Public Officers Pay Adjustments (2004/2005) Bill

Judicial Review on the
Public Officers Pay Adjustments Ordinance (Cap. 574)

***Government Park and Playground Keepers Union v. Secretary for Justice* &**
Lau Kwok Fai Bernard v. Secretary for Justice
(HCAL 177 & 180/2002)

Background

At the Bills Committee meeting held on 17 September 2003, members requested the Administration to provide a paper to brief the Bills Committee on the court judgment on the above applications for judicial review made respect to the Public Officers Pay Adjustments Ordinance (Cap. 574). Hartman J.'s judgment in those applications is summarized in the Administration's paper (CB(1)2552/02-03(02) - Annex B). This paper seeks to provide further information with a view to assisting members to consider other relevant aspects of the judgment.

The Existing Mechanism

2. With regard to certain underlying matters, Hartman J. has given consideration to the "existing mechanism" for determining the pay of public officers generally and the 2002 pay adjustment exercise. With reference to a letter issued by the Chief Secretary for Administration dated 11 June 2002 to various civil service staff associations, he said:-

> "In that letter, the Chief Secretary asserted that no implication could be said to arise from what I have called the existing mechanism that civil service pay may remain unchanged or be increased but can never be reduced. That, in my judgment, must be correct. The possibility of a reduction must be inherent in both the mechanism and the principles relevant to that mechanism." (paragraph 59)

The Challenge in respect of Article 100 and Article 103 of the Basic Law

3. Article 100 of the Basic Law provides that public servants serving in all Hong Kong government departments before the establishment of the HKSAR may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourbale than before. Hartman J. ruled that Article 100 was transitional in nature and applied only to public servants employed by the Crown prior to the transfer of sovereignty who remained in service after that date (paragraph 65).

4. Article 103 provides that "Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of services, shall be maintained …". Hartman J. held that the critical word in Article 103 was the word "system" (paragraph 70). He was satisfied that, in respect of pay, the word "system" incorporated not only its contractual characteristic but also in respect of annual pay adjustments the mechanism employed over an extended period of time to determine the rate of those adjustments (paragraph 71).

5. He went to say:-

> "I doubt whether legislation *per se*, which gives effect by way of general application to what in the past has been achieved by consensus, is so profound as to constitute a change to the previous system. But, if I am wrong in that regard, it appears to me that in any event the use of legislation has, prior to the transfer of sovereignty, been ruled to be a lawful means by which civil service contracts of employment may be unilaterally varied. The authority in point is *Lam Yuk Ming and Others v. Attorney General* [1980] HKLR 815, a decision of the Court of Appeal." (paragraph 75)

6. Hartman J. referred at some length to the judgment of the Court of Appeal in *Lam Yuk Ming's case*. In *Lam Yuk Ming's case*, Roberts C.J. held, amongst other things, the following:-

> "There is thus no objection in principle to a provision in a contract whereby one party can alter some of its conditions without agreement, so long as this overriding provision was within the terms of the main contract which he entered. With hesitation, we conclude that that principle is applicable also when any term is capable of unilateral variation, and that such a clause does not destroy the contractual relationship between the Crown and public officers, however vulnerable the latter may be as a result" (at pp. 830-831)

Contractual Power to Reduce Pay

7. The issue before Hartman J. in those applications for judicial review was whether the enactment of Cap. 574 was in contravention of the Basic Law. Those proceedings, as Hartman J. put it when he dealt with the challenge under Article 35 of the Basic Law, "will not determine, according to the law of contract, the merits of whether the Executive is entitled unilaterally to reduce the pay of its employees", and they only went to "the lawfulness of the legislation that was passed in order to avoid a dispute as to those very merits" (paragraph 102).

8. An observation was made by Hartman J. on the applicants' rights under private law of contract in that:-

> "… [E]ven if the applicants are successful, it cannot be guaranteed that the Executive will concede that it is unable in private law to unilaterally reduce salaries. I have never understood the Executive to make such a concession. At the highest, it has accepted only that its position in private law is uncertain… In summary, the resolution of these proceedings in favour of the applicants will not necessarily finalise the issue as to pay; litigation in private law may still result." (paragraph 102)

Legislative Power to Reduce Pay

9. Hartman J. did not specifically deal with the question of whether legislation is necessary to implement pay reduction, however, he was aware of the fact that public officers had always been under the risk of having their contracts of service amended by way of legislation.

10. Hartman J.'s interpretation of *Lam Yuk Ming's* judgment is found in the following parts of his judgment:-

> "In summary, in cases where contracts of service contain an express term empowering unilateral variation, the Court of Appeal in *Lam Yuk Ming* held that it was lawful for the Crown to amend those contracts *by means of the legislative powers possessed by it*." (paragraph 81)
>
> "Prior to the transfer of sovereignty, there may not in fact have been *legislative steps* taken to bring about a reduction in pay for all civil servants as a class but that is not to say that the power did not exist. I am satisfied that it did exist, most certainly where, after it was calculated in accordance with well-settled mechanisms, it was imposed across the civil service; that is, by way of general application, to avoid the need, as Roberts CJ said, 'to secure the agreement of each public officer' in a service some 170,000 strong." (paragraph 84)
>
> "For the reasons I have given in considering art. 103, I am satisfied that public officers have at all time, both before and after the transfer of sovereignty, been under *the legitimate risk of having their contracts of service amended by way of legislation*." (paragraph 89)

Conclusion

11. In short, Hartman J. dismissed the applications in the above judicial review proceedings on the basis that the enactment of Cap. 574 did not contravene the Basic Law. In answer to the challenges made with respect to the Basic Law by the applicants, Hartman J. held that it was lawful for the Executive to use legislative means to vary the terms of civil service contracts of employment. The question that whether the Executive has contractual power (other than by means of legislation) to reduce the pay of public officers was not in issue in those proceedings, and the judgment accordingly did not rule on that aspect.

Prepared by

Legal Service Division
Legislative Council Secretariat
7 October 2003