

Employee vs Contractors: The Social and Legal Issues Surrounding Employment Status Disputes

Last updated on 5 Oct 2022

Table of Contents

Introduction	1
Differentiation between the Labels: “Employee” and “Contractor”	1
Legal practice in Hong Kong	2
Additional resources and reading	6

Introduction

Hong Kong has consistently been rated as one of the most business-friendly cities on the planet. This is mostly attributed to the strong and pro-business laws in the city. While business-friendly regulations could bring economic prosperity, they are not without pitfalls. A low-cost environment for business operations and hiring are frequently paired with workers’ rights issues and exploitation.

The misclassification of employees as independent contractors is a common phenomenon in Hong Kong, especially in the gig economy and construction industry. This document aims to first identify the differences between independent contractors and employees from a legal perspective, and then analyse past cases revolving around this issue to gain a deeper understanding of the issue.

Differentiation between the Labels: “Employee” and “Contractor”

In the section, the legal definitions of “employees” and “contractors” will first be addressed. Then, the differences between these two categories of workers will be discussed in detail.

Definition of “employees” and “contractors”

The main piece of legislation governing an employment relationship is the Employment Ordinance (Cap.57 of the laws of Hong Kong) (“EO”). The EO generally applies to every employee engaged under a contract of employment with an employer. All employees covered by the Employment Ordinance irrespective of the number of hours they work are entitled to basic statutory protections including payment of wages, restrictions on the deduction of wages and statutory holiday entitlement. If an employee works at least 18 hours each week for 4 weeks or more, an employee will be considered as being under a continuous contract of employment. Employees who are under a continuous contract of employment and who fulfil certain conditions under the EO are entitled to the full benefits under the EO. These include:

- rest days
- paid annual leave

- paid statutory holidays
- sickness allowance
- paid maternity leave
- paid paternity leave
- statutory severance
- long service payment.

Employees are also entitled to be paid wages not less than the statutory minimum wage which is currently HK\$37.50 per hour and employees are protected under the Employees' Compensation Ordinance in the event that an employee sustains a personal injury by accident arising out of and in the course of employment.

Independent contractors (self-employed persons) are not afforded the protection and benefits mentioned above.

Legal practice in Hong Kong

Due to the differences in the scope of legal protection offered to employees as opposed to independent contractors, it is worthwhile to discuss what the legal principles are in determining the status of workers. The leading Hong Kong case on the distinction between independent contractor and employees is the Court of Final Appeal's decision in *Poon Chau Nam v Yim Siu Cheung* (2007) 10 HKCFAR 156. In this case, the Court of Final Appeal held that to determine the status of a worker, it is necessary to consider all of the features of the relationship against the background of the indicia of employment, in order to form a view as to whether, as a matter of overall impression, the relationship is one of employment.

Overall factual evaluation

While there are no hard and fast rules in differentiating an employee from independent contractors, Hong Kong Courts will typically look at a number of factors to form an overall impression and judgment. The non-exhaustive factors that are usually taken into account are summarised below:

- **Express terms of the written contract:** Although the parties cannot alter the true nature of the relationship through the labelling of the written contract (employment contract v independent contractor contract), the express intention of the parties is still relevant in determining the true nature of the relationship.
- **Degree of control of employers and exclusivity:** Employees' work is usually subject to a greater level of control and supervision by employers and they are generally required to work exclusively for one employer. Self-employed workers have the flexibility in choosing engagements and how such projects are completed and who they choose to provide their services to.
- **Freedom to delegate work (the right to substitute):** Employees are usually not allowed to hire their own helpers. However, this restriction is not seen amongst independent contractors.
- **Equipment and machinery:** In an employer-employee relationship, the equipment is

usually provided for by the employer. However, it is more likely for contractors to bring their own equipment and tools to carry out the work.

- **Financial profits and risk:** Employees are usually remunerated in the form of a salary or a bonus, but generally do not bear any financial risks and rewards associated with their work. Independent contractors bear the financial risk in providing the services based on his/her own management decisions.
- **Responsibilities with regard to pension and tax:** In an employment relationship, employers are required to enrol their employees into a mandatory provident fund (pension) scheme and make monthly contributions. Independent contractors are required to make their own MPF arrangements as self-employed persons. In relation to tax, an independent contractor is responsible for paying profits tax on all income generated from providing the services as an independent contractor. Employees are required to pay salaries tax from the salary and remuneration received from their employer.

Court case examples

Four court cases are summarised below:

Case 1: Lee Ting Sang v Chung Chi Keung & Anor [1988] HKCA 315 Case

Lee Ting Sang was a mason who worked for Chung Chi-Keung, a building sub-contractor on behalf of Shun Shing Construction & Engineering Co. Ltd, under a sub-contract. While Lee was working for multiple subcontractors, he gave priority to the work provided by Chung. Chung compensated Lee for his work mostly on a “piece-work rate” basis and occasionally, under a “daily rate” basis. In carrying out his work, Lee received all the equipment from Chung, and did not require any supervision due to his experience and skill in this industry (HKLII, 1990).

