

HONG KONG / JUDGMENT

CHAN CHING MAN v. ORIENTAL LOGISTICS CO LTD

COURT

Court of First Instance

DECIDED

16 April 2004

CASE / FILE NUMBER

HCLA99/2003

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J U D G M E N T

Introduction

The Respondent (the Claimant) was employed by the Appellant as a lorry/godown assistant under a written contract of the employment which provided for one month notice for termination of the employment. The Appellant adopts a policy of employing persons with a disability. Miss Leung who suffers from congenital speech and hearing difficulties was and is so employed by the Appellant as a temporary data processor. On 25 April 2003, the Appellant summarily dismissed the Respondent for touching the hair and face of Miss Leung. The Respondent filed a claim in the Labour Tribunal. The Labour Tribunal found that the Appellant was not entitled to summarily dismiss the Respondent and awarded the Respondent one month wages in lieu of notice, annual leave pay, pro-rata end of year payment and costs on 23 July 2003. The Appellant now appeals against the above order. The facts The Deputy Presiding Officer found Miss Leung a credible witness and accepted her evidence. He rejected the evidence of the Respondent. The facts as found by the trial Deputy Presiding Officer are as follows. Miss Leung is suffering from speech and hearing difficulties. Since mid March 2003, the Respondent had touched Miss Leung's hair at least six times. Miss Leung did not like to be touched and had made that known to the Respondent on every occasion. On one occasion, Miss Leung asked the Respondent why he touched her hair, the Respondent replied that he did it for fun and that was no big deal. Miss Leung then asked why he did not touch the hair of other female colleagues. The Respondent then went to touch the hair of another female colleague, Miss Cheng. Miss Cheng was not upset but laughed instead. On 24 April 2003, the Respondent touched Miss Leung's face with the back of his hand once and then ran away. Miss Leung was very upset. Miss Leung's aunt then made a

complaint to the Appellant on the following day. Mrs Lau and Mr Ho of the Appellant interviewed the Respondent who admitted touching Miss Leung but considered it was no big deal. The Appellant then summarily dismissed the Respondent. The Deputy Presiding Officer's reasons for decision The Deputy Presiding Officer found for the Respondent. The reasons given by the Deputy Presiding Officer in his Reasons for Decision are as follows:

23. The Tribunal finds that the way the Claimant touching Ms Leung's hair was in the form of ordinary social contacts between friends and colleagues. This was confirmed by Ms Leung's evidence that her colleague, Ms Cheng, was not offended by the Claimant touching her hair in the same way.
24. The Tribunal finds that Ms Leung did not like the Claimant touching her hair and had made known to the Claimant that she did not like the Claimant touching her hair. By continuing to touch Ms Leung's hair and on 24th April 2003 her face, the Claimant was handling his relation with colleagues in an immature way.
25. However, the Tribunal does not accept that the Claimant's failure to handle his relation with his colleagues in a proper way as in this case justified a summary dismissal. Ground 1 Whether the touching calls for summary dismissal; Ground 2 Whether touching was a friendly gesture as it was acceptable by another colleague The Appellant's first ground of appeal is that the Deputy Presiding Officer wrongly determined that the touching of the hair/head and face of a female and handicapped colleague does not amount to an act which calls for summary dismissal. The second ground of appeal is that the Deputy Presiding Officer wrongly determined that since the touching was accepted by another female colleague without objection, therefore the touching was merely a friendly gesture. The precise words used by the Deputy Presiding Officer are ordinary social contacts between friends and colleagues and not friendly gesture. These two grounds are inter-related and it is convenient for both grounds to be considered together. Mr Harris placed some emphasis on the fact that the Appellant is a recipient of a certificate of appreciation from the Labour Department awarded in recognition of its policy of employing persons with a disability and that the victim of the Respondent's conduct was a person under a disability. This might not have been an issue which had been properly drawn to the attention of the Deputy Presiding Officer. An employer's right to summarily terminate the employment of his employee without notice or payment in lieu of notice has been exhaustively set out under section 9 of the Employment Ordinance. I think an employer's commitment to employ disabled persons is largely irrelevant for the purpose of determining whether a summary dismissal is justified, though the fact that the victim of the conduct of an employee against whom the employer exercises his right to summary dismissal is a person under disability is one of the factors which the tribunal may take into account in determining whether the summary dismissal is justified. An employer may summarily dismiss an employee in accordance with section 9(1) of the Employment Ordinance under the following circumstances:

- (a) If an employee, in relation to his employment - wilfully disobeys a lawful and reasonable order; misconducts himself such conduct being inconsistent with the due and faithful discharge of his duties; (iii) is guilty of fraud or dishonesty; or (iv) is habitually neglectful of his duties; or
- (b) on any other ground on which he would be entitled to terminate the contract without notice at common law. Mr Harris relied on the grounds stated in section 9(1)(a)(ii) and 9(1)(b). I think the Appellant's first ground can be disposed of briefly. Section 9(1)(a)(ii) refers to misconduct of the employee which is inconsistent with the due and faithful discharge of the employee's duty. Not any misconduct in the wide sense of the word justifies summary dismissal under this sub-paragraph. The misconduct, if it justifies summary dismissal, must be such as would materially affect the proper and regular performance of the employee's duty in accordance with accepted notion or procedures of the employer. The misconduct under this sub-paragraph covers a wide range of misconduct, some of which overlaps with misconduct referred to in the other sub-paragraphs. The misconduct also varies in seriousness. It is always a mixed question of law and fact whether the misconduct justifies summary dismissal. For example, while speeding as such does not justify summary dismissal of a person employed as a driver, an employer may summarily dismiss an employee for speeding in circumstances which endangers the life of his co-workers or puts at risk the property of his employer. The Respondent was employed as a lorry/godown assistant. His repeated assaults on Miss Leung was unrelated to the performance of his duty as a lorry/godown assistant. It might be argued that his assaults might to some extent affect Miss Leung in the performance of her duties which in turn is inconsistent with the due and faithful performance of the Respondent's duty. But this is not the way the case was presented in the Labour Tribunal nor is there any evidence in support. Accordingly, no reliance may be placed by the Appellant for dismissal on this ground. The more forceful criticism of the Deputy Presiding Officer is, however, is Mr Harris' attack on the Deputy Presiding Officer's finding in paragraph 23 of his Reasons for Decision that the touching was in the form of ordinary social contacts between friends and colleagues as was found acceptable by another colleague and his conclusion therefrom that the touching did not justify summary dismissal. Without over emphasising on technicality of the law, it is trite law that touching in circumstances where it is clear that the person touched does not consent, is an assault and battery. In the reality of social interaction, consent may be implied. It may be implied for a tap on the shoulder as a means of drawing the attention of the person touched or as a means of giving encouragement or support. Touching in such circumstances does not constitute assault. However, touching is an assault and battery where a person has indicated clearly that she does not consent to be touched. Whether to consent is a matter for the individual. One person may consent to being touched while another may not. Obviously, one may consent to being touched by a particular person but not by any others. Miss Cheng consented to being touched but Miss Leung did not. Though the Deputy Presiding Officer did not go as far as to say that the touching was lawful even if without consent, he misdirected himself by finding from Miss Cheng's acceptance of the

touching by the Respondent as a social norm. He could have equally, and indeed much more easily, found from Miss Leung's objection that such touching was not a norm. In my judgment, the Deputy Presiding Officer seriously erred in failing to consider the issue of consent. It would be an unthinkable scene for male employees to touch the hair of their female colleagues at the workplace at will. On the facts, Miss Leung had unequivocally told the Respondent that she did not consent to being touched by him. The Respondent knew that. Yet he touched her hair at least six times and then touched her face. It is wrong to find that because another colleague consented to being touched, it was not a misconduct to touch a colleague who did not consent to being touched. The misconduct might be excusable if there was a genuine misunderstanding about Miss Leung's lack of consent. But there could be no misunderstanding here. Viewed objectively, the Respondent knew that Miss Leung did not consent to being touched but he repeatedly touched her. In the circumstances, no tribunal could have come to the conclusion that the touching was in the form of ordinary social contacts between friends and colleagues as was found by the Deputy Presiding Officer. That finding of fact is perverse and must be set aside. It appears that the erroneous finding of fact played a central part in the Deputy Presiding Officer's reasoning because from that finding the Deputy Presiding Officer went on to conclude that the Respondent was only handling his relation with colleagues in an immature way and that did not justify summary dismissal. If the premise on which the Deputy Presiding Officer's conclusion was based is erroneous, the correctness of that conclusion is called in question. On the facts as found by the Deputy Presiding Officer despite the Respondent knew Miss Leung did not consent to being touched by the Respondent, he touched her hair repeatedly for at least six times within the month of March 2003. The touching was not in the form of ordinary social contacts. In the circumstances, the only reasonable inference that could be drawn is that it was done to annoy Miss Leung and Miss Cheng added to that annoyance by her laughter. The question is whether these touching amounted to sufficient misconduct as to justify the Respondent's summary dismissal. This brings me back to the Appellant's first ground of appeal. An employer has a duty to provide a safe and decent working environment for those in his employ. That includes a duty to ensure that his employees are not subject to abuse or ill-treatment of any kind from fellow employees while at work. Miss Leung is suffering from congenital speech and hearing difficulties. The Respondent had been annoying her repeatedly by touching her hair without her consent. Miss Leung has difficulties in expressing herself and making a complaint. On one occasion, Miss Cheng added to the annoyance with her laughter. The reality was that the Respondent was abusing a fellow worker suffering from a disability. In my view, the touching was an assault and an abuse on Miss Leung. These abuses escalated when the Respondent touched Miss Leung's face. When interviewed by the management officer, the Respondent was unremorseful and said it was no big deal. I consider these abuses were acts of misconduct. The Respondent is a nuisance at the workplace which an employer was not only entitled but under a duty to remove for the protection of his other employees. The summary dismissal is justified under section 9(1)(b) of the Employment Ordinance. Mr Harris also sought to argue on the Appellant's right to dismiss the Respondent under clause 13(ii) and (viii) of the contract of employment, which

provide: If any of the following circumstances takes place, the company will summarily dismiss the employee: has done an act which is inconsistent with his duty; (viii) made a statement or acted in a manner which was detrimental to the company's benefit or public image. The Appellant's right to summarily dismiss the Respondent under Clause 13(ii) is similar to that under section 9(1)(a)(ii). For similar reasons, I do not consider the misconduct inconsistent with the Respondent's performance of his duty. As for the argument on Clause 13(viii), I think Mr Harris was over emphasising the seriousness of the effect of the misconduct on the Appellant company's benefit or public image. Ground 3 Whether the touching was sexual harassment Mr Harris argued at great length on this ground of appeal, presumably out of abundance of caution. He referred to section 2(5) and 23(5) of the Sex Discrimination Ordinance. Section 2(5) provides as follows: For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if the person

- (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or
- (b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her. Section 23(5) provides: It is unlawful for a contract worker to sexually harass a woman who is a fellow contract worker. With respect to Mr Harris, I think he was over-emphasising the misconduct of the Respondent. It was a case of playfulness rather than sexual harassment. However, it was unfortunate that the Respondent has allowed such playfulness to escalate to abusive conduct which he indulged too often as to make it impossible for his employer to adopt more lenient measures other than summary dismissal. The Respondent was not touching parts of the body which were overtly sexual nor was the touching in circumstances suggestive of any sexual content. I therefore dismiss this ground of appeal.

Conclusion

Accordingly, I allow the Appeal and set aside the orders of the Deputy Presiding Officer made on 23 July 2003. The Respondent shall pay the Appellant's costs of the appeal including the costs of the application for leave to appeal. (Anthony To) Deputy High Court Judge Mr Paul Harris and Ms Vivian To, instructed by Messrs Ho, Tse, Wai & Partners for the Appellant Respondent, in person PAGE 1udk 1udk _=B\$ 3*2d 0Br` _=B\$ x22z user HCA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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