

Clarify Your Employment Status



Foreword



All along, having considered their respective aspirations and situations, different people may participate in the labour market in ways that suit themselves. Many of them work for employers as employees, while some people choose to provide service as self-employed persons/contractors for the purpose of achieving greater autonomy or getting more profits. Moreover, with the rapid development of information and communication technology, members of the public can look for jobs more easily through the use of websites or mobile applications (digital platforms). To understand your own rights and benefits, you should learn carefully the nature of cooperation and clarify your identity, whether you are engaged as an employee or a self-employed person/contractor, before entering into a contract or determining the mode of cooperation. This can avoid misunderstanding or dispute.

Some differences in the rights and benefits enjoyed by an “employee” and a “self-employed person/contractor”

Rights and benefits	Employee	Self-employed person/contractor
Entitled to employment rights and benefits and protection under the Employment Ordinance, the Employees’ Compensation Ordinance and the Minimum Wage Ordinance ¹ .	✓	✗
Must contribute to mandatory provident fund (MPF) in compliance of the relevant requirements of the Mandatory Provident Fund Schemes Ordinance.	✓ ²	✓ ³

¹ As to the application of individual ordinances, please refer to relevant leaflets.

² Employees are also entitled to the employers’ contribution to the mandatory provident fund.

³ A self-employed person/contractor should enrol in a Mandatory Provident Fund scheme and make contributions on his own.

Distinguishing an “employee” from a “self-employed person/contractor”

There is no one single conclusive test to distinguish an “employee” from a “self-employed person/contractor”. In differentiating these two identities, all relevant factors of the case should be taken into account. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:



control over work procedures, working time and method



ownership and provision of work equipment, tools and materials



whether the person is carrying on business on his own account with investment and management responsibilities



whether the person is properly regarded as part of the employer’s organisation



whether the person is free to hire helpers to assist in the work



bearing of financial risk over business (e.g. any prospect of profit or risk of loss)



