

HONG KONG / JUDGMENT

ER v. LI KWOK CHANG, LAWRENCE

COURT

District Court

DECIDED

23 May 2017

CASE / FILE NUMBER

DCEO10/2016

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bjbj DCEO 10/2016 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EQUAL OPPORTUNITIES ACTION NO 10 OF 2016

BETWEEN ER Claimant and LI KWOK CHANG, LAWRENCE Respondent

Coram : His Honour Judge Ko in Chambers (open to public) Date of Hearing : 22 May 2017 Date of
Decision : 22 May 2017 Date of Handing Down Reasons for Decision : 23 May 2017

REASONS FOR DECISION

This is the respondent's application for specific discovery against the claimant for the following documents: The medical records, notes, reports and/or referral letters of Dr John Simon in respect of the claimant for the period of October 2014 to January 2015. The medical records, notes, reports and/or referral letters of Professor van Hasselt of Prince of Wales Hospital in respect of the claimant from January to August 2015. The medical records, notes, reports and/or referral letters in respect of the claimant at Shatin Union Hospital in connection with the operations (including pre-operative assessments and post-operative care) he underwent on 23 January 2015, 10 April 2015 and 28 August 2015 (including the further sleep nasoendoscopic evaluation). Notwithstanding the initial opposition of the claimant and as a result of the meaningful discussion at the hearing, the claimant was willing to disclose materials relating to viral load count and antiretroviral therapy in the documents requested under (a) and the documents requested under (b) and (c). The respondent maintained the scope of the application under (a) and I granted the application after hearing the parties. What follows are the reasons for my decision.

Background

This is a disability discrimination action. The respondent is a registered specialist in Otorhinolaryngology, and the claimant his patient. It is common ground that the claimant was suffering from mild obstructive sleep apnoea. He was referred to the respondent and the respondent began treating him on 15 August 2014. After some preliminary enquiry, examination and tests, and trying some more conservative treatments but without much improvement, the respondent advised the claimant on 18 November 2014 that he might consider surgical intervention by way of uvulopalatopharyngoplasty, tonsillectomy, septoplasty and turbine reduction (the Surgery), which was accepted by the claimant. The respondent then made arrangement for an operating room at the HK Sanatorium & Hospital (HKSH) for 24 November 2014, and made a backup reservation at the Canossa Hospital (Canossa) for 26 November 2014. During the whole course of consultation including the preparation for the Surgery, the claimant had never communicated to the respondent that he is HIV positive. In fact, the claimant had been treated by Dr John Simon (an infectious diseases specialist) since April 2013 and he had been prescribed with antiretroviral medication for long-term viral suppression of HIV. According to the claimant, it was better for Dr Simon to fully and properly disclose his diagnosis to the respondent. On 22 November 2014, the respondent received a phone call from Dr Simon and was informed of the claimant s condition. It is common ground that the respondent cancelled the booking at HKSH on 24 November 2014 and requested the claimant to attend his clinic instead. What transpired at the meeting is a matter of controversy between the parties. After that meeting, the claimant arranged (at the request of the respondent) a written note of Dr Simon to be sent to the respondent detailing the claimant s condition. The claimant also learnt that Canossa had approved the Surgery notwithstanding his condition. On 25 November 2014, the claimant was requested back to the respondent s clinic and was told that the respondent would not go ahead with the Surgery. What transpired at this meeting is also disputed. Eventually, the respondent referred the claimant to Professor van Hasselt of Prince of Wales Hospital who performed the Surgery on the claimant on 23 January 2015 at Shatin Union Hospital. The claimant underwent further procedures on 10 April and 28 August 2015 in relation to his nasal obstruction. It is the claimant s case that he had been discriminated in the sense that he had been treated less favourably by the respondent on the ground of his disability (namely, the fact that he is HIV positive). He accuses the respondent of refusing to provide medical services to him in the terms, conditions or manner as the respondent would normally provide to others on the ground of his disability, which is a contravention of the Disability Discrimination Ordinance, Cap 487, () by deferring, cancelling and refusing to perform the Surgery on him. The respondent denies that he was discriminating against the claimant. He explains that the claimant was his first patient with a history or diagnosis of HIV positive and therefore he had to proceed with caution. The revelation by Dr Simon of the claimant s condition on 22 November 2014 (which was a Saturday) necessitated reassessment, further investigation and procurement of advice before proceeding with the operation scheduled for next Monday (ie 24 November 2014). He took steps between 24 and 26 November 2014 to proceed with the reassessment, further investigation and procurement of advice from more experienced and knowledgeable colleagues and it was necessary and