To determine whether Lee was an employee or a contractor, the Court considered the following criteria:

- The level of control exercised by the employer over the worker.
- The level of responsibility for the worker to manage his/her own work.
- The level of financial benefits and risks the worker needed to bear.
- Whether the worker hired his/her own helpers in carrying out the work.
- Who were the benefactors if the worker did well in his/her tasks.
- Whether the worker was working exclusively for his/her employer or on their own account (where he/she could work for various employers).
- Whether the worker used his/her own working equipment.

The Court found that Lee did not bring his own tools to work, had no responsibilities for investment in the work, did not price his job, and did not hire any helpers. Accordingly, Lee was classified as an employee of Chung (HKLII, 1990).

Case 2: Leung Kam Wah v Fung Yuk Ching [2008] HKCFI 350 Case

Leung worked as a Hong Kong and Mainland cross-border lorry driver under Fung from 24 July 2003 to 15 July 2005. When Leung was working for Fung, Fung paid for all the expenses in relation to Leung's work. At the same time, Leung was instructed to pick up Fung's order every time he crossed the Hong Kong-China border and inform Fung whenever he needed to take leave. Meanwhile, Leung made no contribution or investment, and did not take any financial risks in respect of Fung's business. As Fung was required to obtain Leung's permission before crossing the border and Leung was mandated to receive work instructions from Fung, the Court decided that Leung was an employee of Fung (HKLII, 2008).

This case shows how the Court could identify employer-employee relationships through analysing the degree of control that the employer exercises over their employee/contractor.

Case 3: Market Investigations Ltd. v Minister of Social Security [1969] 2 QB 173 Case

Mrs. Anne Florence Irving was engaged by Market Investigations Ltd, a market-research company, on the company's panel of interviewers on a part-time basis. When participating in any of the interviews, she was required to adhere to strict guidelines, such as compliance with an "Interviewer's Guide" and other relevant guidelines directions. Moreover, she was required to work at specific times due to strict deadlines of some of the surveys. On 22 December 1965, Mrs. Irving confronted Market Investigations Ltd, and alleged that the company had not paid national insurance contributions at a rate suitable for her as an employee, unlike what they did for their full-time interviewers.

The Court used the evaluation of the "degree of control" test that the company exerts over its workers to identify any employer-employee relationship in this case. As Mrs. Irving was under a high level of control by the company in the work process, the Court held that Mrs. Irving was an employee of Market Investigations Ltd, and the company needed to compensate for her loss in insurance contributions.

This UK case had been relied upon by the Hong Kong Courts as a precedent. This case has defined the method of assessing the level of control the company has over its workers when deciding whether workers are employees or independent contractors.

Case 4: Poon Chau Nam v Yim Siu Cheung [2007] HKCFA 19 Case

The case was between Poon Chau Nam, an air-conditioning technician, and Yim Siu Cheung, the sole proprietor of Yat Cheung Air Conditioning. During their relationship, Yim had full discretion in deciding what jobs should be assigned to Poon. Besides, all financial gain or losses in their relationship were borne by Yim's business. Yim paid Poon a daily rate of HK\$550 and provided all the equipment used in carrying out his job. Meanwhile, Poon joined an MPF scheme on 1 December 2000 as a "self-employed" person and did not require any supervision at work given that he was a skilled and experienced worker. On 18 September 2002, Poon suffered an injury to his left eye, leading to a 30% loss in eyesight and a subsequent 45% loss in earning capacity.

Considering that Yim had total control over Poon's work, paid for all the tools, and bore all

the financial awards or costs in the relationship, the Court determined that Poon was an employee of Yim at the time of the accident, despite Poon’s casual nature of work and the fact that he joined an MPF scheme as an “self-employed” person. This case shows that the express terms in a written contract (describing the worker as a self-employed person or independent contractor) could be disregarded by the Court if the factual circumstances suggested otherwise. This is known as the “overall impression test” which is adopted by the Hong Kong Courts when adjudicating disputes regarding the status of workers.

Disclaimer

This guide has been drafted with the support of Lewis Silkin. The information provided on this website does not, and is not intended to, constitute legal advice or be used as a substitute for the particularized advice of your own counsel. All information, content, and materials available on this website are for general informational purposes only, and they may not constitute the most up-to-date legal or other information. This website contains links to other third-party websites, and such links are only for the convenience of the reader, user or browser. These links to third-party websites or information are not intended as, and should not be interpreted by you as, constituting or implying our endorsement, sponsorship, or recommendation of the third party information, products, or services found there.

APPENDIX

Additional resources and reading

1. Herbert Smith Freehills - Hong Kong - Looking Behind The Label - Contractors Vs Employees.
([Hong Kong - Looking Behind The Label - Contractors Vs Employees. - Conventus Law](#))
2. Hong Kong Labour Department - Clarify your employment status, Protect your Rights and Benefits
([Clarify Your Employment Status script en.pdf \(labour.gov.hk\)](#))
3. Herbert Smith Freehills - Hong Kong: Categorising individuals as contractors or employees
([Hong Kong: Categorising individuals as contractors or employees | Employment notes \(hsfnotes.com\)](#))
4. Simmons & Simmons LLP - Employment status in Hong Kong
([Simmons & Simmons \(simmons-simmons.com\)](#))