Hong Kong Law Journal
2010

Analysis

***593** Section 70 of the Employment Ordinance: Does it Stand in the way of Employers and Employees Settling Matters Once and for All?

Prue Bindon [FNa1]

Section 70 of the Employment Ordinance prevents an employer from agreeing with an employee to reduce or extinguish, in the contract of employment between them, the minimum rights and benefits conferred on the employee under the Ordinance. While preventing "contracting out" of rights and benefits under the Ordinance is a critical part of achieving its aim of protecting employees, it is questionable how far s 70 goes in fettering the freedom of contract of employers and employees. This article examines whether s 70 ought to be construed broadly enough to capture, not only contracts under which an employer agrees to engage a person as an employee, but also agreements that an employer and an employee may make at the conclusion of their relationship to finalise matters between them. This article examines the provision in light of its context and purpose and concludes that on a proper construction, s 70 should not be understood as extending so far. Moreover, while little consideration of this question can be found in case law, the weight of existing cases can be understood to support this conclusion.

Section 70 -- Employees' Protection against Contracting Out

Introduction

Section 70 of the Employment Ordinance (Cap 57) (EO) is a provision which prevents "contracting out". It renders void any term of a contract of employment which purports to reduce or extinguish various rights or entitlements that are conferred on an employee under the EO.

It is not surprising to find provisions which prevent contracting out in legislation that governs labour relations. [FN1] It is well recognised that one of the principal aims of such legislation is to protect employees who are ***594** generally considered to occupy the inferior bargaining position in relation to employers. The common way to confer this protection is by prescribing certain minimum rights and benefits to which employees will be entitled in performing work for the employer. This protective aim would, of course, be readily defeated if employers were free to reduce or dispense with those minimum entitlements through the contract of employment under which they engage their employees.

But how far does s 70 really go in fettering the freedom of contract between employers and employees? In particular, can it not only capture agreements about the entitlements that an employee will earn pursuant to the employment relationship, but can it also capture agreements about how the employer and employee will *conclude* matters between them, as commonly occurs in a settlement agreement?

The case law is not entirely clear on this point. In fact, there are very few cases that have given any con-

sideration to the question, and those cases in which the question has been considered do not seem to provide an altogether consistent answer.

This article contends that s 70, on a proper construction, ought not prevent the enforceability of a contract in which an employee agrees to forego the right to make further claims against the employer in respect of rights and entitlements that have arisen under the employment relationship, including minimum entitlements under the EO. Moreover, the balance of case law can be seen to support this interpretation and the cases that appear to depart from this view do not, on closer analysis, stand as convincing authority for a contrary conclusion.

Does Section 70 Extend to Settlement Agreements?

The Plain Meaning of Section 70

There would perhaps have been little doubt about whether s 70 captures settlement agreements that purport to extend to minimum entitlements under the EO if it had simply been expressed to apply to all "contracts" between an employer and an employee. However, the section is in fact in the following terms:

> "Any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void."

***595** The term "contract of employment" is itself defined in s 2 of the EO as:

> "[A]ny agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee and also a contract of apprenticeship."

Although a settlement agreement may be a contract between an employer and employee, it does not ostensibly fall within the plain meaning of a "contract of employment" as defined in s 2. Rather than being an agreement in which one party agrees to employ another as an employee, a settlement agreement in the employment context is typically an agreement between an employer and an employee about how the employment relationship has been, or is to be, brought to an end.

Indeed, using the interpretive principle of *expressio unius*, [FN2] the legislature's use of the term "contract of employment" rather than simply "contract" suggests that it was not concerned to regulate all contracts which might cut across the provisions of the EO. Rather, it was only concerned to regulate those contracts which governed the employment relationship -- that is, contracts under which an employer agrees to employ a person and that person agrees to serve the employer as an employee.

