

HONG KONG / JUDGMENT

HKSAR v. ADAMS SECUFORCE (INTERNATIONAL) LTD

COURT

Court of First Instance

DECIDED

6 February 2007

CASE / FILE NUMBER

HCMA685/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA685/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 685 OF
2006 (ON APPEAL FROM STS 2545-7 OF 2006)

BETWEEN HKSAR Respondent and ADAMS SECUFORCE (INTERNATIONAL) LIMITED Appellant

Before : Hon Nguyen J in Court Dates of Hearing : 31 January 2007 Date of Judgment : 6 February
2007

J U D G M E N T

AUTONUMOUT The appellant company was convicted by Mr Thomas Tsang on 23 June 2006 at Shatin Magistrates Court of three offences under section 63(4)(b)(ii) of the Employment Ordinance, Cap. 57, of being an employer, without reasonable excuse, failing to pay to an employee holiday pay which the appellant was required to pay under section 40 of the Ordinance. The rate of holiday pay is specified in section 41 of the Ordinance which states that it shall be a sum equivalent to the wages which an employee would have earned on a full working day. AUTONUMOUT The particulars of the offence were that the appellant failed to pay an employee () on three public holidays in 2005, namely the day following the Chinese Mid-Autumn Festival, National Day and Chung Yeung Festival. The amount involved were respectively \$51.90, and \$61.80 for the two subsequent occasions, making a total of \$175.50. The appellant company was fined \$500 on each summons. It now appeals against both the convictions and sentences. Grounds of appeal AUTONUMOUT Ho, SC, has advanced 5 grounds of appeal, the details of which I shall not reproduce here, basically attacking the magistrate's conclusion that the appellant

company did not have a reasonable excuse when it failed to pay the employee the amount involved. The evidence AUTONUMOUT The defence called one witness who was the manager of the manpower department and she gave evidence that there were at the material time 1,600 employees in the company and there was one payroll clerk who manually put into the computer system the details of the employees who attended work and there was another officer who did the checking of the details input into the computer. With regard to public holiday benefits, the witness testified that if the shift was for more than 9 hours then any hours in excess of that had to be input manually into the computer system. The witness herself was also in charge of supervising the details input into the computer. Every three months there was a periodic check of the entries in the computer and one out of 10 entries was checked at random. The witness believed that the error which caused the company to pay the employee PW1 less than what she was entitled to was due to a human error in omitting to input the overtime work. She said that the company foresaw the problem of manually inputting details of 1,600 employees because the company was bound to grow. Therefore in July 2005 a new computer system was purchased but by the dates of the offences, namely September and October 2005, the new computer system was not in use yet because it was being test-run and modifications had to be made to the system. The magistrate s findings AUTONUMOUT The magistrate in his oral reasons for verdict said, inter alia, that inputting the wrong details into the computer was not necessarily acting without reasonable excuse and that that could be a reasonable excuse. He said that the court would have to consider whether a person manually putting in details is liable to make mistakes and that the court would not expect that such a person would produce perfect work without there being any mistakes. He said that the errors in this case were not intentionally made but whether an excess payment was made or too little salary was paid, that was a mistake. He also said that the defence witness said this was not the only time a mistake was made and that there were occasions in the past when mistakes were made. That last statement appears to have been an error on the magistrate s part because I am told by Mr s junior who was the counsel at the trial, that it was PW1 s evidence and not that of the defence witness that in the past there were errors of over-payment. In his Statement of Findings, the magistrate mentioned that from one of the documents produced by the defence it was apparent that in the past errors of payment were made but that this involved over-payment of salaries. AUTONUMOUT have looked at the three defence exhibits produced at the trial but cannot see that they showed any excess payments in the past. The three exhibits were time cards of the company and showed that the errors which were caused were in fact omitting to input the figure for the statutory holiday work which would then have calculated the correct wage to be paid to the employees attending work. On the time card for September 2005 which Mr Ho produced for my perusal, on 19 September which was the day following the Mid-Autumn Festival, the figure had not been typed in and therefore it showed . AUTONUMOUT In the magistrate s Statement of Findings, he also appeared to have misquoted the defence witness s evidence when he said that the witness admitted that the company foresaw the matter of errors in paying salaries and that the company knew earlier on about these errors and could foresee that such errors could occur in the future. As stated above, the witness s evidence was not that the company was aware of errors in salary payments but foresaw that the problem of inputting details manually might arise if the company continued to grow. The