reasonable to cancel and defer the operation scheduled for 26 November 2014 as well. And the claimant never went back to the respondent for treatment. The respondent argues that there had not been any refusal or omission to provide services to the claimant. The deferral was (in the respondent's honest and professional opinion) in the best interest of the claimant and that requiring the respondent to perform the Surgery on 26 November 2014 upon the claimant's insistence would pose unjustifiable hardship on him in the practice of his medical profession and/or in discharge of his professional duties amidst unaddressed concerns. Applicable legal principles There is no dispute on the applicable legal principles. Both parties have cited the judgments in Chan Hung and Lee Sai Nam in their respective submission. In the interest of expedience, I shall not recite the principles here but only made references to them insofar as it is necessary for the disposal of the argument. The remaining aspect of Dr Simon's record requested The first request is for Dr Simon's medical records, notes, reports and/or referral letters in respect of the claimant for the period of October 2014 to January 2015. The claimant initially refused to disclose the documents mainly on the grounds that: (i) the relevant documents do not exist and (ii) the documents are not relevant or that disclosure is not necessary. Although Mr Vidler (the claimant's solicitor) has deposed to the fact that the written note prepared by Dr Simon for the respondent is the only document in the category of documents requested in the possession of the claimant or that the claimant has ever had, the claimant has the power to request for additional documents from Dr Simon. Although Dr McCoy (the claimant's counsel at the hearing) accepts that materials relating to viral load count and antiretroviral therapy in the record may explain Dr Simon's opinion that the risk of infection was (as opposed to) and hence could be said to be relevant, he maintains his opposition to any wider discovery as unnecessary and oppressive. As I have explained at the hearing, given the claimant's case (at paras 24-26 of the Notice of Claim) that the deferral of the 24 November 2014 appointment is already discriminatory and the defence (at para 80 of the Notice of Opposition) that Dr Simon's revelation had necessitated reassessment, further investigation and procurement of advice on the part of the respondent, the documents requested may contain information that enable the respondent either to advance his own case or to damage the case of his adversary in the sense of confirming the advisability of the deferral. I do not agree with Dr McCoy that any wider discovery would unnecessarily impinge upon the claimant's privacy. The respondent is only requesting for records from about 1 month prior to Dr Simon's written note (ie from October) but not from the very beginning of Dr Simon's consultation (ie from April 2013). The request ends at January 2015 when the Surgery by Professor van Hasselt was done. Dr McCoy took the point that what is material is the state of mind of the respondent in deferring the Surgery and anything that followed the cancellation of the appointments would not be relevant. With respect, how Dr Simon had managed or treated the claimant before and after Professor van Hasselt's operation may confirm the validity of the respondent's postponement of the operation. This is all the more so as Dr Simon did not unequivocally confine himself to viral load count and antiretroviral therapy when rendering his opinion that there was low risk. I consider the scope of the respondent's request to be proportionate and measured. In the circumstances, I would order discovery in the scope requested.

Conclusion

The parties were otherwise content with the terms of the Summons, and I made an order in terms of the Summons (including costs) at the end of the hearing. It remains for me to thank Dr McCoy (leading Ms Souza) and Mr Chan for their able assistance. (Justin Ko) Acting Chief District Judge Dr Gerard McCoy SC leading Ms Denise Souza instructed by M/s Vidler & Co (assigned by the Director of Legal Aid) for the claimant. Mr William Chan of M/s Mayer Brown JSM for the respondent. Chan Hung v Yung Kwok Chung, unreported, HCA 216/2004, 15 January 2009, Deputy High Court Judge H Wong SC. Lee Sai Nam v Li Shu Chung, unreported, HCA 1711/2009, 10 January 2014, Deputy High Court Judge Marlene Ng. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V }ul^ULC yt v2 yt v2 {vqlgb^b^bYvUPbUb hqB8 gds8 yt v2 yt v2 yt v2 hc - hPE: hqB8 hqB8 gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E gdg]E h81j gdg]E gdg]E gdg]E gdg]E h0-) hg]E hg]E hg]E hg]E hg]E hg]E hg]E hg]E gdAa zvqvj hg]E hg]E h81* &`#\$ gdAa yt v2 yt v2 yt v2 yt v2 [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ]# theme/theme/theme1.xml \$O)) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .)xE /,EE} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/>)XZb we2, @1]E L@sV8 ZhG4c w~+] L@sV @1]E w~+] & 6" CACV Jeannie MY MokSo ABC.dot Windows User Microsoft Office Word Judiciary CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{C58E435A-9375-41E0-8138-639491D30E73}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria