

## ILO conventions ratified\* by the Government of the Hong Kong SAR

- |   |  |
|---|--|
| Convention No. 2 on Unemployment, 1919  | Convention No. 97 on Migration for Employment (Revised), 1949                        |
| Convention No. 3 on Maternity Protection, 1919  | Convention No. 98 on Right to Organise and Collective Bargaining, 1949               |
| Convention No. 8 on Unemployment Indemnity (Shipwreck), 1920                              | Convention No. 101 on Holidays with Pay (Agriculture), 1952                          |
| Convention No. 11 on Right of Association (Agriculture), 1921                             | Convention No. 105 on Abolition of Forced Labour, 1957                               |
| Convention No. 12 on Workmen's Compensation (Agriculture), 1921                           | Convention No. 108 on Seafarers' Identity Documents, 1958                            |
| Convention No. 14 on Weekly Rest (Industry), 1921   | Convention No. 115 on Radiation Protection, 1960                                     |
| Convention No. 16 on Medical Examination of Young Persons (Sea), 1921                     | Convention No. 122 on Employment Policy, 1964  |
| Convention No. 17 on Workmen's Compensation (Accidents), 1925                             | Convention No. 124 on Medical Examination of Young Persons (Underground Work), 1965  |
| Convention No. 19 on Equality of Treatment (Accident Compensation), 1925                  | Convention No. 133 on Accommodation of Crews (Supplementary Provisions), 1970        |
| Convention No. 22 on Seamen's Articles of Agreement, 1926                                 | Convention No. 138 on Minimum Age, 1973  |
| Convention No. 23 on Repatriation of Seamen, 1926   | Convention No. 141 on Rural Workers' Organisations, 1975                             |
| Convention No. 29 on Forced Labour, 1930  | Convention No. 142 on Human Resources Development, 1975                              |
| Convention No. 32 on Protection against Accidents (Dockers) (Revised), 1932               | Convention No. 144 on Tripartite Consultation (International Labour Standards), 1976 |
| Convention No. 42 on Workmen's Compensation (Occupational Diseases) (Revised), 1934       | Convention No. 147 on Merchant Shipping (Minimum Standards), 1976                    |
| Convention No. 50 on Recruiting of Indigenous Workers, 1936                               | Convention No. 148 on Working Environment (Air Pollution, Noise and Vibration), 1977 |
| Convention No. 64 on Contracts of Employment (Indigenous Workers), 1939                   | Convention No. 150 on Labour Administration, 1978                                    |
| Convention No. 65 on Penal Sanctions (Indigenous Workers), 1939                           | Convention No. 151 on Labour Relations (Public Service), 1978                        |
| Convention No. 74 on Certification of Able Seamen, 1946                                   | Convention No. 160 on Labour Statistics, 1985  |
| Convention No. 81 on Labour Inspection, 1947  |  |
| Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948 |  |
| Convention No. 90 on Night Work of Young Persons (Industry) (Revised), 1948               |  |
| Convention No. 92 on Accommodation of Crews (Revised), 1949                               |  |

*\* These conventions were automatically ratified on 1 July 1997, as they were carried over from the previous government, as provided in Article 39 of the Basic Law. The exception is ILO Convention No. 138, which was ratified on 28 April 1999, with the minimum age specified as 15 years of age.*

Kong's inhabitants, the more so as those policies have been exacerbated by globalisation."<sup>8</sup> Included among the comprehensive list of criticisms and recommendations advanced by the UNCESCR concerning the Government's failure to implement the International Covenant on Economic, Social, and Cultural Rights is a direct reference to the shortcomings in the legal protection of workers' rights (see Box 1).

### **Workers' rights under the law**

Despite the significance of the UNCESCR report on Hong Kong, the Government essentially ignored its recommendations on the basis that its obligations under the International Covenant on Economic, Social, and Cultural Rights are not binding, but are only intended as a guide or set of suggestions. While not surprising, this response (or lack of response) is indicative of the Government's attitude towards international treaties on human, worker, and trade union rights. When the SAR was founded in 1997, Article 39 of the Basic Law (the constitution of the SAR) automatically carried over existing treaty obligations from the previous government. This included the International Covenant on Civil and Political Rights and 39 International Labour Conventions, including Conventions 87 and 98 on freedom of association, the right to organise, the right to strike, and the right to collective bargaining (see Box 2). With the exception of collective bargaining rights, freedom of association, the right to organise and the right to strike are recognised in Article 27 of the Basic Law: "Hong Kong residents shall have freedom of speech, of the press, and of publication; freedom of association, of assembly, of procession, and of demonstration; and the right and freedom to form and join trade unions, and to strike."

In practice these rights are severely restricted. An extensive body of labour laws carried over from British colonial rule contain both limits on worker and trade union rights and loopholes that allow employers to systematically violate these rights. The most important labour legislation includes: the Employment Ordinance, the Trades Union Ordinance, the Labour Relations Ordinance, and the Labour Tribunal Ordinance. There are also several laws governing occupational safety and health, discrimination in employment, compensation, pensions, and retraining (see Box 3).

### **The Employment Ordinance**

The Employment Ordinance is primarily concerned with the protection of wages, the terms of employment contracts, and regulation of employment agencies. It covers rest days, paid holidays, annual leave, sickness allowance, maternity protection, long service payment, severance payment, termination of employment contracts, dismissal, and protection against anti-union discrimination. An additional set of sub-regulations deal directly with the minimum age for employment (15 years), working hours and working conditions of young people, and the regulation of employment agencies. A series of amendments in June 1997 removed restrictions on entitlements to unpaid maternity leave, added a degree of flexibility to maternity leave arrangements, and prohibited hazardous work for pregnant workers. In addition there were changes to those sections of the Ordinance concerning the protection of wage payment and long-service payment, unreasonable termination of employment, and employment contracts. A further amendment was made in June 2000 to clarify protection against dismissal for participating in a strike, and the terms of termination with payment in lieu of notice.

The Employment Ordinance's limitations and its failure to guarantee workers' rights is discussed in greater detail below. It is sufficient here to point out that one of the critical shortcomings of the law is that it does not require employers to accept reinstatement even if it is proven that an employee's dismissal is in breach of the law. According to Section 32N (3) of the Employment Ordinance:

"Where the court or Labour Tribunal finds that an order for reinstatement or re-engagement, as the case may be, is appropriate, it shall explain to both the employer and the employee what order for reinstatement or re-engagement may be made, and shall ask them whether they agree to the court or Labour Tribunal making such an order. If the employer and the employee express such agreement, the court or Labour Tribunal shall make an order for reinstatement or re-engagement in accordance with that agreement."

In cases of unfair dismissal, the emphasis is on financial compensation for employees whose legal rights are violated. As a result claims brought to the Labour Tribunal are basically monetary claims to compensate for

whatever action by the employers has contravened workers' legal rights.

### **Discrimination in employment**

Separate ordinances cover various kinds of discrimination in employment, including sex discrimination, discrimination against those with disabilities, and discrimination according to family responsibility. The Sex Discrimination Ordinance includes protection against discrimination in employment and sexual harassment in the workplace and provides for the lodging of complaints with the Equal Opportunity Commission (in addition to recourse to civil litigation). However we should again note that these laws on discrimination do not provide for reinstatement in cases of dismissal. Employees may only seek monetary compensation and employers are only faced with fines if prosecuted.

Despite ongoing public campaigns, the Government refuses to legislate against racial and age discrimination in employment – key issues cited by the UNCESR as violations of the International Covenant on Economic, Social, and Cultural Rights. In particular, age discrimination in employment, combined with the absence of a

public pension system, contributes to a high incidence of poverty among older workers.

### **The Trade Unions Ordinance**

The Trade Unions Ordinance is administered by the Registry of Trade Unions and covers the registration of trade unions, making and amendment of trade union rules, use of trade union funds, rights and liabilities of trade unions, picketing, intimidation and conspiracy, as well as rules on trade union federations. According to official data, there are 594 registered trade unions in Hong Kong with a total membership of 673,375. Based on this, the unionisation rate among the territory's workforce of 3.46 million is 22.08 percent.<sup>9</sup> Of the total trade union membership 62.2 percent are male and 37.8 percent female, with the unionisation rate of men workers at 21.3 percent and women workers at 18 percent.<sup>10</sup> Between December 1999 and December 2000, 17 new unions were registered, five were dissolved or ceased to exist and one was re-classified. The distribution of trade union membership according to the size of the union is shown in Table 1. It should be noted that the relatively high unionisation rate, and the number of registered

Box 3

#### **Major labour legislation**

Employment Ordinance  
 Trade Unions Ordinance  
 Labour Relations Ordinance  
 Labour Tribunal Ordinance  
 Minor Employment Claims Adjudication Board Ordinance

*Discrimination*  
 Sex Discrimination Ordinance  
 Family Status Discrimination Ordinance  
 Disability Discrimination Ordinance

*Occupational Safety & Health*  
 Factories and Industrial Undertakings Ordinance  
 Occupational Safety and Health Ordinance  
 Occupational Safety and Health Council Ordinance

Radiation Ordinance  
 Boilers and Pressure Vessels Ordinance  
 Builders' Lift and Tower Working Platforms (Safety) Ordinance

*Compensation, Pensions & Retraining*  
 Employees Compensation Assistance Ordinance  
 Employees' Compensation Insurance Levies Ordinance  
 Employees' Compensation Ordinance  
 Pneumoconiosis (Compensation) Ordinance  
 Occupational Deafness (Compensation) Ordinance  
 Protection of Wages on Insolvency Ordinance  
 Mandatory Provident Fund Schemes Ordinance  
 Employees Retraining Ordinance



Table I: Distribution of trade union membership according to size

Size of union membership	Number of unions	Percent of the total number of unions	Declared membership	Percent of total union membership
Under 51	136	23	3,315	0.5
51 to 250	227	38	28,034	4
251 to 1,000	136	23	72,628	11
1,001 to 5,000	72	12	127,629	19
5,001 and over	23	4	441,769	65.5
TOTAL	594	100	673,375	100

Source: Registry of Trade Unions, Annual Statistical Report 2000 (Hong Kong Labour Department, 2001).

trade unions in the territory, relies heavily on union membership among public sector workers, particularly civil servants. Of the 594 registered trade unions, two-thirds are civil servants' unions.

In 2000 there were 125 cases of contraventions of the Trade Union Ordinance, mainly concerned with failure to notify change of officers within 14 days, failure to transmit annual accounts within three months after termination of the union's financial year, failure to submit

application for registration change of rules within 30 days, and failure to submit annual returns of membership punctually.<sup>9</sup>

There are four main trade union federations in Hong Kong (see Box 4 and Table 2). The pro-Beijing Federation of Trade Unions (FTU), founded in April 1948, has 286,900 members in 162 affiliates. The FTU works closely with the Government and is strongly influenced, if not controlled, by the Chinese Communist Party in

Beijing. The HKCTU is the second largest federation in the territory with 151,600 members in 59 affiliates.<sup>10</sup> It was established in July 1990 to strengthen the independent, democratic trade union movement in Hong Kong, providing workers with an alternative to the pro-Beijing and pro-Taiwan union confederations. HKCTU is actively involved in the pro-democracy movement and supports the struggle of the independent workers' movement in mainland China.<sup>11</sup> As a result of its political stance and its commitment to advancing workers' rights through

Box 4

**Contact details of major trade unions**

**Hong Kong Federation of Trade Unions (FTU)**

6F, 50 Ma Tau Chung Road, Tau Kwa Wan, Kowloon, Hong Kong SAR  
 Tel:+852 2715 6671 Fax: +852 2715 6671  
 Email: hkftu@ismart.net  
 Web site: <http://www.ftu.org.hk/>

**Hong Kong Confederation of Trade Unions (HKCTU)**

19/F Wing Wong Commercial Building, 557-559 Nathan Road, Kowloon, Hong Kong  
 Tel: +852 2770 8668 Fax: +852 2770 7388  
 Email: hkctu@hkctu.org.hk  
 Web site: <http://www.hkctu.org.hk/>

**Hong Kong and Kowloon Trades Union Council (HKTUC)**

2F, Hanway Commercial Centre, 36 Dundas Street, Kowloon, Hong Kong  
 Tel: +852 2384 5150 Fax: +852 2770 5396

**Federation of Hong Kong and Kowloon Labour Unions (FLU)**

2F, 6-8 Tai Po Road, Kowloon, Hong Kong  
 Tel: +852 2776 7232 Fax: +852 2788 0600

organised struggle, HKCTU is excluded from the tripartite Labour Advisory Board (LAB).

The LAB was first established in 1927, but did not become a tripartite body until 1946. In 1950 the election of employee members was permitted for the first time. The LAB is a non-statutory body responsible for advising the Commissioner for Labour on policies, labour legislation and the application of international labour conventions. It is chaired by the Commissioner for Labour, with a Labour Officer as Secretary. There are six employer members and six employee members of which five of each are elected and one of each is appointed. The employer members are elected by major employer associations and the employee members are elected by registered trade unions. Election of the employee members is based on the number of trade unions voting, not union membership. This means that a union with as few as seven members has the same vote as a union with 70,000 members. The result is that the FTU is able to register votes of over 200 affiliates, keeping out HKCTU despite the fact that it has the second largest trade union membership in Hong Kong. This exclusion from the LAB means that HKCTU is denied the right to participate in tripartite negotiations concerning labour laws and labour policy, as well as being excluded from bodies such as the Committee on the Implementation of International Standards which reports to the ILO on the implementation of International Labour Conventions in the territory.

The role of trade unions is seriously constrained by the fact that there are no laws guaranteeing the right to collective bargaining. This remains a fundamental obstacle to the realisation of trade union rights. Without a legal-institutional framework for union recognition and collective bargaining, the role of unions and their ability to defend the rights of their members is severely re-

stricted. Bargaining is neither promoted nor encouraged by the authorities, and employers generally refuse to recognise unions. Less than one percent of workers are covered by collective agreements, and those that exist are not legally binding.<sup>12</sup>

### The Labour Relations Ordinance

Disputes between employees and employers are dealt with under the Labour Relations Ordinance. The Ordinance establishes a set of procedures for settling disputes through conciliation by the Labour Department. In cases where 'ordinary' conciliation fails, the Commissioner for Labour may appoint a special conciliation officer to conduct 'special' conciliation. It is important to note that both kinds of conciliation are voluntary and non-binding. Essentially this is presented by the Labour Department as a form of 'free advice' or counseling to resolve disputes between employees and employers. The Labour Department has no power to compel employers to attend reconciliation meetings and employers are not penalised for failing to attend.