responsibilities in insurance and tax



traditional structure and practices of the trade or profession concerned

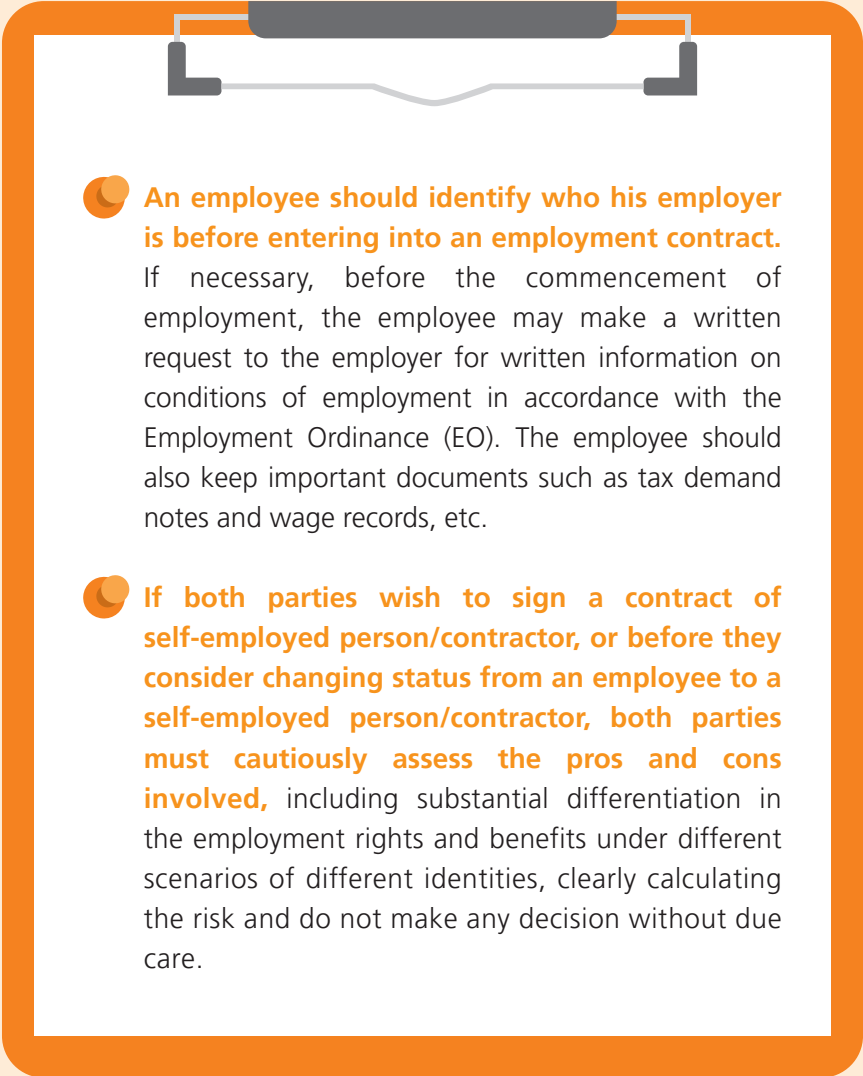



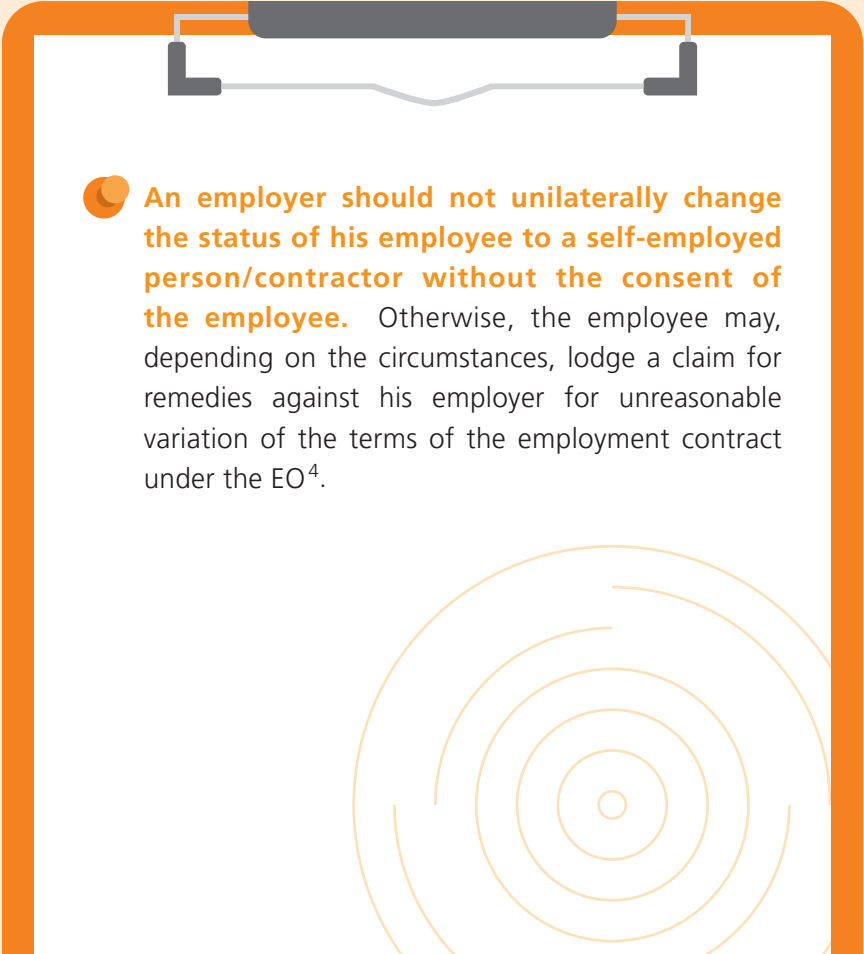
other factors that the court considers as relevant

Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.