company had in fact bought the new system in July 2005 even before the alleged offences were committed. I am told that the matter only came to light when the employee PW1 complained to a labour inspector who went to the company, instead of raising queries with the company hotline specially set up for this purpose. Once the errors were pointed out, the company, within a reasonable period of time, paid back the payments that PW1 was entitled to. AUTONUMOUT As stated above, the error was made when the person concerned omitted to type in the figure thereby leaving the figure in the computer. This was an omission on the part of that person and it was not, as the magistrate said in the Statement of Findings, that the wrong details had been input into the system. The magistrate was critical of the system used by the company when he said in his Statement of Findings that to avoid these mistakes occurring, the company could have employed a few more workers to input the details and to check the details input. This was ignoring the fact that even if more employees were used to do this work, an error could still have occurred if only one of them made a mistake. AUTONUMOUT At the trial the defence raised the common law defence of honest but mistaken belief. The magistrate correctly found that this defence was not applicable to the present case. In the case quoted to me by Mr Cheung for the respondent namely HKSAR v. Ho Hon Chung Daniel & Ors [2004] 3 HKC 304, the Court of Appeal held that if a statute specified a certain defence for a statutory offence, it would be most unlikely that the legislative intent was also to make available to the accused the common law defence of honest and reasonable belief. The law AUTONUMOUT Ho relies on the New Zealand case of Oosterman v. New Zealand Police CR1-2005-404-251 where Harrison J quoted the case of Mark v. Henshaw 85 FCR 555 (FCA) where the Supreme Court of the Australian Capital Territory decided that the defence of reasonable excuse had first to be examined and identified; secondly, that it was necessary to determine whether the excuse was genuine; and thirdly, an assessment was necessary to determine if the excuse was reasonable. The court said that the defendant's belief or his state of mind were relevant factors and may afford some assistance to the trier of fact but the final answer must always come from an objective assessment of the particular facts of each case. The court said that that assessment required a consideration of not merely the defendant's belief and state of mind but it required the application of community standards. It said In particular it requires the trier of fact to determine whether the trespassers conduct is acceptable to the community. Harrison J also noted that the objective standard was applied in New Zealand in A v. Police [1999] 2 NZLR 501, where Baragwanath J said at I accordingly reject the argument that the term reasonable excuse means reasonable only in the subjective perception of the defendant Reasonable has been adopted by the law in a range of contexts as imposing an objective standard as a societal norm. In this context I consider it to mean an excuse which an ordinary New Zealander would consider to be reasonable in all the circumstances. AUTONUMOUT Ho also relies on the case of HKSAR v. Ching Yeung Development Company Limited, HCMA806/2002, where Deputy Judge Pang quoted from the Australian case of Pascoe v. The Nominal Defendant (Queensland)(no.2) [1964] QD 373 where that court held that reasonable excuse meant a cause which a reasonable man would regard as an excuse, a cause consistent with a reasonable standard of conduct.

Conclusion

AUTONUMOUT The magistrate in his Statement of Findings used three pages to repeat the evidence of the defence witness in the section entitled assessment of the evidence . He correctly stated that the defence of reasonable excuse had only to be established on a balance of probabilities and not beyond a reasonable doubt. As pointed above he misquoted or misunderstood the evidence of the defence witness as regards the foreseeability of problems with salary payments. He then dealt with the defence of honest but mistaken belief and correctly said that that defence was not applicable. AUTONUMOUT Then in three lines he said that having considered all the circumstances comprehensively, he was of the view that the company did not have a reasonable excuse when it failed to pay the employee the payments in question. He then found that the three offences in the three summonses were made out. AUTONUMOUT Cheung s submission is that when the magistrate assessed the evidence in the three pages mentioned above, he was in fact assessing whether or not the appellant had made out a case that it was acting with reasonable excuse. Mr Cheung also submits that the magistrate was the trier of the facts and his findings of fact should not be lightly interfered with. AUTONUMOUT reminded Mr Cheung of the decision of the Court of Final Appeal in Chou Shih Bin [2005] 1 HKLRD 838 where the Court of Final Appeal held that an appeal under s. 113 of the Magistrate Ordinance was by way of rehearing on the evidence before the trial court supplemented by such further evidence as the intermediate appellate court might admit under its statutory power to do so and that where the facts were concerned, the appellate tribunal would recognise it did not enjoy the advantage of having received the evidence at first hand but even so it would not fail to quash a conviction that it considered unsafe. AUTONUMOUT In the instant appeal, the evidence of the defence witness was uncontroversial which is shown by the fact that the magistrate did not have to make a finding as regards whether he believed her evidence or not. The crux of the matter here is : the excuse by the appellant was that the errors were caused by an employee making a mistake when manually inputting details of work into the computer system; whether the excuse is reasonable or not is a matter which falls to be assessed. The magistrate s assessment of the evidence was in two instances faulty as mentioned above. The magistrate s criticism of the system which was employed was that firstly the magistrate was of the view that more employees should have been employed to input the data and to check what was input and secondly that the defence had called the wrong witness and should have called the person who input the data and/or the person who checked what was input. I have dealt with the first matter in the course of this judgment. As regards the second matter, all that the person who input the data could have said was he/she made a mistake. AUTONUMOUT The analysis by the magistrate was, with respect, not along the lines of what was advocated in Oosterman s case and, to my mind, the magistrate never considered the vital question of whether or not a reasonable person applying community standards would have found this excuse to have been reasonable. Mr Cheung s reply to that is that the magistrate here was like a jury in a criminal trial sitting as a judge of the facts and therefore representing the views of the community at large. I accept that in theory, that might well have been so, but if the magistrate did not express this to show that he had taken into account community standards and was assessing the excuse as a reasonable member of the

community, then his assessment is liable to be faulted. AUTONUMOUT In my judgment, the excuse that the appellant relied upon was reasonable and I find that the appellant was acting with reasonable excuse when it failed to pay the payments required under the Ordinance. The result is that the appeals against convictions are allowed and the convictions and sentences are quashed. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Patrick Cheung, SADPP and Ms Agnes Chan, SGC of the Department of Justice, for HKSAR Mr Ambrose Ho, SC and Mr Leung Chun Keu 1udk 1udk P Q R S T U V &`#\$ P" (# P" (# & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=55968

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-adams-secuforce-international-ltd-2007>

Prepared on 26 October 2026 · Esheria