A similar observation was made by A Cheung J in the Court of Appeal's decision in *Kao Lee & Yip (a firm) v Lau Wing and Another*: [FN3]

> "[S]ection 70 only strikes down '[a]ny term of a contract of employment' which seeks to do what is prohibited. An ad hoc agreement, arrived at by the employer and employee not at the beginning but only at the time when one of them wanted to terminate the contract of employment by an agreement for payment in lieu of notice -- which is a common enough situation, is not a contract of employment. It is a different and subsequent contract to terminate the prior contract of employment. Section 70 simply does not apply to invalidate such an agreement." [FN4]

The specific use of "contract of employment" in s 70 stands in contrast to the contracting out provision in s 203 of the UK Employment Rights Act 1996 (c 18) which provides:

> ***596** "(1) Any provision in an agreement (*whether a contract of employment or not*) is void in so

far as it purports --

(a) to exclude or limit the operation of any provision of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an industrial tribunal." [FN5]

Quite clearly, all contracts (including settlement agreements) are intended to be captured by this provision. It is noteworthy, however, that s 203 goes on to include an express exception for compromise agreements that satisfy certain conditions. [FN6] The UK Act therefore recognises the value in enabling parties to an employment contract to be able to settle claims between them -- including claims to statutory entitlements -- at the point at which they decide to conclude the employment relationship.

Section 70 in Light of Context and Purpose

Of course, we cannot stop with the plain meaning of the terms used in s 70. In interpreting statutory provisions, s 19 of the Interpretation and General Clauses Ordinance (Cap 1) requires us to go beyond the literal meaning of the words and apply "such a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit".

Certainly a key object of the EO is to protect employees by prescribing various minimum entitlements which cannot be negotiated away to the detriment of the employee. The question is whether this objective would necessarily be undermined if employees could effectively release their employers from any further obligation to provide entitlements prescribed by the EO in return for some benefit conferred on them at the point of termination. [FN7]

***597** At first glance, if employees are entitled under the EO to receive certain minimum entitlements from their employers, that objective may seem to be undermined by settlement agreements that effectively prevent employees from recovering such entitlements if they later discover that the employer did not provide for them adequately.

However, on closer analysis, this is not necessarily the case. Indeed, as argued below, far from undermining the objectives which underlie the EO, limiting s 70 so as to preserve the enforceability of settlement agreements which purport to discharge minimum entitlements under the EO may, in fact, be seen to further those objectives.

The distinction between accrued entitlements and entitlements yet to be accrued

It must be recognised that there is a significant distinction between the following two situations. The first is where an employee agrees with the employer to forego various minimum entitlements prescribed by the EO in respect of services which he or she will perform for the employer going forward during the employment relationship. The second is where an employee agrees to release the employer from any obligation to provide any further entitlements in respect of the employee's services to date.

If permitted, the first situation would mean that the employee would never have the opportunity to earn the minimum entitlements prescribed under the EO in the first place. The terms of the employment contract would in effect deprive the employee from the ability to earn those entitlements from the very beginning of the employment relationship. Moreover, being in an inferior bargaining position, the employee may nonetheless feel compelled to accept such terms or else face the prospect of no job at all. Clearly, such a situation undermines the protective aim of the EO and falls squarely within the scope of what s 70 is designed to prevent.

However, in the second situation, the entitlements of the employee have *already* been earned. It is therefore not a question of asking the employee to work for less than what the EO prescribes. If the employee assesses that the settlement agreement would leave him or her worse off than if he or she pursued what is already owed under the EO (or otherwise), then the employee is free to refuse it and his or her right to receive those entitlements from the employer remains perfectly intact for the entitlements have already been earned.

For this reason, the second situation is not prone to defeat the protective aim of the EO in the same way that the first situation is. Therefore, it is not inconsistent with the aims of the EO to understand s 70 as being directed only to agreements about the rights and entitlements that *will* accrue during the employment relationship -- which is the essence of what a contract of employment is. It is not concerned with agreements ***598** about how rights and entitlements which have already accrued to the employee might otherwise be discharged.

While there has been little analysis of s 70 in case law to date, a number of decisions can be seen implicitly to support this interpretation.

In *Chiu Wing Hang and Others v BG Lighting Co Ltd* [FN8] the employers had fallen into arrears with payment of wages to their employees as a consequence of the economic downturn which commenced in 1997. Rather than implementing redundancies, the employers struck two agreements with the employees. The first was that they would pay the employees partial wages at the rate of HK$1,000 per week. The second was that the wages for July would be paid in two instalments -- one in mid-August and one at the end of August (July Agreement) -- in addition to the weekly payment of HK$1,000.

This arrangement was at odds with s 23 of the EO which entitles employees to be paid their wages within seven days of the last day of the wage period. Six of the 30 or so employees who agreed to the July Agreement decided subsequently to lodge a claim in the Labour Tribunal, despite having earlier confirmed the July Agreement in conciliation at the Labour Department.

The Labour Tribunal found that the July Agreement to defer payment of wages was void as being unsupported by valuable consideration. The question of s 70 was not addressed. On appeal, the High Court reversed the decision on the question of consideration, finding that valuable consideration had been provided in the form of the mutual agreement of all the employees to accept deferred payment of wages. The Court likened this to a mutual agreement among creditors to forbear, which is regarded as valuable consideration to support a composition agreement.

Accordingly, the employees resorted to an argument based on s 70 and contended that the July Agreement was void since it purported to take away the right of the employees to have their wages paid within seven days of last day of the July wage period. The Court rejected this argument and upheld the validity of the July Agreement, although its discussion of s 70 was very brief:

> "The July agreement is not a term of a contract of employment. [Section 70] therefore has no application to the July agreement. Wages were due 7 days after the last day of the wage period. They were due and outstanding at various times before the July agreement. It was only when they were due and liabilities ***599** accrued that the parties agreed to discharge that liability by the arrangements in the July agreement. The section therefore has no application to the July agreement, whether in relation to the employee's rights under section 23 or under section 10A which I shall next turn to." [FN9]

Nonetheless, the reasoning here is implicitly that s 70 will not strike down agreements which address how entitlements that have already accrued under the EO are to be discharged, as opposed to agreements which purport to stipulate what entitlements employees are to accrue in the first place.

In *Wong Yin Mui Sandy v Newport May (Administratrix of the estate of Newport William James, deceased)*, [FN10] the employer company was expected to close operations around Dec 2002 and negotiated a settlement agreement in which the employee agreed not to pursue her entitlements under the EO up to Dec 2002 in exchange for a lump sum payment of HK$441,000.

The question was whether the agreement was unenforceable as being contrary to s 70 of the EO and public policy. The argument was that if the company did not in fact cease operations in Dec 2002 as anticipated and the employee continued to be employed until retirement, then the settlement agreement amounted to a variation of the contract of employment between the employer and the employee, and was itself a "contract of employment". As such, it fell within the scope of s 70 and was void in that it sought to prevent the employee from recovering her statutory entitlements from the employer by reference to her actual date of termination. Alternatively, it was argued that as a matter of public policy, the employee's future right to benefits under the EO was a matter of public concern and could not be "bartered away".

The Court rejected the argument on the basis that, in light of the background and negotiations leading to the agreement, the parties had not intended that the settlement agreement extinguish all future rights of the employee under the EO in the event that the employer decided to continue its operations beyond Dec 2002. Rather, it would always be open to the employee to come back on the issue of her entitlements if the employer did not cease to operate after Dec 2002. This did not, however, affect the enforceability of the settlement agreement to the extent that it settled the employee's entitlements for services performed up to Dec 2002.

***600** This conclusion therefore supports the argument that s 70 will not invalidate agreements about how entitlements that have already accrued to the employee from past service with the employer are to be discharged.

It must be acknowledged that the Court made a further comment in relation to s 70 which casts some confusion on its conclusion:

> "Further, s 70, is to restrict employers and employees from contracting out of any legislative right in order to protect employees' entitlement to minimum statutory employment benefit. See *Halsbury's Law of Hong Kong* ***Vol****. 10 (2) (2005) at paragraph [145.035]*. I find the present agreement to have exceeded the statutory minimum for employment benefit and s 70 does not apply." [FN11]

In other words, it appears as though the Court's conclusion was influenced by its assessment that the sum agreed to be paid to the employee was not in fact lower than the minimum statutory amount due to the employee under the EO and for that reason s 70 did not apply.

It is not difficult to see that if a court must actually assess whether an amount paid to an employee under a settlement agreement does in fact discharge the employee's entitlements under the EO, this undermines the very point of the settlement agreement from the employer's point of view -- that is, to operate as an effective bar against a subsequent claim by the employee for entitlements under the EO. Further, it ignores the important point, discussed in the section below, that settlement agreements are generally entered because they bestow some other (and potentially more valuable) benefit on the employee to which he or she would not otherwise be entitled.

A contrary approach to the decisions above appears to have been taken in the earlier case of *Tsang Wai Sun v Beverly Fashion Ltd*. [FN12] In this case, the employee had signed an acknowledgement receipt of his final termination payments and had resolved with his employer that the parties would not claim against each other. The employee subsequently brought a successful claim in the Labour Tribunal that the termination payments were insufficient. On appeal to the High Court, the employer argued, among other things, that the

claimant should be estopped from bringing any further claims arising from the contract of employment, having already received an amount upon termination for which he had acknowledged receipt.

***601** The Court rejected the employer's argument on the basis that such an agreement was void by virtue of s 70:

> "[T]he payment for termination of employment in lieu of notice and the payment of long service payments are rights and benefits conferred upon the employees by the Ordinance. The parties cannot by agreement override provisions set out in the Ordinance because to do so the Defendant would be reducing the employee's right and benefit conferred by the Ordinance. Any agreement to that effect must therefore be void." [FN13]

However, the Court's conclusion on this point may be regarded as obiter because the Labour Tribunal's finding of fact (which the Court did not disturb) was that the employee had accepted the cheque for final termination payments "under protest". As such, the Court held that "there was no valid and binding agreement for the Claimant to waive the balance nor was the Claimant estopped from claiming the balance". [FN14] In other words, the employee had never actually agreed to give up his rights to recover minimum entitlements under the EO, so there was, in fact, no settlement agreement in place at all.

Accordingly, the decision is not convincing authority that s 70 should be interpreted so as to capture settlement agreements that address how entitlements that have already accrued under EO are to be discharged. It is perhaps for this reason that no mention of this decision was made in either *Chiu Wang Hang v BG Lighting* or *Wong v Newport*.

Settlement agreements provide benefits to employees

As pointed out above, an employee is always free not to agree to any proposed settlement agreement and her right to accrued entitlements under the EO (if any) will remain perfectly intact.

Usually, however, there is some greater benefit to be gained by the employee in entering the settlement agreement. The employee might well assess that benefit as being significantly more valuable than the ability to make claims in respect of minimum entitlements under the EO. Employers would have little incentive to offer such benefits to employees if what they require in return (namely, a release from claims relating to the employment or its termination) is unenforceable to the extent that it covers minimum entitlements under the EO.

In this sense, rather than furthering the protection afforded to employees under the EO, interpreting "contract of employment" in s 70 broadly ***602** enough so as to encompass settlement agreements may in fact detract from that objective insofar as it closes off an avenue for employees to negotiate beneficial termination arrangements.

For example, in the recent case of *Knight John Lee v Global Force Ltd trading as The Mix*, [FN15] the employee sought recovery of various termination payments from his previous employer, including entitlements under the EO such as annual leave pay, end of year payment and wages in lieu of notice. The employer argued that the employee was barred from bringing his claim by virtue of a deed which both parties had signed at the time the employee ceased employment.

The deed recorded that the employee had, for some time during his employment, been secretly operating a business in competition with his employer. The deed provided that the employee would immediately resign from employment and the employer would be released from any obligation to pay the employee wages in arrears, annual leave and other termination payments required under the EO. Additionally, it provided that the

employee would not bring any claim against the employer in respect of any matter concerning his employment, and equally the employer would take no further action against the employee.

Interestingly, s 70 was not even raised by the employee in this case. It is not clear whether this was because the parties assumed that the deed was not a "contract of employment" and therefore that s 70 was not relevant, or simply that the parties had not turned their mind to s 70 at all.

In any event, what is important to emphasise is that the prospect of litigation against the employee was very real at the time the parties entered the deed. The employer alleged that it had discovered the employee's secret activities, some of which were criminal. While the employer may well have owed the employee various entitlements under the EO, it is clear that it considered itself to have strong grounds for its own action against the employee for recovery of losses sustained as a result of his secret activities. The deed was the means by which the employer allowed the employee to "walk away" from potentially serious proceedings being instigated against him.

Aside from an employer forbearing to sue, there are a number of ways in which an employee may derive benefits under a settlement agreement that may be more valuable to the employee than the ability to make claims in respect of minimum entitlements under the EO. In *Wong v Newport*, for example, the benefit was the simple fact that the employee received a payment in respect of certain entitlements in ***603** advance of those entitlements being accrued, thereby giving her the early use of a lump sum. [FN16]

Another example is where the employer allows the employee to resign, or to end the employment relationship by "mutual agreement", [FN17] with provision of a reference or statement of service recording that fact, rather than by the employer dismissing the employee. In practice, this commonly arises where the employee's performance has been poor or amounted to misconduct and the employer would otherwise proceed to exercise its right to terminate the employee on notice or, if grounds exist, summarily. The major benefit here is the ability to represent to prospective employers that the employee resigned from previous employment as opposed to having been "fired". [FN18]

Other common examples of benefits provided to employees under settlement agreements include where the employer agrees to release the employee from post-employment restraints which would otherwise prevent the employee from commencing work with a competitor, or where the employer agrees to waive the employee's notice period in circumstances where the employee wishes to depart immediately but does not want to make a payment in lieu of notice in order to do so. [FN19] Another situation is where the employer agrees to waive certain adverse consequences that would normally flow to the employee in respect of unvested or deferred entitlements under incentive or bonus plans, as it is common for such plans to require such entitlements to be forfeited when an employee ceases employment for any reason other than redundancy or retirement.

***604** Where an employer makes such concessions, it is understandable that it would only want to do so if the employee executes a settlement agreement releasing the employer from any further claims and that such a release will be effective in barring the employee from putting the employer to the not insignificant inconvenience of having to defend a subsequent claim in respect of entitlements under the EO.

Recognising that settlement agreements offer employees the opportunity to negotiate beneficial termination arrangements and in that sense do not detract from the protective aims of the EO may be the key to reconciling one decision which on first glance appears to hold that s 70 will render such agreements void.

In *Choi Tze Keung v Green Club*, [FN20] the employer terminated the claimant employee's employment and prepared a cheque for one month's wages in lieu of notice, pro rata annual bonus and a long service payment. The employee signed a note acknowledging acceptance of the cheque and stating that he gave up his

rights for “further claims from now on” and any right to further payments in the future.

The employee subsequently brought a claim in the Labour Tribunal for arrears of wages, annual leave pay and severance pay. The Tribunal upheld the claim, finding that the note which the employee signed was not effective to bar his claim because s 70 did not permit the employer to reduce the benefits and protections afforded to the employee under the EO.

The employer appealed on the basis that, among other things, the employee had accepted the sum paid to him on termination in settlement of all his claims. The High Court found, firstly, that what the employee had accepted in signing the note had to be viewed in light of the circumstances existing when he appended his signature. While it was not entirely clear from the note itself, the circumstances suggested that the employee had only intended to give up his rights to make further claims in respect of the specific items which had formed the basis of the final payment made to him (that is, wages in lieu of notice, pro rata annual bonus and long service pay), rather than *all* entitlements arising from the employment.

Secondly, the Court found that if the employee had purported to give up his rights to all entitlements, his promise was not supported by valuable consideration. In particular, there was no evidence that the employee had given the promise in return for the employer forbearing to take action against him or to avoid legal proceedings.

***605** This conclusion is surprising, since the terms of the note were relatively clear in stating that the employee gave up rights to “*any* further payments”. Further, the employer had in fact alleged that the employee had committed various acts of misconduct, including overcharging of customers and embezzling club fees, although the employer had ultimately decided to take a lenient view and ask the employee to resign. In that sense, there was in fact some evidence from which it could be inferred that the employer had accepted the employee's waiver of claims to further payments in return for making the payment it did.

In any event, the critical point is that the Court's conclusion was based on the facts as determined by the Labour Tribunal, rather than on a view that s 70 prevents an employee from giving an enforceable waiver of claims to minimum entitlements under the EO. On the contrary, the case suggests that the employee's waiver would have been effective if it had been worded more clearly to cover *all* entitlements and if valid consideration to support the employee's promise had been more apparent. At the very least, it can be said that a more carefully drafted document, and one to which both the employer and employee were party (as was the case in *Knight v Global Force*), would have gone a large way towards fixing these two issues.

This is no more than a reminder that a settlement agreement, like all contracts, must meet the requirements of a valid contract. Among other things, the terms should be clearly expressed and there must be evidence that consideration of some value (although not necessarily adequate) was provided in return for the employee's agreement to release the employer from the obligation to make any further provision in respect of minimum entitlements under the EO.

Settlement agreements assist in facilitating harmonious labour relations

In adopting a purposive approach to construction of statutory provisions, courts have emphasised the need to consider the provision in context, taken in its widest sense. [FN21]

In this regard, it is important to recognise that the aim of labour regulation is not only to protect employees through the establishment of various minimum entitlements, but also to establish a framework for harmonious labour relations through facilitating the resolution of labour disputes.

***606** For example, a key function of the Labour Tribunal -- which has exclusive jurisdiction over claims for recovery of entitlements under the EO [FN22] -- is to encourage parties to reach a settlement of their claim at all points in the process.

Parties are generally encouraged to make use of the free conciliation services offered by the Labour Relations Division of the Labour Department before proceeding with a claim in the Labour Tribunal. [FN23] If this does not result in settlement, the Labour Tribunal must also conciliate the matter with a view to reaching a settlement before it can even proceed to hear a claim. [FN24] The only exceptions to this are where one of the parties refuses to participate in the conciliation, or where a tribunal officer assesses that conciliation either is unlikely to result in settlement or may be prejudicial to the interests of one party. [FN25] Additionally, during the hearing of a claim, the Labour Tribunal may, with the parties' agreement, adjourn the matter where it believes there is a likelihood of settlement being reached. [FN26]

If the aim, then, is to prevent as many claims as possible from requiring full adjudication by encouraging parties to reach a settlement at all points in the process -- including where the claim relates to minimum entitlements under the EO -- it seems anomalous that the EO would not permit parties from reaching a settlement of their own accord before they even get to the point of lodging a claim.

A similar point has been made in the context of the Sex Discrimination Ordinance (Cap 480) (SDO) and the function of the Equal Opportunities Commission.

The SDO contains a broad provision against contracting out, however it includes an express carve-out for contracts which settle a civil claim for breach of the SDO. [FN27] In *Au Kwai Fun and Others v Cathay Pacific Airways Ltd*, [FN28] it was argued that the carve out only permitted settlement of claims that were actually in being -- that is, claims which were already the subject of proceedings or at least asserted in a pre-action letter -- rather than all conceivable and still inchoate claims which may arise.

***607** The Court rejected this argument, pointing out that one of the key functions of the Equal Opportunities Commission is to facilitate the settlement of possible discrimination claims through conciliation. As a result, a number of settlement agreements are made before any legal proceedings are commenced. If it were necessary for proceedings to have been initiated in order for a settlement agreement to come within the carve out, none of the settlement agreements reached in conciliation would be binding and it would simply not be possible for parties to settle a discrimination claim outside of commencing legal proceedings. The Court concluded that this could not have been the legislature's intention. Accordingly, there was no requirement for a claim to have been articulated in any form of letter of demand or court proceedings in order to come within the scope of the carve out. [FN29]

Indeed, the importance of facilitating harmonious labour relations was emphasised explicitly in *Chiu Wang Hang v BG Lighting*. The Court was not shy in acknowledging that its decision was influenced by the difficult economic backdrop and what it saw as “commercial reality and practical convenience”. [FN30] As it stated plainly:

> “[T]he whole transaction is to be looked at with commercial sense and not with self-interest. The July agreement kept the company alive so as to provide employment for all the 30 employees, and on unreduced terms. It offered a realistic scheme whereby the arrears would be cleared at $4000.00 a month and possibly more if the condition permitted. ... [I]n fairness to the appellant employers, they have struggled on and so have the other employees who kept their promise of forbearance. ... If self motivated employees should be allowed to ignore these composition agreements, our commercial life will become very fragile and exceedingly vulnerable even to the slightest economic turbulence.” [FN31]

Conclusion

It is unquestionable that a necessary part of achieving the protective aim of labour regulation is ensuring that employers are not free to avoid their obligation to provide minimum employee entitlements simply by agreeing to do so with the employee in the contract of employment between them. Section 70 is in that sense a critical feature of the EO.

***608** However, the plain meaning of s 70 does not extend to capture *any* type of agreement made between an employer and an employee, in particular a settlement agreement which does not purport to address the terms on which the employer agrees to engage the person as an employee, but rather the basis on which the parties will conclude the relationship between them.

Nor does a purposive construction of s 70 compel us to go so far. Firstly, settlement agreements address how the parties will discharge the rights that have *already accrued* to the employee pursuant to the employment relationship, rather than the rights which the employee *would earn* as a result of performing work pursuant that relationship. Therefore, they are not able to strip an employee of protections in the way that the contract which is to govern the employment relationship would (in the absence of s 70) be able to do.

Secondly, settlement agreements confer some additional benefit on the employee to which she would not otherwise be entitled. Employers may have little incentive to offer such additional benefits to employees if settlement agreements are not capable of finally discharging claims in respect of minimum entitlements under the EO.

Finally, settlement agreements assist in facilitating the speedy and effective resolution of labour disputes which is, in itself, an important aim of labour regulation.

Employers should, therefore, be entitled to feel confident that settlement agreements struck with departing employees will be effective in barring the employee from pursuing future claims in respect of employee entitlements arising from the employment relationship, including minimum entitlements under the EO. Of course, it is important to add the qualification that, given the protective aim of the EO, the Labour Tribunal and courts will be cautious in giving effect to such agreements and may be expected to scrutinise them closely if challenged. To be effective, settlement agreements need to be meticulously drafted and must meet all other necessary elements of a valid contract including consideration and the absence of duress.

[FNa1]. BA, LLB (Hons) (Australian National University), BCL (Oxon), Registered Foreign Lawyer.

[FN1]. For provisions which have the effect of prohibiting reduction or exclusion of certain statutory entitlements of employees in the United Kingdom and Australia, *see* s 203 of the UK Employment Rights Act 1996 (c. 18) and s 61 of the Fair Work Act 2009 (Cth) respectively.

[FN2]. *Expressio unius est exclusio alterius*: "to express one thing is to exclude another": *Sze Hei Fa Helena v The Chinese Medicine Practitioners Board of the Chinese Medicine Council of Hong Kong* [2005] 1 HKLRD 58 at para 94.

[FN3]. [2007] 4 HKC 86.

[FN4]. *Ibid*. at para 63. The point was obiter as the appeal was decided on a different basis.

[FN5]. Emphasis added.

[FN6]. Sections 203(2)(f) and 203(3). The conditions are, broadly, that the agreement must be in writing, it must relate to the particular complaint and the employee has received independent legal advice from a qualified lawyer.

[FN7]. The rule in *Pepper v Hart* [1992] **3** WLR 1032 permits reference to parliamentary material such as *Hansard* where the legislation is ambiguous or obscure or leads to absurdity. Sometimes courts in Hong Kong refer to legislative debates even in the absence of ambiguity, obscurity or absurdity: *See*, eg, *Hong Kong Racing Pigeon Association Ltd v Attorney General* [1995] 2 HKC 201. Nonetheless, little guidance can be gleaned from the Secondary Speech or Explanatory Memorandum of the Employment (Amendment) Bill 1970 which introduced s 70 (discussed as s 35A in that Bill): Hong Kong Legislative Council, *Hansard* (**3** Dec 1969). In debate on the Second Reading, Dr S. Y. Chung simply noted that the new section "prohibits contracting out of the provisions of the Ordinance only where this would result in a reduced benefit or protection being conferred upon the employee". The rest of the debate was devoted to the specific issue of explaining how providing a longer period of notice was an increased benefit to an employee and not a reduced one: Hong Kong Legislative Council, *Hansard* (17 Dec 1969).