Points to note



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- **An employee should identify who his employer is before entering into an employment contract.** If necessary, before the commencement of employment, the employee may make a written request to the employer for written information on conditions of employment in accordance with the Employment Ordinance (EO). The employee should also keep important documents such as tax demand notes and wage records, etc.
 - **If both parties wish to sign a contract of self-employed person/contractor, or before they consider changing status from an employee to a self-employed person/contractor, both parties must cautiously assess the pros and cons involved,** including substantial differentiation in the employment rights and benefits under different scenarios of different identities, clearly calculating the risk and do not make any decision without due care.

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- **An employer should not unilaterally change the status of his employee to a self-employed person/contractor without the consent of the employee.** Otherwise, the employee may, depending on the circumstances, lodge a claim for remedies against his employer for unreasonable variation of the terms of the employment contract under the EO⁴.

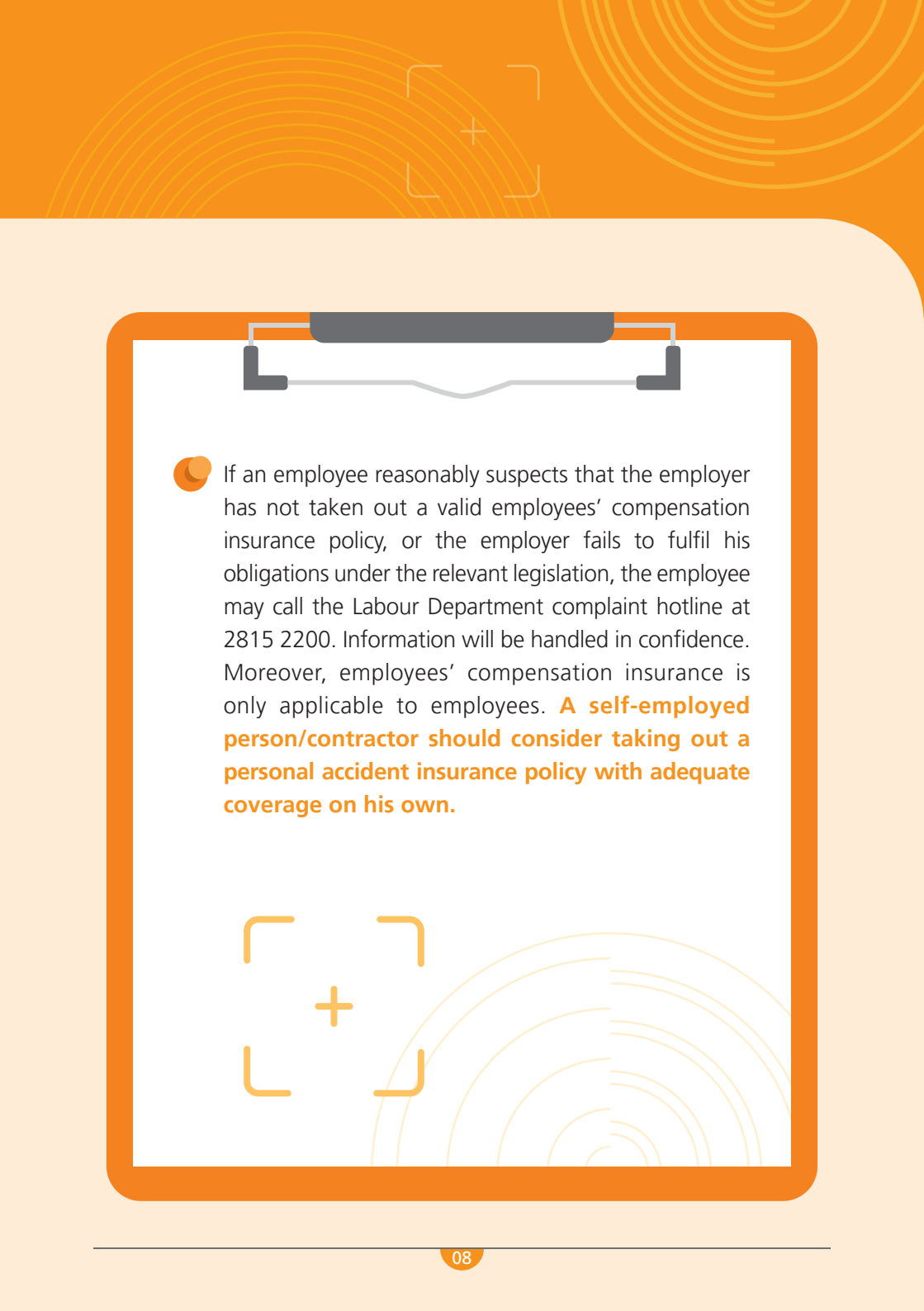
⁴ In addition, if substantial and fundamental changes to the detriment of the employee have been made to the contract of employment arising from the employer's conduct without the employee's consent, the employee can claim for termination compensation from his employer on the ground of constructive dismissal.

