

HONG KONG / JUDGMENT

C v. HAU KAR KIT

[2023] HKDC 974**COURT**
District Court**DECIDED**
28 July 2023**CASE / FILE NUMBER**
DCEO10/2021

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bjbj DCEO 10/2021

[2023] HKDC 974 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EQUAL OPPORTUNITIES ACTION NO 10 OF 2021 BETWEEN C Claimant and HAU KAR KIT Respondent Before: Deputy District Judge M Lam in Court Date of Hearing: 29 June 2023 Date of Judgment: 28 July 2023 ASSESSMENT OF DAMAGES

Introduction

This is an assessment of damages of the claimant's claim under the Sex Discrimination Ordinance, Cap 480 (the SDO).

Procedural History

With the legal assistance of the Equal Opportunities Commission (), the claimant commenced the present action to claim for damages and other reliefs against the respondent under sections 2(5) and 23(3) of the SDO. Upon the claimant abandoning her claim for non-monetary reliefs, interlocutory judgment on liability was entered against the respondent for her with damages to be assessed on 29 April 2022. Several affidavits of service have been filed for the claimant for verification of the respondent's address and for proof of effective service of the court documents and the relevant documents on the respondent. The respondent did not participate in these proceedings. He neither filed any documents in this action. Nor did he attend the assessment hearing. In the circumstances, I directed the assessment to be proceeded in the absence of the respondent. The Claimant's Case In these assessment proceedings, the claimant claims against the respondent for damages caused by his sexual harassment acts under sections 2(5) and 23(3) of the SDO. The claimant's case as pleaded in the Notice of Claim is summarized as follows: - By an employment contract signed between a recreation club (Club) and the claimant dated 29 March 2018, the claimant was employed by the Club as Event Coordinator. The employment commenced on 9 April 2018. At all material times, the respondent was employed by the Club as Operations Manager. The respondent sexually harassed the claimant on several occasions during

the period from 10 May 2018 to 26 May 2019. The first sexual harassment incident took place on 10 May 2018 (First Incident) in that the respondent stroked the claimant's back near the buckle of her bra and stared at her legs. The claimant complained to her supervisor about the incident. As a result, the respondent was cautioned not to have physical contact with the claimant by the chairperson of the Club. Notwithstanding the complaint of the claimant and the caution of the chairperson of the Club, the respondent sexually harassed the claimant again on 9 occasions during the period between 9 March 2019 and 26 May 2019. He intentionally made repeated unwelcome physical contacts with her. He touched her hand, brought his chest against her shoulders and upper arms, grasped her left wrist, left elbow and upper arm, pressed his chest against her back, patted her shoulder. He also gave unwanted attention of a sexual nature by staring at her breasts and legs. On or about 19 March 2019, the claimant lodged a written complaint against the respondent to the Club. On 10 April 2019, she also reported to the Police alleging indecent assault by the respondent. In February 2020, the police discontinued the investigation. On 5 June 2019, the claimant resigned from her employment due to persistent distress caused by the respondent's continuing acts of sexual harassment. She was also dissatisfied with the Club's handling of her complaint. Her last day of employment was 4 July 2019. On 12 June 2019, the claimant lodged a complaint with the EOC against the respondent for sexual harassment. Subsequently, the claimant commenced the present action to claim for damages for injury to feelings as well as exemplary damages pursuant to section 76 of the SDO.

Discussion Having considered the evidence adduced by the claimant, including the testimony of the claimant and her ex-colleague, Ms. Yau, I am convinced that as a result of the respondent's persistent sexual harassment acts, the claimant was offended, humiliated, and suffered grave emotional distress and anxiety. She had conveyed her discomfort and frustration with the respondent's behaviour to her superiors, fellow colleagues as well as personal friends at the material times. During her employment with the Club, the claimant frequently had nightmares when she knew that the respondent would be at work with her the next day. He had created an unpleasant and intimidating work environment ultimately leading to her resignation from the employment which she cherished. There were times when the claimant had flashbacks of the sexual harassment incidents. She had fear of being sexually harassed again, which affected her relationship with others, including her male colleagues and her boyfriend. She was often stressed and intimidated whenever a male individual came into unexpected physical contact with her. She also tried to keep considerable distance with her male colleagues and became very sensitive to their body movements whenever they were in her proximity. She once shouted to her boyfriend and cried in the street when he made a sudden gesture of touching her back. Ms. Yau's evidence corroborated the claimant's evidence. She witnessed two incidents of the respondent sexually harassing the claimant. She also observed the claimant's development of distress caused by the respondent's harassment acts. In my view, the evidence given by the claimant and Ms. Yau were logical and consistent with the background facts. It also sits well with the contemporaneous documents, including, the WhatsApp, emails and letters sent by the claimant to the management of the Club, her fellow colleagues and friends regarding the sexual harassment acts of the respondent. I have no reason not to believe their evidence. The Claimant's case is well supported by the witness evidence and documentary proof adduced by the claimant. I will now turn to

consider the two heads of claim for damages sought by the claimant. Injury to Feelings Ms. Lau, the Senior Legal Counsel of EOC acting for the claimant, refers to *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731 for the legal principles governing the assessment of damages for injury to feelings, which are recited as follows: - Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches. Awards should bear some broad general similarity to the range of awards in personal injury cases. This should not be done by reference to any particular type of personal injury award, rather to the whole range of such awards. In exercising the discretion in assessing a sum, the Court should take into account of the value in everyday life of the sum. This may be done by reference to purchasing power or earnings. Finally, the Court should bear in mind the need for public respect for the level of awards made. In that case, both the plaintiff and the defendant were university students. The defendant secretly placed camcorder inside the plaintiff's room in the university. He kept video tapes which contained images of the plaintiff changing her clothes. He also shown the tapes to a former schoolmate of the plaintiff. In 1999, the plaintiff was awarded HK\$50,000 as damages for injury to feelings, HK\$20,000 as exemplary damages plus HK\$10,000 as aggregated damages. In *L v David Roy Burton* [2010] 5 HKLRD 397, the defendant, being the general manager to the plaintiff, had made numerous sexual advances towards the plaintiff and had touched her inappropriately, including stroking her thigh and touching her breast. The plaintiff had refused the sexual advances and was eventually dismissed (W gP 012), the plaintiff was sexually harassed by her co-worker who made a sexual remark and slapped her breast. The plaintiff was awarded HK\$80,000 in damages for injury to feelings. In *Yuen Wai Han v South Elderly Affairs Limited* [2005] 2 HKLRD 277, a claim of pregnancy discrimination, the Court of Appeal approved the principle of three broad bands of compensation for injury to feelings as set out in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871:

- (i) The top band of between 15,000 to 25,000 for the most serious cases such as where there has been a lengthy campaign of discriminatory harassment.
- (ii) Middle band of between 5,000 to 15,000 for serious cases which do not merit an award in the highest band.
- (iii) The lower band of between 500 to 5,000 for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. The Court of Appeal further commented that the award of injury to feelings should not be below HK\$50,000 in general. In *Da Bell v National Society for Prevention of Cruelty to Children* [2010] IRLR 19, the UK Employment Appeal Tribunal updated the Vento bands in line with inflation as follows: 500 to 6,000 being the bottom band; 6,000 to 18,000 being the middle band; and 18,000 to 30,000 being the higher band. In *z gP nvinced* that this is a clear case of sexual harassment which justifies a claim for damages for injury to feelings under the SDO. The claimant was progressively offended and distressed by the persistent harassment acts of the respondent over a year. Her complaints about the

respondent's acts did not deter him from harassing her. She suffered from anxiety, stress and fear as a result of his acts ending up with her resignation from the employment she treasured so as to save herself from further harassment acts by the respondent. The resignation was forced upon the claimant in the circumstances that she found it necessary to quit the job so as to save herself from further harassment by the respondent. Her frustration and distress caused by the respondent's unlawful acts was well-illustrated in her resignation letter. I accept the claimant's evidence that she had, at all material times, been full of expectation working for the Club and was eager to establish herself in the event-planning industry. Her evidence sits well with the fact that she is a diligent person who had managed to be employed as a receptionist immediately after her resignation, and still, strived to get back to the event-planning industry, and finally, succeeded in securing the present employment as an event-coordinator. Although each of the respondent's unlawful acts singularly was not as serious and sexually explicit as those in *Burton*, I do not ignore the fact that the repetitive nature of the harassing acts over a long period of time for W gP involved only one single act, whereas this case involves multiple acts by the respondent over a year, which have caused progressively much stress and fear to the claimant. She was ultimately forced to resign from her employment so as to avoid him. She should be compensated for the anxiety, stress, humiliation as a result of the sexual harassment. Looking at all the matters in the round, I take the view that the claimant's claim for an award for injury to feelings in the sum of HK\$80,000 should be allowed in full. Exemplary damages In *Allan v Ng & Co (a firm)* [2012] 2 HKLRD 160, the Court of Appeal reiterated that the rationale for exemplary damages is not to compensate, but to punish. They are additional to an award which is intended to compensate a plaintiff fully for the loss she has suffered, both pecuniary and non-pecuniary. If the wrongdoer's conducts are so outrageous that an order for payment of compensation is not an adequate response, he may be ordered to make a further payment, by way of condemnation and punishment, to demonstrate that his wrongful conduct is altogether unacceptable to society. The test of outrageousness usually involves intentional wrongdoing with, additionally an element of flagrancy or cynicism or oppression or the like, something additional, rendering the wrongdoing or the manner or circumstances in which the defendant's conduct outrageous: *Yiu Shui Kong v Legend World Asia Group Limited* (unreported, DCEO 8/2015, 27 October 2016). In *Burton*, it was held that the sexual harassment exploited and abused the victim, who was vulnerable because of a power imbalance. A sum of HK\$20,000 was awarded to the claimant as exemplary damages. In the present case, the respondent exploited his senior position as operation manager by sexually harassing the claimant at the workplace. The relatively junior position of the claimant rendered her particularly vulnerable to the unlawful conduct of the respondent. I am alive to the fact that the respondent was not deterred from his persistent sexual harassment acts against the claimant despite being cautioned by the chairperson of the Club not to make physical contact with the claimant after the First Incident. Worse still, even after the claimant had filed a subsequent written complaint to the Club about his wrongful acts in March 2019, the respondent continued to sexually harass her until her resignation. It is beyond dispute that those were intentional and malicious acts. During the investigation

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