[FN8]. Unrep., Labour Tribunal Appeal No 67 of 1999 (Court of First Instance, 8 Mar 2000).

[FN9]. *Ibid*. at para 15.

[FN10]. Unrep., DCCJ No 2477 of 2004 (District Court, 29 Aug 2006).

[FN11]. *Ibid*. at para 77.

[FN12]. Unrep., Labour Tribunal Appeal No 54 of 1992 (Supreme Court of Hong Kong High Court, 7 May 1993).

[FN13]. *Ibid*. at 5.

[FN14]. *Ibid*. at **3**.

[FN15]. Unrep., DCCJ No 5534 of 2007 (District Court, 7 July 2009).

[FN16]. *See* n 10 above, at para 71.

[FN17]. In *Kao, Lee & Yip v Lau Wing and Another* [2008] HKCFA 74 at para 31, the Court of Final Appeal recognised that the common law right of parties to bring a contract to an end by mutual consent was not ousted by the EO: "It is beyond question that at common law, contracts can be terminated simply by mutual consent and without any payment or compensation passing between the parties. In an employment context, situations no doubt arise where both employee and employer agree, for whatever reason, that it would be best to bring the employment relationship to an end without more. Equally, of course, they may decide to part company on such terms as they choose to agree. As Huggins J noted, all of this can be achieved without any statutory intervention and so militates against the conclusion that section 7 is intended to regulate termination by mutual agreement."

[FN18]. In *Chu Hei Man, Qualia v Dynasty World Holdings*, unrep., Labour Tribunal Appeal No 58 of 1999 (Court of First Instance, 7 Jan 2000) at paras 5 and 6, the Court noted that where it is better for an employee to resign in the circumstances than be dismissed and where the employee then chooses to resign, no question of constructive dismissal arises. In this case, it was acknowledged that it was better for the employee to resign in that she would receive the reference letter and she would be able to tell prospective employers that she had resigned rather than that she had been dismissed.

[FN19]. Section 7 of the EO enables either party to a contract of employment at any time to terminate the contract without notice by agreeing to pay to the other party a sum equal to the employee's average daily or monthly wages for the duration of the period of notice.

[FN20]. Unrep., Labour Tribunal Appeal No 77 of 1996 (Supreme Court of Hong Kong High Court, 22 Nov 1996).

[FN21]. *See*, eg, the unanimous decisions of the Court of Final Appeal in *Town Planning Board v Society for the Protection of the Harbour Ltd*, unrep., Final Appeal No 14 of 2004 (Court of Final Appeal, 9 Jan 2004), at paras 28-29 and *HKSAR v Lam Kwong Wai* [2006] HKLRD 808 at para 63.

[FN22]. Labour Tribunal Ordinance (Cap 25) ss 7(1), 7(2) and para (1)(b) of the schedule.

[FN23]. *See Guide to Court Services -- Labour Tribunal* pp 18, 31 available at http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/labour.pdf (visited 7 May 2010) and *Conciliation Service of the Labour Relations Division* available at http://www.labour.gov.hk/eng/public/wcp/ConciliationServiceLRD.pdf (visited 7 May 2010).

[FN24]. *See* n 22 above, s 15(1).

[FN25]. *Ibid*.

[FN26]. *Ibid*. s 15(5).

[FN27]. Sex Discrimination Ordinance (Cap 480) ss 87(3), 87(4).

[FN28]. [2008] 2 HKC 507.

[FN29]. *Ibid*. at paras 31-34.

[FN30]. *See* n 8 above, at para 13.

[FN31]. *Ibid*. at paras 12-14.
40 Hong Kong L. J. 593

END OF DOCUMENT