If special conciliation also fails, the Chief Executive may refer the dispute to (voluntary) arbitration or a board of inquiry. Another important aspect of the Labour Relations Ordinance is the power granted to the Chief Executive to order the suspension of industrial action, including strikes. Under Section 35 of the Ordinance the Chief Executive is empowered to order a 30-day 'cooling-off' period in cases where industrial action is perceived to have a serious effect on the Hong Kong economy. During this period all industrial action must cease. An additional 30 days may be ordered under Section 36, extending the cooling-off period to 60 days in total.

Work stoppages are rare in Hong Kong. According to official data, in 2000 there were five strikes with 934 lost workdays and in 2001 there was only one work stoppage with 780 days lost. In 2000 the Labour Department dealt with 308 labour disputes and 28,620 claims. Of these claims 62 percent were settled through non-binding conciliation. In 2001 the Labour Department dealt with 31,698 cases, mostly concerned with wage arrears, holiday pay and wages in lieu of notice.<sup>13</sup>

Table 2: Membership of major trade union federations

Trade union federation	Total membership	No. of affiliates
Hong Kong Federation of Trade Unions	286,900	162
Hong Kong Confederation of Trade Unions	151,600	59
Hong Kong and Kowloon Trades Union Council	19,520	55
Federation of Hong Kong and Kowloon Labour Unions	28,530	45

### **The Labour Tribunal Ordinance**

Labour disputes that are not resolved by the Labour Department may be taken to the Labour Tribunal, which is under the judicial branch of Government. The Labour Tribunal deals with financial claims resulting from violations of the Employment Ordinance. When a claim is filed the registrar must fix a place and date for a hearing between 10 and 30 days from the time the claim is lodged. An investigating officer sees the both parties and prepares a report for the presiding officer (adjudicator) of the Labour Tribunal. Both the investigating officer and presiding officer are members of the judiciary. Under Section 10 of the Labour Tribunal Ordinance the presiding officer may decline jurisdiction and transfer the claim to the Court of First Instance, the District Court, or the Small Claims Tribunal.

It is important to note that neither party in a dispute may have legal representation in claims heard by the Labour Tribunal. However, employees may apply for the right to be represented by a trade union officer, while employers may be represented by an official from a trade or industry association.

In 2000, there were 9,611 cases filed with the Labour Tribunal of which 9,376 were initiated by employees and 235 by employers. In addition there were 313 case reviews and 1,096 cases carried over from previous years. According to data for 2001 (up to 30 September), 7,852 cases were filed and 356 cases were registered for review.<sup>14</sup> Nearly all of these cases were referred to the Labour Tribunal after the failure of Labour Department conciliation. In total there are only 13 presiding officers handling an average 10,000 disputes each year.

### **The Minor Employment Claims Adjudication Board Ordinance**

Faced with a rapid increase in labour disputes and claims since the mid-1980s. The Minor Employment Claims Adjudication Board was created in 1994 under the Labour Department to handle claims relating to individual contracts and/or the Employment Ordinance involving 10 workers or less and no more than HK\$8,000 per worker. In 2000, there were 2,422 claims amounting to HK\$11.5 million, mainly concerning unpaid wages, wages in lieu, and annual leave pay. In 2001, the Board dealt with 2,640 claims totaling HK\$6.6 million.

The Minor Employment Claims Adjudication Board cannot deal with cases involving bankruptcy or liquidation, or cases more than 12 months old (that is, a year before the complaint was filed). The Board does not allow legal representation on either side and awards may be registered and enforced as a District Court ruling, thus giving judicial power to an administrative decision. Appeals to the High Court against a decision by the Board may only be made on a point of law or question of jurisdiction. In 2000 there were six appeals, of which one was accepted then subsequently dismissed by the High Court.

### **The Protection of Wages and Insolvency Ordinance**

Separate legislation deals with unpaid wages in cases or bankruptcy or insolvency. The Protection of Wages and Insolvency Ordinance establishes the Protection of Wages and Insolvency Fund financed through an annual fee of HK\$600 on business registration certificates. The fund allows claims for unpaid wages not exceeding HK\$36,000 accrued over four months, and wages in lieu of notice of one month's wages or HK\$22,500, whichever is less. Claims for severance pay from a bankrupt employer are limited to HK\$50,000 plus 50 percent of any entitlement in excess of HK\$50,000. In 2000-2001, there were 14,161 applications of which 10,910 received a total of HK\$349.8 million in payments from the Fund.

In practice the majority of workers seeking compensation from the Protection of Wages and Insolvency Fund are denied access due to strict criteria for eligibility and the financial costs incurred. Prior to lodging claims workers must apply for legal aid to cover application costs. Eligibility for legal aid is means-tested, with workers holding a certain level of savings or assets (including housing) denied legal aid support. In such cases workers must cover the legal costs incurred by their compensation claim (approximately HK\$10,000) themselves – a sum that is paid in advance. Workers failing to recover unpaid wages and benefits, they are not reimbursed for the legal fees paid in advance.

### **Occupational safety and health**

Two key pieces of legislation concern occupational safety and health: the Factories and Industrial Undertakings Ordinance and the Occupational Safety and Health Ordinance. These two ordinances contain 31 sets of sub-

subsidiary regulations, ranging from inspections and training to safety requirements for specific kinds of industrial equipment. Investigation of industrial accidents and prosecution are also provided for under these laws. In 2001, there were 12,500 accident investigations resulting in 2,660 prosecutions with fines totaling HK\$32.3 million. In the same year there were 67,540 industrial accidents and 201 workers killed at work. Despite these injuries and deaths, the Government continues to resist union pressure for more stringent penalties on employers, instead focusing on compensation entitlements for industrial accident victims and their families. The Employees' Compensation Ordinance stipulates that employers are liable to pay compensation to workers or their families for injuries or deaths caused by industrial accidents or occupational diseases.

As yet there are still no legal provisions allowing workers to avoid hazardous or dangerous work conditions without risk of dismissal. This severely limits the ability of workers to refuse dangerous work, contributing to a high rate of industrial accidents and diseases. According to the Hong Kong Association for the Rights of Industrial Accident Victims (ARIAV): "Over the past 10 years over 750,000 workers suffered industrial injuries and 2,500 workers were killed at work. The number of victims of occupational diseases was 6,500. On average, 200 workers were injured every day and 4 workers died every week."<sup>15</sup>

### **The Employment and Labour Relations (Miscellaneous Amendments) Ordinance**

The Employment and Labour Relations (Miscellaneous Amendments) Ordinance is unique in that its sole purpose is to repeal legislation that was passed just prior to Hong Kong's reunification with China. The laws it repeals strengthened worker and trade union rights and guaranteed for the first time in the territory's history the right to collective bargaining.