Points to note



- If in essence there exists an employer-employee relationship, even though the worker is called a contractor or self-employed person or has been labelled as a self-employed person in the contract, the employer is still required to fulfil his responsibilities under the relevant labour legislation by paying back statutory benefits retroactively to the worker who is falsely labelled as a self-employed person. Moreover, **the employer may be criminally liable in respect of the benefit items of relevant legislation.**



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- If an employee reasonably suspects that the employer has not taken out a valid employees' compensation insurance policy, or the employer fails to fulfil his obligations under the relevant legislation, the employee may call the Labour Department complaint hotline at 2815 2200. Information will be handled in confidence. Moreover, employees' compensation insurance is only applicable to employees. **A self-employed person/contractor should consider taking out a personal accident insurance policy with adequate coverage on his own.**

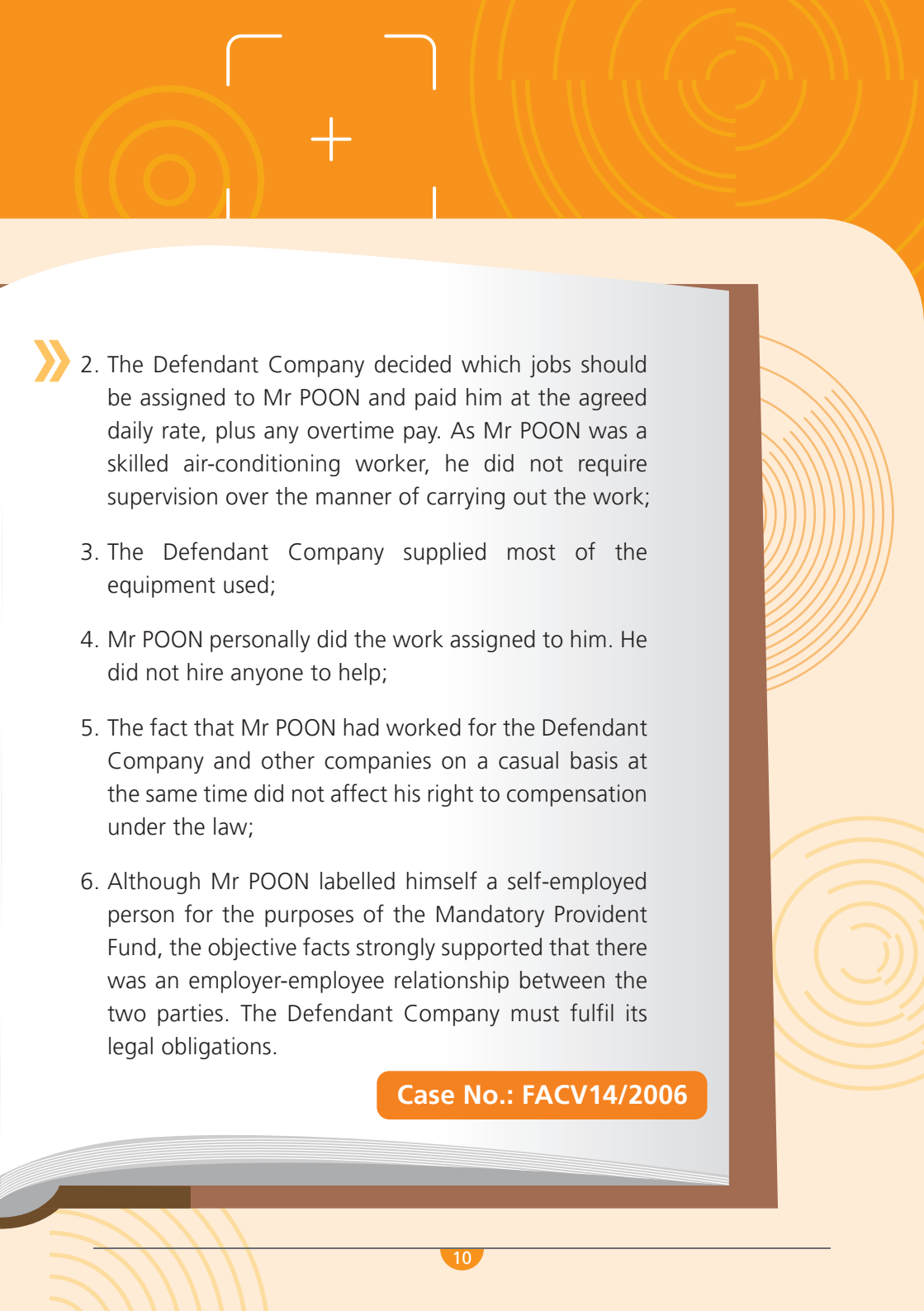
Reference Court Case

CASE 1



Mr POON was an air-conditioning worker. He suffered partial loss of vision in his left eye in an accident during the installation of an air-conditioner. The contracting company considered Mr POON a self-employed person and refused to pay compensation for his injury at work. Thus Mr POON made a claim to the court. After trial of his case by the District Court and the Court of Appeal of the High Court, Mr POON appealed to the Court of Final Appeal. The Court of Final Appeal finally decided that Mr POON was an employee of the Defendant Company and the Defendant Company had to pay him compensation for his injury at work. The grounds of judgement were as follows:

1. Since the air-conditioning business belonged to the Defendant Company, Mr POON bore no financial risks. He only received daily-rated remuneration. Whenever items had to be purchased for work purposes or travel expenses were incurred in the course of the work, he was reimbursed by the Defendant Company;

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- » 2. The Defendant Company decided which jobs should be assigned to Mr POON and paid him at the agreed daily rate, plus any overtime pay. As Mr POON was a skilled air-conditioning worker, he did not require supervision over the manner of carrying out the work;
3. The Defendant Company supplied most of the equipment used;
4. Mr POON personally did the work assigned to him. He did not hire anyone to help;
5. The fact that Mr POON had worked for the Defendant Company and other companies on a casual basis at the same time did not affect his right to compensation under the law;
6. Although Mr POON labelled himself a self-employed person for the purposes of the Mandatory Provident Fund, the objective facts strongly supported that there was an employer-employee relationship between the two parties. The Defendant Company must fulfil its legal obligations.


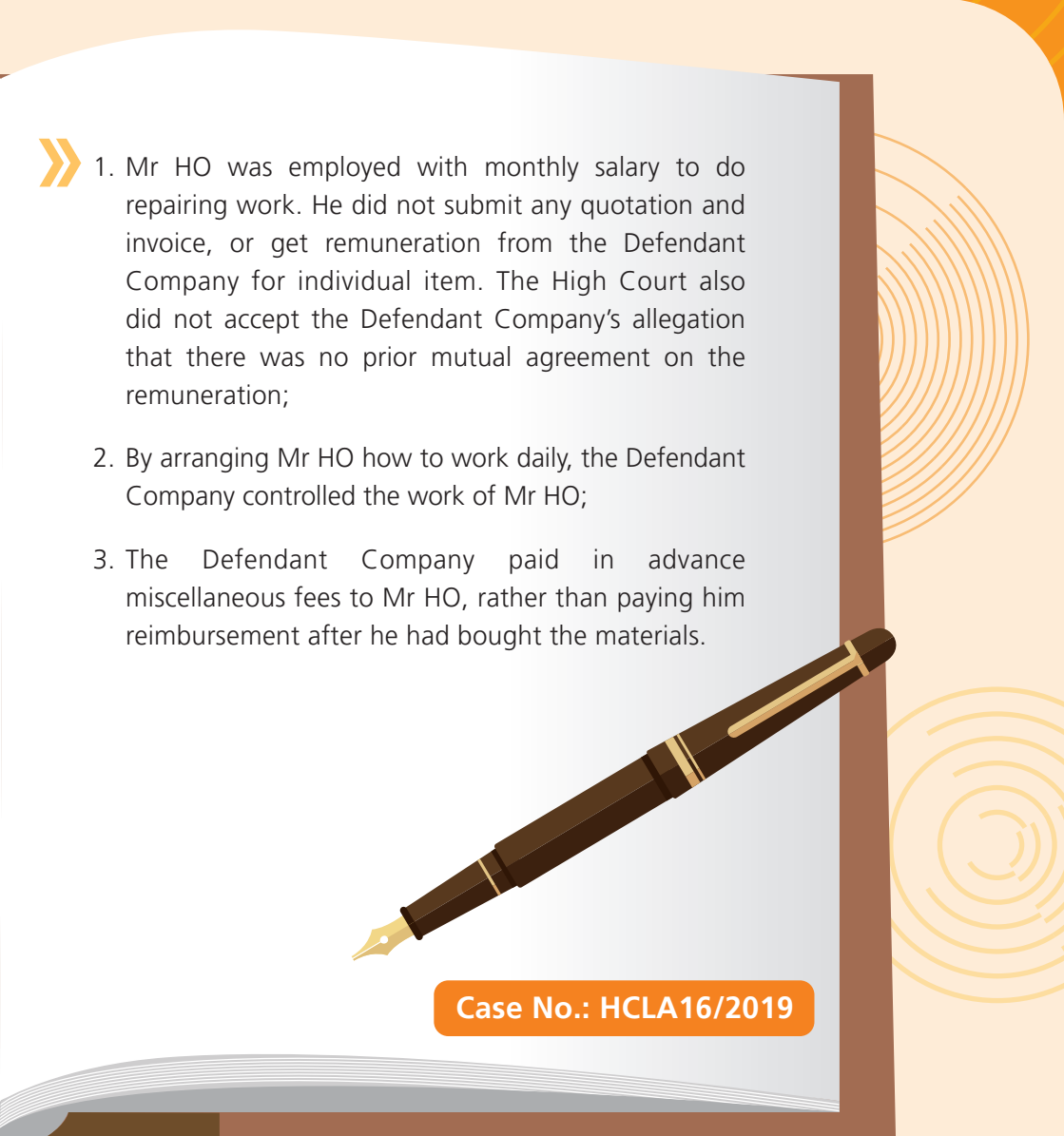
Case No.: FACV14/2006

Reference Court Case

CASE 2



Mr HO engaged with the Defendant Company to do renovation and repairing work in its factory. The Defendant Company paid Mr HO miscellaneous fee in advance, and paid him "renovation fee" by cheque. After Mr HO had worked for half a month, the Defendant Company owed rent and so the landlord closed the factory and prohibited entry of relevant personnels into it. Mr HO then lodged a claim against the Defendant Company for wages in arrears at the Labour Tribunal and the claim was allowed. The Defendant Company appealed to the High Court, stating that Mr HO was a self-employed person and there was no agreement on remuneration before he commenced work. Having taken all relevant factors into consideration, the High Court ruled that Mr HO was an employee and upheld the judgement of wages in arrears in favour of Mr HO. The grounds of judgement were as follows:

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- » 1. Mr HO was employed with monthly salary to do repairing work. He did not submit any quotation and invoice, or get remuneration from the Defendant Company for individual item. The High Court also did not accept the Defendant Company's allegation that there was no prior mutual agreement on the remuneration;
2. By arranging Mr HO how to work daily, the Defendant Company controlled the work of Mr HO;
3. The Defendant Company paid in advance miscellaneous fees to Mr HO, rather than paying him reimbursement after he had bought the materials.

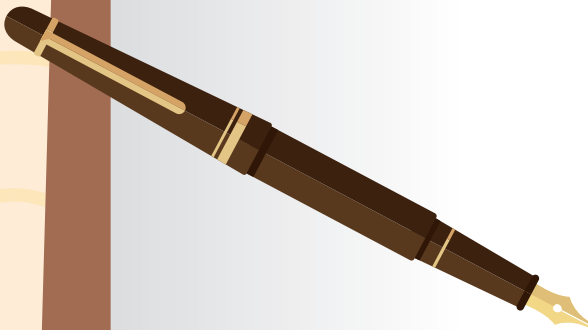
Case No.: HCLA16/2019

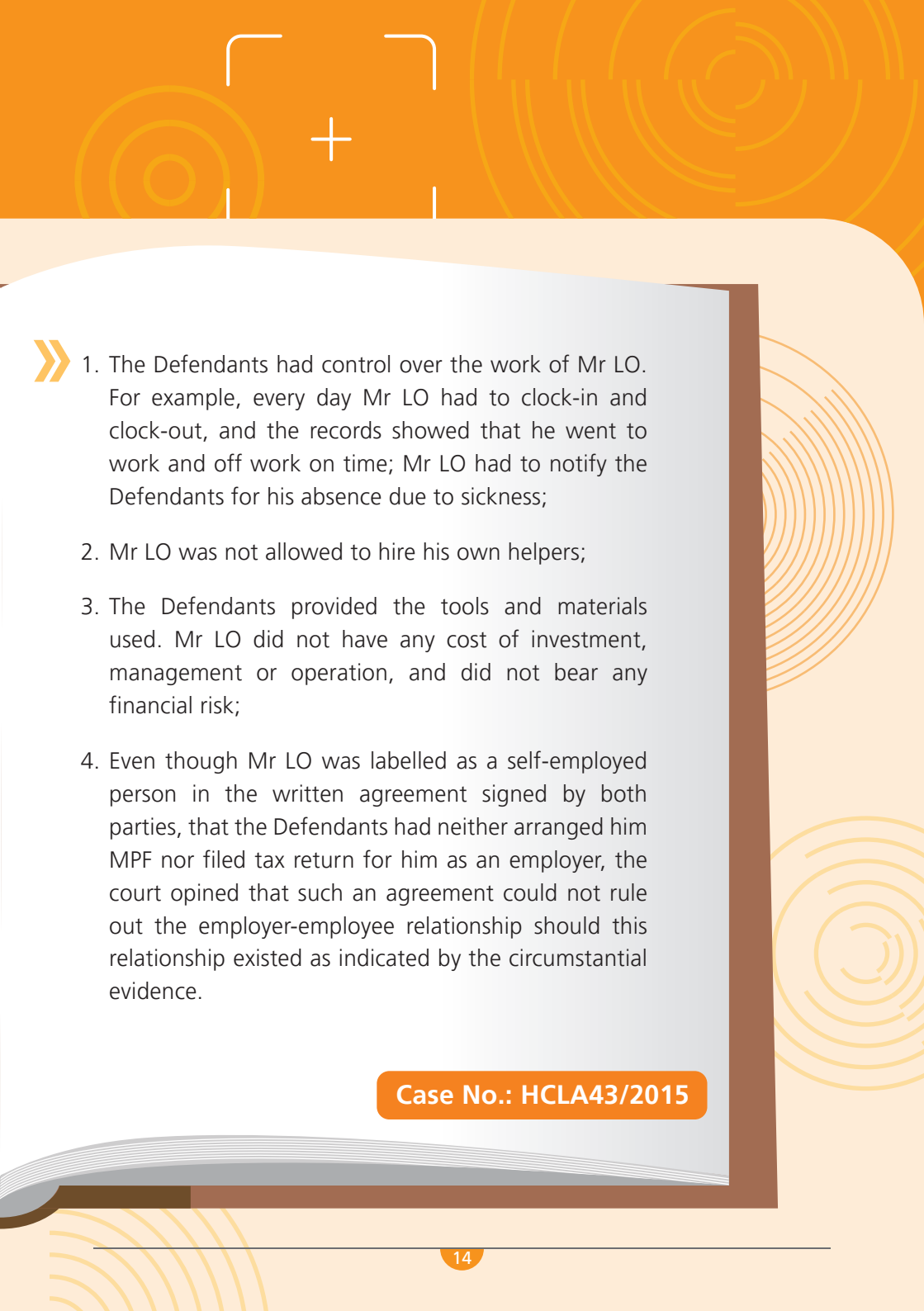
Reference Court Case

CASE 3

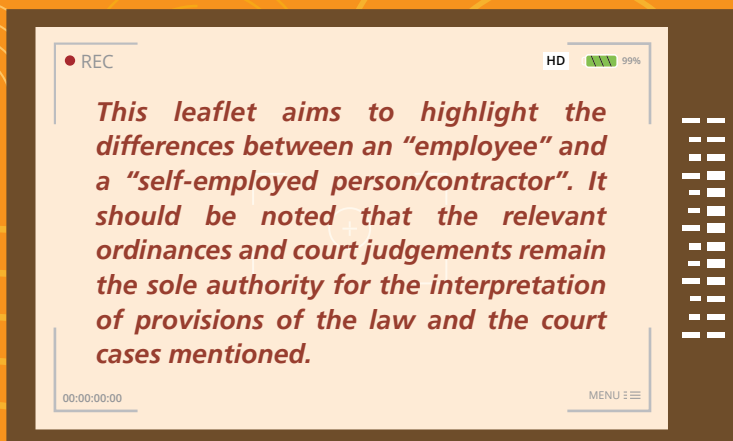


Mr LO worked as a hair stylist assistant in the salon owned by the three Defendants. On termination, he claimed for payment in lieu of notice, annual leave pay, etc. The Labour Tribunal found that the Defendants should pay the items. The Defendants appealed to the High Court against the finding, alleging that Mr LO was a self-employed person and thus not entitled to the rights and benefits under the EO. Having taken all relevant factors into consideration, the High Court dismissed the appeal and ruled that Mr LO was an employee. The grounds of judgement were as follows:



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- » 1. The Defendants had control over the work of Mr LO. For example, every day Mr LO had to clock-in and clock-out, and the records showed that he went to work and off work on time; Mr LO had to notify the Defendants for his absence due to sickness;
2. Mr LO was not allowed to hire his own helpers;
3. The Defendants provided the tools and materials used. Mr LO did not have any cost of investment, management or operation, and did not bear any financial risk;
4. Even though Mr LO was labelled as a self-employed person in the written agreement signed by both parties, that the Defendants had neither arranged him MPF nor filed tax return for him as an employer, the court opined that such an agreement could not rule out the employer-employee relationship should this relationship existed as indicated by the circumstantial evidence.

Case No.: HCLA43/2015



Enquiry and Complaint:

- The general enquiry hotline: **2717 1771** (the hotline is handled by “1823”)
- The complaint hotline: **2815 2200** (information will be handled in confidence)
- Visit the offices of the Labour Relations Division of the Labour Department:
www.labour.gov.hk/eng/tele/lr1.htm



- Visit the Labour Department website:
www.labour.gov.hk