As a directly elected member of the Legislative Council (Legco, government legislative house) the General Secretary of HKCTU introduced amendments to the Employment Ordinance and Trade Unions Ordinance on 26 June 1997, days before the end of British colonial rule. Together with these amendments a new law, the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance was also passed in the

Legislative Council. Five days later the Legislative Council was disbanded and replaced with a Provisional Legislature appointed by central Beijing Government.

Included in the amendments to the Employment Ordinance was the rejection of the right of employers to refuse reinstatement, providing instead for automatic reinstatement in cases of unfair dismissal. This included automatic reinstatement of workers dismissed as a result of anti-union discrimination. Protection against anti-union discrimination was further expanded to cover acts not limited to dismissal, such as such as transfer, demotion, and denial of promotion. The Trade Union Ordinance was amended to remove restrictions on eligibility for trade union office. Under the current law only persons actually or previously employed in the trade, industry, or occupation of the trade union concerned are permitted to become trade union officers. Also removed from the Trade Union Ordinance were legal restrictions on financial contributions to trade unions and the use of union funds, particularly the use of funds for political ends.

On 9 July 1997, days after the founding of the SAR, a bill called the Legislative Provisions (Suspension of Operation) Bill was submitted to the Provisional Legislature by the Government. This was passed on 15 July, effectively suspending the amended Employment Ordinance and Trade Unions Ordinance and the Employees' Right to Representation, Consultation, and Collective Bargaining Ordinance passed on 26 June. Following a review by the LAB and the Executive Council it was resolved on 30 September to repeal the law on collective bargaining and the amendments protecting trade union rights. In this context it is important to note that the FTU, which controls employee representation in the LAB, was complicit in the decision to repeal the laws.

To enforce the repeal of the right to collective bargaining law and the amendments to the Employment Ordinance and Trade Union Ordinance, the Government gazetted the Employment and Labour Relations (Miscellaneous Amendments) Bill on 9 October. On 29 October the Provisional Legislature passed the Employment and Labour Relations (Miscellaneous Amendments) Ordinance and effectively repealed the amendments and new laws passed on 26 June.

The repeal of these laws formed the basis of an ILO complaint against the Hong Kong Government by

HKCTU in November 1998. This complaint (Case No.1942) was examined and upheld by the Committee on Freedom of Association (CFA) in November 1998, November 1999, March 2000, March 2001, and November 2001. Based on Case No.1942, the CFA requested the Government to repeal sections 5, 8 and 9 of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance – clauses that violate freedom of association by restricting union office and the use of union funds. The CFA has called on the Government to ensure better protection of the right to reinstatement in cases of unfair dismissal and to re-instate legislative guarantees for the right to collective bargaining and trade union recognition. Notably, the CFA's recommendations focus on the need to repeal sections of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance – a law that was introduced solely to repeal previous legislative amendments.

### **Labour laws in context**

The previous section provided a brief overview of key pieces of labour legislation. A critical understanding of these laws requires a closer examination of the historical and political context in which these laws were created and enforced. While a detailed account is beyond the scope of this essay, it is useful to identify three important elements in these labour laws that remain, to a certain degree, subject to colonial legacy.

The first concerns the role of labour laws in imposing labour discipline and control, particularly in managing the turnover of labour and the stability of labour supply. Here the issue of control and punishment of workers is critical. The forerunner of the current Employment Ordinance (enacted in 1968) was the Employers and Servants Ordinance of 1902. The primary role of this law was to penalise domestic servants for breaching terms of their employment contracts. This in turn had its origins in an 1844 statute that was introduced “for the preservation of good order and cleanliness within the Colony”.<sup>16</sup>

The second factor concerns the promulgation and revision of labour laws in response to industrial unrest. When faced with mass industrial action governments may respond with repression, conciliatory measures, or a combination of both. The primary concern of political leadership is to contain industrial unrest so that it does not threaten political and social order. (This is particu-

larly acute under colonial rule.) When faced with such unrest – especially if it suggests revolutionary potential – governments may impose or revise laws to improve working conditions and protect workers' rights. While such measures adversely affect employers' profits by limiting the rate of exploitation, they do so in order to protect the capitalist system as a whole. In other words, if industrial disputes spark wider social unrest that may threaten the system, then the state will often impose certain limits on employers for the sake of the system itself.

Of course, legal measures are just as likely to deny workers' their rights as they are to guarantee them. The dockworkers' and seafarers' strikes (which precipitated a general strike) in Hong Kong in 1925-26 led to the imposition of the extremely repressive Illegal Strikes and Lock-Outs Ordinance of 1927. This was only repealed by the Labour Relations Ordinance in 1975. In contrast, amendments to the Employers and Servants Ordinance in 1961 formed part of a strategy of appeasement and containment. By imposing obligations on both employers and employees to fulfill their rights and duties under employment contracts, the law sought to appease growing unrest. The fact that this law applied only to manual workers earning less than HK\$700 per month suggests an attempt to target that section of the workforce most susceptible to militancy. Events suggest that the threat of communist subversion was a primary determinant in the introduction of laws to improve working conditions and constrain employers' worst excesses. It was in the context of the anti-colonial riots in 1966 and the protests of 1967 that the Employment Ordinance was enacted in 1968 to more effectively manage industrial relations and recognise a minimum set of claims on the part of industrial workers.

Revision of labour laws again followed a wave of protests in the 1980s against widespread plant closures and relocation to mainland China. The manufacturing sector saw the disappearance of “30 percent of the sectoral employment and 13 percent of the entire labour force in less than a decade's time”.<sup>17</sup> In other words, 13 percent of the entire national workforce lost their jobs in less than ten years. Protests over plant closures contributed to further revision of labour laws and greater emphasis on financial compensation for workers.

A 17-day strike by the Flight Attendants' Union at Cathay Pacific Airways in January 1993 prompted the

Government to undertake a comprehensive review of existing labour legislation. Significantly, the strike action intensified following the dismissal of three union members, while over 60 NGOs and community organisations formed the Alliance Supporting the Flight Attendants of Cathay Pacific. The level of public support and the economic impact of the strike forced the Government to provide several guarantees, including the assurance that union leaders would not be persecuted by the employer upon returning to work. Despite this, intimidation by management continued and the union's vice chairperson, Courtney Chong, was unfairly dismissed. Despite a ruling by the ILO, Cathay Pacific Airways refused reinstatement, and Chong's case is now entering its tenth year. Following its review of existing labour legislation as a direct result of the Cathay Pacific strike, the Education and Manpower Department issued a report in October 1993 stating that: "... although the Government has from time to time received complaints from employees against their employers for anti-union discrimination, there has yet to be a successful prosecution case. Past experience has shown that it is difficult to prove such violations, as often other reasons are used as cover-up for the hidden discriminatory motive".<sup>18</sup>

The third element underpinning these laws concerns the obligations of the employee and the emphasis on individual claims. There is a complex legal infrastructure that guarantees certain rights and individual claims vis-à-vis employers. However, these laws function in such a way as to fragment workers, placing emphasis on individual claims and interests and at the same time focusing on financial compensation as the defining principle of workers' rights and employers' obligations. The absence of guaranteed reinstatement without the consent of the employer substantially diminishes workers' rights. The right to employment protection, the right to decent work, and the right to a safe working environment appear to be guaranteed by law, but are substituted with the right to seek financial claims in cases where these legal rights are contravened. As some analysts of Hong Kong labour law have observed: "The objective is to confer benefits only on employees who have some claim, by virtue of their loyalty".<sup>19</sup> In this sense workers' rights – narrowly defined in terms of financial claims – are contingent on uninterrupted employment with the same employer.

## **Critical shortcomings in the employment ordinance**

### **The 4-18 rule**

A major loophole in the Employment Ordinance is created by the restriction of certain rights and benefits to those workers employed under a 'continuous contract.' According to Schedule 1, Section 3 of the Ordinance, a continuous contract is one where "an employee has been employed under a contract of employment during the period of four or more weeks next preceding such time he shall be deemed to have been in continuous employment during that periods".<sup>20</sup> This is conditional on the definition of a week, whereby: "no week shall count unless the employee has worked for 18 hours or more in that week". In other words, an employee under continuous contract is defined as anyone working no less than 18 hours per week for at least four consecutive weeks for the same employer.

According to the Employment Ordinance only those workers employed under a continuous contract are entitled to paid sick leave, statutory holidays, paid annual leave and other benefits. As a result, this '4-18' (4 weeks/18 hours) rule effectively excludes casual and part-time workers from the right to sick leave, statutory holidays, and paid annual leave. To avoid paying workers these entitlements, employers deliberately schedule working hours at just under 18 hours per week, or break the continuity of the minimum four-week period. In this way the 4-18 rule is used by employers to manipulate working hours and prevent casual and part-time workers from gaining regular employment status.

Over the past three years the Hong Kong Catering and Hotel Industry Employees' General Union, an affiliate of HKCTU, has waged a campaign against the 4-18 rule, calling for its removal from the Employment Ordinance and the recognition of rights for casual and part-time workers. The union accuses employers in the hotel, restaurant and catering industry of using an informal '3-18' system as a means of exploiting the 4-18 loophole. Under the 3-18 system casual and part-time workers are assigned work in excess of 18 hours per week (even working double shifts), but are denied work assignments every fourth week so that they cannot accumulate four consecutive weeks of employment. In this way, regardless of the hours worked in three consecutive

weeks, without working during the fourth week workers are not entitled to the employment benefits stipulated in the Employment Ordinance. This 3-18 system is used extensively in Hong Kong's luxury hotels.

### **Anti-union discrimination and unfair dismissal**

Under Sections 21B and 21C of the Employment Ordinance anti-union discrimination is treated as a criminal offence, with employers facing a maximum fine of HK\$100,000. Workers whose dismissal is deemed an act of anti-union discrimination are eligible for a maximum HK\$156,000 in compensation plus statutory entitlements. Claims such as these are handled by the Labour Relations Division of the Labour Department. In 2000 there were six complaints of anti-union discrimination investigated by the Labour Relations Division and in 2001 there were five cases. None of these complaints led to prosecution.

It is important to note two major limitations concerning protection against anti-union discrimination as provided for in the Employment Ordinance. The first is that acts of anti-union discrimination are defined only in terms of dismissal. Other forms of discrimination, such as transfer, demotion, and denial of promotion are not recognised. The second weakness is that reinstatement of workers found to be unfairly dismissed as a result of anti-union discrimination requires the mutual consent of the employer and employee. In effect this means that employers merely have to pay a fine and may exercise the right to refuse the reinstatement of a worker, even if the Labour Tribunal rules that she was fired as a result of her trade union involvement.

As a recent request by the ILO to the Hong Kong Government indicates: "...where an employee, who has been found to be unreasonably and unlawfully dismissed (including dismissal on the grounds of anti-union discrimination), makes a claim for reinstatement or re-engagement, the Labour Tribunal may make an order of reinstatement or re-engagement if it considers it appropriate without the need to secure the consent of the employer".<sup>21</sup>

On 10 August 2001, the Chair of the Container Truck Drivers' Union was dismissed for trade union activity. The previous month he was elected as the labour representative in a tripartite committee established by the Labour Department to improve industrial relations in the

container transport sector. Coincidentally his employer was elected to represent the employers' group in the tripartite committee. His employer dismissed him immediately after seeing that he was the trade union representative in the consultative committee. Despite the clear case of anti-union discrimination motivating his dismissal, he lost the case in the Labour Tribunal.

Another case of dismissal as an anti-union measure concerns the workers at Pricerite, a major home decoration and furniture chain. From September to October 2001 workers at Pricerite began organising a union. The employer responded by forcibly transferring the most active organisers to other branches. It should be recalled that the Employment Ordinance does not recognise the transfer or demotion of union organisers as an act of anti-union discrimination. Despite this harassment, an application for the registration of the union was lodged. On 1 November, six union organisers were dismissed and four were forced to resign. Three of them were members of the preparatory union committee and the other seven were trade union members. In November the trade union's registration was approved by the Registrar of Trade Unions. At the union's first general meeting held on 2 December, elections of union officers were held. Those elected were then harassed and forcibly transferred by management. As a result five union officers quit the union, and by the end of December the remaining union officers were forced to resign from the company. Since the executive committee members are no longer employees of Pricerite, they are no longer eligible to hold union positions and were forced to disband the union altogether.<sup>22</sup>

### **Conclusion: political constraints on the legislative process**

In the absence of universal suffrage and faced with authoritarian political control over the legislative process there is little prospect of effective labour laws to strengthen workers' rights. Where direct elections are permitted pro-democratic candidates — including the General Secretary and President of HKCTU — have been elected as members of the Legco. Despite this the power of pro-democratic members within Legco remains severely restricted.

Only 24 of the 60 seats in Legco are elected by universal suffrage. Not only can the Government ensure a

pro-Beijing, pro-business majority by allocating seats to professionals, it also severely restricts what the legislature can do. According to Article 74 of the Basic Law, private members may introduce bills, but only if they do not “relate to public expenditure or political structure or the operation of government”. If a bill affects government spending or operations, it must receive prior approval from the Chief Executive. The limitations are obvious. Two bills on collective bargaining and anti-union discrimination introduced by HKCTU representatives in Legco in January 1999 and a minimum wage bill put forward in April 2002 were blocked on the grounds that they would affect both the government’s operation and public spending. Any amendment of government bills or ultimate legislative approval of members’ bills requires approval of both sectors of Legco. That is, approval by a majority vote among the 30 functional constituency members and a majority in the other half of Legco.

These restrictions on Legco are combined with virtually impossible conditions for the democratic revision of the Basic Law itself. Article 159 stipulates that amendments to electoral provisions in the Basic Law require approval of the National People’s Congress (NPC) Standing Committee in Beijing. Any local proposal to do so requires approval from local NPC delegates (chosen by a mainland appointed body), two-thirds of Legco, and the Chief Executive. So while the Basic Law allows for the possibility of the direct election of the Chief Executive and full direct elections of all Legco seats after 2007, serious political obstacles remain.<sup>23</sup>

## Section two

### The ISS cleaning workers’ strike

This section examines the dynamics of the labour law in practice, illustrating its major weaknesses and limitations through a case study of the struggle of the ISS cleaning workers that culminated in a historic strike from 21 to 30 November 2001. This ten-day strike by 300 workers was the first strike by cleaning workers in Hong Kong in over 20 years.

The strike’s significance was enhanced by the fact that it was directed at International Service Systems (ISS), the world’s largest cleaning contractor, headquartered in Denmark, employing 265,000 people in 36

countries. It is the tenth largest employer in Europe. As a signatory of the United Nations ‘Global Compact’ on human rights, labour and the environment, ISS has a carefully managed image as a ‘good’ employer – an image supported by unions such as the global union federation, Union Network International (UNI), which praised the company for high social standards and recognition of worker and trade union rights. On its Web site the company claims to support an “open dialogue on equal terms between management and employees”.<sup>24</sup>

In Hong Kong ISS operates a subsidiary called ISS Servisystem (HK) Ltd. One of the key business activities of ISS Servisystem is providing cleaning services to railway and underground (subway) stations operated by the Kowloon-Canton Railway Corporation (KCRC) and the Mass Transit Railway Corporation (MTRC). The company has been contracted by the MTRC to clean its stations under a series of two- and three-year contacts since 1979. By the end 2001 this involved 522 workers to clean the territory’s 43 MTR stations used by 2.2 million passengers every day.

### Background to the dispute

On 11 October 2001, the MTRC informed ISS Servisystem that it would not renew its contract after December 1. Instead the contract for cleaning services was awarded to Wai Hong Cleaning & Pest Control Co. Ltd. Having lost the MTR contract ISS Servisystem faced an additional cost, which it had never considered during financial planning. This cost concerned severance pay that MTR cleaning workers were entitled to under the law.

According to Sections 31B and 31G of the Employment Ordinance a worker who has been employed under a continuous contract for not less than 24 months and is dismissed or laid-off is entitled to a severance payment calculated on the basis of two-thirds of monthly pay or HK\$22,500 (whichever is less) for every year of employment. Of the 522 workers employed in the MTR stations, 354 had worked for the company for more than two years – many of them for 10 years or more. As a result, these workers were entitled to severance pay claims totaling HK\$4 million (US\$512,000). To avoid paying this, ISS Servisystem exploited a loophole in Section 31D of the Employment Ordinance under which workers who resign forfeit any right to claim severance pay.



In other words, if an employee voluntarily resigns, s/he is no longer entitled to severance pay. The strategy of the company was to create conditions under which the 354 workers would resign. Alternatively, the company could dismiss the workers without severance pay if the employees' conduct justified 'exclusion from the right to severance payment' under Section 31S of the Employment Ordinance. Either way, the company was intent on saving money.

Over the years ISS Servisystem had saved a great deal of money on labour costs. Workers assigned to cleaning the MTR stations were paid extremely low wages – a problem clearly exacerbated by the fact that there is no statutory minimum wage in Hong Kong. In the lead-up to the dispute workers were paid an average monthly wage of HK\$3,000 (US\$384), with some receiving as little as HK\$2,800 (US\$359). These wages fall into the lowest income-earning group, or what the Hong Kong Social Security Society classifies as 'the working poor' – those earning less than HK\$5,000 per month. The absence of a public pension system or unemployment insurance means that lump sum severance payments received by workers when they retire or are terminated are extremely important for their survival.

### **Relocation as coercion**

In the first week of November the company issued notices to 354 workers (with more than 24 months' employment) informing them of their new work assignments commencing on 1 December. Workers were immediately aware that there was a problem. New assignments were all situated far from current work sites, involving an increase of two to three hours commuting time and higher transport costs, exacerbated by having to eat away from home, the common practice among these workers.

Shortly after receiving letters notifying them of new work locations, workers at several MTR stations compared the new arrangements and found that they were systematically relocated to the farthest point from current work sites. Workers employed in the Kowloon area were reassigned to Hong Kong Island and vice versa. Suspicions were also aroused because the company did not actually have positions for the reassigned workers. For example, 40 workers received letters informing them of reassignment to Western Kowloon Centre,

where only eight workers were employed and no plans to expand cleaning operations had been made. Another 20 workers were told they would be reassigned to the Mong Kok KCR Station, where only four cleaners worked. The workers argued that this showed that the management did not expect them to keep their new positions for very long.

Since the majority of the cleaning workers are married women aged between 35 and 55 with children living at home, the impact of longer traveling time, late night shifts, and extended hours away from home had a significant bearing on their ability to accept – and maintain – the new assignments. The management was well aware that adding two to three hours to commuting time, especially on night shifts, and having to eat meals away from home increased the pressure of family responsibilities and would force them to resign.

According to the workers, ISS Servisystem has always used a strategy of reassignment to distant or inconvenient locations as a means of forcing employees to resign. In this way the company has avoided paying severance entitlements. Workers with up to 15 years' employment with the company point out that they have never known a colleague who retired with severance pay. In every instance they were reassigned to an inconvenient work location and eventually resigned.<sup>25</sup>

Suspecting that the company had created a plan to force them to resign, the workers approached the Hong Kong Buildings Management and Security Workers General Union, an affiliate of the HKCTU, for assistance.

### **Union organising and industrial action**

After an initial workers' meeting at the union, all workers who received reassignment notices were contacted. This was followed by a meeting of 320 of the 354 affected workers on 5 November, when the workers were unanimous that they wanted to be formally dismissed, receiving full severance payments, rather than being forced to resign 'voluntarily'. In this meeting a ten-member organising committee was elected from among the workers to negotiate on their behalf. A resolution was passed to write to the company to demand that all affected workers receive full entitlement to severance pay. By 7 November a total of 350 of the 354 workers had signed a petition demanding severance pay

instead of reassignment and a letter to this effect was sent to the company on 9 November.

ISS Servisystem immediately rejected the union's demands, stating unequivocally that all employees were expected to accept new work assignments or resign. Another meeting of over 300 workers was held at the union office on 16 November, when they decided to protest in the Central MTR station two days later. The protest action on November 18, involving 200 workers, was followed by a second petition to ISS Servisystem and to the MTRC threatening industrial action if workers' demands were not accepted by 21 November. ISS Servisystem management failed to respond, so strike action began on the morning of November 21. A 24-hour picket in the Central MTR Station was established with 300 workers rotating in three shifts. The strike attracted wide media attention as well as support from community organisations and other unions.

On the third and fourth days of the strike ISS Servisystem management sent out a second round of reassignment letters to the workers allocating positions closer to their current work sites. However, by this time the workers no longer trusted the management's long-term intentions, and rejected the new offer of reassignments on the basis that – after the strike – they would face individual punishment and be forced to resign.

### **Bargaining in bad faith**

On the third day of the strike a protest was held at the ISS Servisystem offices. A delegation of 80 workers accompanied the workers' committee to the office on 23 November, calling on the management to negotiate. After workers entered the offices, three Labour Department officials were called in to arbitrate. However, the company's Chief Executive Director, Gregory Rooke, refused to meet the workers' delegation and trade union representatives, even in the presence of Labour Department officials. Workers were angered that he refused to sit in the same room with them. In defence Rooke claimed that his senior position meant that he did not have to deal with workers. This further angered the workers who declared, "Because we're cleaners he treats us like garbage!"

After more than three hours Rooke still refused to negotiate. He told the Labour Department officials that he

was due to fly out of Hong Kong and was going home. In response workers blocked the exits and prevented him from leaving. More workers then arrived to occupy the office and news reporters gathered in the lobby of the building. At well past midnight, the Labour Department arranged for the management to sign a letter agreeing that negotiations would be held on 26 November, and the workers withdrew.

It should be noted that Rooke's refusal to speak to the workers for the nine hours they were in his offices, and his outright rejection of any negotiations whatsoever clearly contradicts ISS's claim to 'open dialogue on equal terms between management and employees.'

On 26 November, the workers' delegates, trade union representatives and 100 workers returned to the company's offices for the promised negotiations. However, this time police and private security guards were deployed in force. Only 20 people, including the workers' committee members and union organisers, were permitted to enter the building together with three Labour Department officials. The remaining workers held a protest outside, surrounded by security guards and police. The talks broke down after five hours when management refused to consider the workers' demands. As mentioned in Section One, the Labour Department has no power to compel an employer to engage in negotiations. All negotiations – and their outcomes – are voluntary and non-binding. Thus the letter issued on 23 November by ISS Servisystem promising to engage in conciliatory talks – a letter that Labour Department officials orchestrated during the workers' occupation of the company's offices – was rendered meaningless by their refusal to negotiate only two days later.<sup>26</sup>

As the strike continued into its second week, ISS management finally agreed to meet workers' representatives and union organisers for another round of negotiations on 28 November. However, since there is no legal obligation for employers to engage in negotiations with workers' representatives, management imposed stringent conditions on the meeting. The meeting was held in the offices of a law firm representing ISS Servisystem and only four union representatives, including only one member of the workers' committee, were permitted to attend. The ISS Managing Director for International, Overseas, Jan Vistisen, flew in from Denmark for talks. However, it was immediately clear that management

had no interest in negotiating. Instead, a lump sum payment of HK\$500,000 (US\$64,100) – averaging only HK\$2,000 (US\$256) per worker - was made as a final offer. This amounted to only a fraction of the HK\$4 million that the 350 affected workers were entitled to, and management ruled out any possibility of strike pay. In reality, the workers had lost 10 days' pay, averaging HK\$1,000 each. Therefore, the actual sum they would gain from this offer would only be HK\$1,000 (US\$128).

When the meeting adjourned, Wong Yim-fong, the workers' delegate participating in negotiations, submitted the proposal to a general meeting of the striking workers held that night. The workers angrily rejected the offer, shouting, "We're not beggars! Pay us what we're owed!" The workers rejected the company's offer. The following morning negotiations resumed. Wong Yim-fong informed management that the offer had been rejected. The management then broke off negotiations and Vistisen returned to Denmark.

On 30 November, the ISS Servisystem contract with the MTRC formally ended, bringing an end to the strike. Protest actions were held at Central Government Offices and the MTRC that night and on 1 December; 146 workers refused to go to their new work locations. The company issued letters formally dismissing the workers on 14 December without compensation or severance payments.

### **The limits of the law**

While the Employment Ordinance ostensibly provided workers with the right to claim severance payments, the loophole concerning resignation as an act forfeiting severance entitlements allowed the employer to deny this right. This reflects the emphasis on employees' 'loyalty' to the employer and the treatment of workers' entitlements as a set of 'rewards' for this loyalty.

In practice the Employment Ordinance reinforces rather than moderates the employer's right to unilaterally transfer workers, allowing the company to defend its contractual right to relocate workers, regardless of its intentions. This is stated in Clauses 1.3 and 1.9 of the Conditions of Employment signed by workers individually upon commencing work with ISS Servisystem:

1.3 Work allocation: workers must obey directions given by the management of the company regarding work allocation, work location and working hours without dispute or delay.

1.9 Re-location: the company has the right to relocate workers to an alternative work unit or position as actual circumstances require. Employees who refuse to accept such re-location arrangements shall be treated as having voluntarily resigned and shall not have a claim for compensation against the company.

Notably these contract conditions lay the basis for dismissal without compensation or severance payments by linking non-compliance to 'employee misconduct', as defined in the Employment Ordinance. This contractual right to dismiss workers without compensation or severance pay (Condition of Employment Clause 1.10 - Termination of Employment), is supported by Sections 9, 31D and 31S of the Employment Ordinance. For example, Section 31S(1) on 'general exclusions from right to long service payment by reason of dismissal' reads:

"An employee shall not be entitled to a long service payment by reason of dismissal where his employer, being so entitled by reason of the employee's conduct, terminates his contract of employment without notice or payment in lieu in accordance with section 9."

This claim of employee's misconduct, together with Section 9 on dismissal, was invoked against the 146 workers who failed to report for duty at new work locations by 14 December.

Throughout the negotiations the only concession the management appeared to make was that workers would have a 'right of refusal' if they found their new work locations to be inconvenient or if it caused excessive difficulty. However, the management stated that workers could only raise such concerns on an individual basis, that is, without union representation. Moreover, there is no binding agreement requiring the company to recognise a workers' refusal of the new assignment. In effect workers did not have a right of refusal, but only the right to raise a grievance with the company's Human Resources Manager.

While ISS Servisystem exercised a contractual right to reassign workers permitted under law, it should be clear that the content of employment contracts was unilaterally decided by the employer in the first place. Thus the exercise of this particular right of the employer has a legal basis only because there is no legal protection of workers' right to collective bargaining. In the absence of

the right to collective bargaining workers are unable to challenge the content of their employment contracts, since only collective representation has the potential to counter-balance the power of the employer. As overseas experience indicates, had there been a collective agreement negotiated by the workers at ISS Servisystem, issues such as relocation and work reassignment would be covered in a collective agreement and not individual employment contracts. This of course assumes workers would be unionised prior to signing a collective agreement. However, in a general climate of fear against dismissal without possibility of reinstatement, and the use of transfer and relocation to harass workers involved in trade union activities, such anti-union actions by employers further undermine this possibility.

Following their dismissal on 14 December, 159 workers collectively lodged claims in the Labour Tribunal, seeking compensation and severance payments on 28 January 2002. The first hearing was on 27 February, followed by hearings on 18 April, 31 May, and 29 July. These legal proceedings are expected to go on for another year. In the initial hearings ISS Servisystem based its defence solely on the contractual right to relocate workers. However, the union representative presented evidence showing that the reassignments were undertaken with malicious intent. In response the Labour Tribunal's presiding officer requested evidence from the company that the relocation was not retaliatory, as the workers claimed, by proving that the relocations were not arranged on the basis that workers would resign. Specifically the employer was requested to submit evidence showing that the reassignments were feasible, that workers would not become redundant once relocated, and that the process of relocation was reasonable.

### **Conclusion: organising beyond the limits of the law**

At the very outset workers decided against seeking Labour Department intervention because they had no clear legal basis on which to make their claims. In the absence of legal safeguards regulating the re-allocation clauses in their contracts, the Labour Department would merely remind workers of their contractual obligations and the employer's right to reassign them. As such the workers were aware that any Labour Department intervention would result in their being encouraged (or coerced) to

act on an individual basis and to abide by the terms of their employment contracts.

It was in this context that the workers decided to focus on organising their collective strength first – and displaying this strength through industrial action – rather than seeking Labour Department assistance in the early stages of the dispute. According to a union organiser:

“Only workers’ collective power can be used to change the situation. It’s a matter of choosing between the law and workers’ power. If the law is used, then workers were likely to lose their claims by being forced into conciliation. Also, workers would not learn about the union and their rights.”

What is clear from the ISS cleaning workers’ struggle is that the issue of severance pay entitlements quickly grew into broader concerns about their rights and dignity. Many workers used the opportunity to bring attention to grievances spanning the past decade. Union organising activities and the strike created the opportunity to speak openly about these issues for the first time and to confront the company directly and public ally over its exploitative labour practices. The management’s hostile reaction and the failure of the legal system to protect workers only served to strengthen this emphasis on dignity and justice.<sup>27</sup>

Throughout the struggle it was evident that the law is primarily designed to prevent labour conflict and maintain industrial peace. As workers soon found, neither the law nor the legal system through which these laws are applied, upholds dignity or justice. At best the law is a tool that may be used in the struggle for workers’ rights, and in that process its shortcomings are exposed. Also exposed were the collective interests of the cleaning contracting companies that rallied to support ISS Servisystem’s aggressive stance towards the workers. Fearing the spread of industrial militancy among cleaning workers and the prospect of the strike setting a dangerous precedent, the Environmental Contractors Management Association (EMCA) exhibited overt support for ISS. On 29 November the EMCA issued a statement calling on workers to end the industrial action.

Despite the failure of the strike to secure severance payments and the long legal dispute that lies ahead, workers argue that there is a positive, long-term outcome involved. The former ISS workers established a new union of cleaning workers on 15 May 2002, imme-

diately launching a campaign to organise cleaning workers throughout Hong Kong. By doing so the workers have made the EMCA's worst fears come true.

## Notes

1. Wall Street Journal and The Heritage Foundation, *The Index of Economic Freedom 2002*, at <http://www.heritage.org/index/>
2. For a more detailed discussion, see Gerard Greenfield, 'Hong Kong SAR and Taiwan', in *The World As Seen By its Peoples*. (Belgium: World Forum for Alternatives (WFA), August 2001), at <http://www.forum-alternatives.net/eng/>
3. 'Rule by tycoon consolidated', *Union Action*, (June 2002, pp.1-3).
4. 'Whose Voices?', *Union Action*, (March 2002, pp.1-3).
5. The number of poor households with at least one unemployed member was about 70,300, compared to a total of 370,000 poor households. Submission of the HKCTU to the 25th session of the United Nations Committee on Economic, Social, and cultural Rights on the implementation of the International Covenant on Economic, Social, and cultural Rights, Geneva, 23 April to 11 May 2001. See also Kwong-leung Tang and Jacqueline T.Y. Cheung, *An Insider View: Opinions and Assessments of Retraining Policy from Hong Kong Workers*, (Hong Kong: Asia Monitor Resource Center, March 2001, p.49).
6. Wong Hung and Lee Kim-ming, (City University of Hong Kong, July 2002). See also, 'Poverty gap grows as rights are denied', *Union Action*, (May 2001, p.4).
7. Quoted in 'Union-backed minimum wage bill defeated', *Union Action*, (June 2002, p.4).
8. *Concluding Report on the Hong Kong Special Administrative Region of the People's Republic of China*, (United Nations Committee on Economic, Social, and Cultural Rights on the Implementation of the Covenant on Economic, Social, and Cultural Rights, Geneva, 11 May 2001).
9. The trade union participation rate is calculated on the basis of declared membership divided by the number of salaried employees and wage earners.
10. Registry of Trade Unions, *Annual Statistical Report 2000*, (Hong Kong: Labour Department, 2001, p.89).
11. *Ibid*, (p. 118).
12. For more information visit the HKCTU at <http://www.hkctu.org.hk>
13. A useful insight into the history of the Hong Kong trade unions in relation to the student and workers' pro-democracy movements in Spring 1989 can be found in the *Workers Remember*, (Hong Kong, 2002) booklet, at <http://workersremember.org/>.
14. This is adapted from the text written for the *Annual Survey of Violations of Trade Union Rights 2002* by the author together with Michael Siu, the International Secretary of HKCTU.
15. Unless otherwise stated, all data in this section is based on information provided by the Department of Labour of the Hong Kong SAR.
16. *Hong Kong Judiciary Annual Report 2001*, (Hong Kong: Hong Kong Judiciary, 2002, p.79).
17. Every year on 28 April, ARIAV, HKCTU, and HKCTU affiliates are involved in organising campaigns for the International Commemoration Day for Dead and Injured Workers. For more information see <http://www.hkctu.org.hk/english/news/april2802.html>
18. Joe England, *Industrial Relations and Law in Hong Kong* (Second Edition). (Hong Kong: Oxford University Press, 1989, pp.161-162; 166;186).
19. Stephen W K Chiu and Ching Kwan Lee, *Withering Away of the Hong Kong Dream? Women Workers under Industrial Restructuring*. Occasional Paper No.61, (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, June 1997, pp.7;31).
20. Education and Manpower Department, *Review of Industrial Relations System in Hong Kong*, (Hong Kong, 1993).
21. Joe England and John Rear, *Industrial Relations and Law in Hong Kong: an Extensively Rewritten Version of Chinese Labour under British Rule*. Hong Kong: Oxford University Press, 1981, p.207. Cited in Anthony Woodiwiss, *Globalisation, Human Rights and Labour Law in Pacific Asia*, (Cambridge University Press, 1998, p.177).
22. 'Down by Law: Catering and hotel workers fight the "4-18" rule', *Union Action*, (May 2001, pp. 1-3).
23. *Emphasis added*. ILO International Labour Standards Department, Appendix IV, (China, Hong Kong Special Administrative Region, March 2002).
24. This is adapted from the text written for the *Annual Survey of Violations of Trade Union Rights 2002* by the author together with Michael Siu, the International Secretary of HKCTU. For the full text see, International Confederation of Trade Unions (ICTU). *Annual Survey of Violations of Trade Union Rights 2002*. Brussels, (ICTU, 2002).
25. This text concerning Lego is based on 'Rule by tycoon', *Union Action*, (June 2002, pp.1-3), which was originally written by this author.
26. See <http://www.iss-group.com>.

27. These and other views are recorded in the testimonies given by workers in the documentary film, *From Silence to Outcry! The Industrial Action by the ISS/MTR Cleaning Workers*, (Hong Kong: HKCTU, 2002). The union later documented 53 cases of deliberate reassignment to create hardship that occurred prior to the dispute in November 2001.

28. Although the management later claimed in its testimony to the Labour Tribunal that it had contacted the

Labour Department and the union refused conciliation meetings, Labour Department officials announced that they had never received any request for mediation. *South China Morning Post*, (22 November 2001).

29. Sze Pang Cheung, 'Putting down their brooms and picking up dignity! The MTR janitors' strike', *Ming Pao*, (30 November 2001).