

HONG KONG / JUDGMENT

HUI SING PAN v. ROSE KNITTING (ASIA) LTD

COURT

District Court

DECIDED

9 July 2007

CASE / FILE NUMBER

DCEC178/2002

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bjbj DCEC 178/2002 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 178 OF 2002

IN THE MATTER OF AN APPLICATION BETWEEN HUI SING PAN Applicant and ROSE KNITTING
(ASIA) LIMITED Respondent

Coram: His Hon. Judge Leung in Court Date of hearing: 6-7 June 2007 Date of handing down
judgment: 9 July 2007

JUDGMENT

INTRODUCTION

The Applicant claims compensation in respect of accidental injury allegedly arising in and out of the course of his employment as a driver. The Respondent, his employer, denies liability and disputes certain aspects of the quantum.

BACKGROUND

The Applicant was 61 years old when he was employed by the Respondent. He started work on 8 February 2000. His major duty was to drive at the order of Mr. Yip, who was and is a director of the Respondent, and his family. He would also do some shopping for Yip's family in the morning. The accident allegedly happened in the morning of 14 March 2000, about a month after the commencement of his employment. The Applicant was at the car park of Mr. Yip's residence at South Bay, Hong Kong, cleaning a 7-passenger van. The van was one of the vehicles which he would drive in the course of his duty. He claimed to have sprained his back. 4 days later, on 18 March 2000, the Applicant consulted Dr. S K Kwok, a private medical practitioner, for back injury. On the following day, the Applicant also attended the accident & emergency ward of the

government hospital. On 23 March 2000, the Applicant consulted Dr. K W Tam, another private medical practitioner. On 28 March 2000, the Applicant consulted Dr. Kwok again for back injury. On the following day, the Applicant went to the hospital where X-ray was taken this time. On 10 May 2000, the Applicant consulted Dr. C K Chan, an orthopaedic specialist. The attending doctors gave the Applicant various sick leaves. Notwithstanding that, the Applicant continued to work until 17 May 2000 when he finally admitted himself to the hospital. He was discharged a couple of days later. During the hospitalisation period, the Applicant filed a report of the alleged accident to the Labour Department (the Department). As a result, the Department wrote to the Respondent on 18 May 2000. The Respondent filed Form 2 on 23 May 2000, but denying any knowledge of the alleged accident on the basis that no such report has been received from the Applicant. The Applicant continued his follow up treatment after discharge. On 3 June 2000, he resumed his duty. On 14 June 2000, he wrote to the Department to cancel his claim. The Department notified the Respondent on 17 June 2000 of the same. One week later, on 21 June 2000, the Respondent dismissed the Applicant. Besides the salary for June, he received one month s salary in lieu of notice and pro rata year-end double pay. Towards the end of 2001, the Applicant sought legal aid assistance and eventually restored his claim filed with the Department. Apparently the Respondent was notified of the same and replied on 23 January 2002. The Respondent maintained that it had no knowledge about the alleged accident until the Department s previous letter dated 18 May 2000. The Respondent also queried whether the Applicant s alleged injury was the result of an accident arising in and out of the course of his work or was his pre-existing condition. The Application herein was filed only on 5 March 2002. The Medical Assessment Board on 19 August 2002 concluded that the Applicant suffered from sprained back resulting in pain and stiffness. Loss of earning capacity was assessed to be 2%. Further MRI on the Applicant s back, done in the following months in the Mainland and locally, confirmed the protrusion of L4/5 intervertebral disc and compression of both L5 nerve roots. In November 2004, posterior decompression of the Applicant s lumbar spine was performed in the hospital. In the light of that, the Medical Assessment Board on 18 February 2005 adjusted its assessment of the Applicant s loss of earning capacity to 5%. Except for the alleged accident, the above background was basically common ground or in any event evidenced by contemporaneous documents. LIABILITY According to the Applicant, the accident happened when he was standing on a stool to wash the top of the van with a wet towel. In the course of that, his left hand slipped so that he lost balance and fell down to his left. He landed on his hands and knees on the ground. There was no eyewitness of the accident. The Respondent put the Applicant to proof and argued that the Applicant s evidence was incredible. How the Applicant fell Besides his testimony, the Applicant has arranged photographs to be taken of himself demonstrating how he fell. Mr. Wong for the Respondent attacked the Applicant s credibility on the basis that he did not mention in his statement the actual twist of his body in the alleged fall but only complained about pain in his hands and feet. Mr. Cheung for the Applicant however submitted that the fall from the stool to the Applicant s left, as demonstrated and explained by the Applicant, naturally involved the back sprain. The onset of symptom and pain at his back was gradual. Both counsel asked me to apply common sense to judge whether the fall could involve the back sprain mechanically. In my view, the proper application of common sense in these circumstances is this: If the manner in which

the Applicant allegedly fell was obviously inconsistent with his back sprain, I would have expected the medical officers and doctors, who have examined him, to make such observation. The fact was that none of them has raised such query. The witnesses Both Mr. and Mrs. Yip denied having been informed by the Applicant of the accident. Mrs. Yip went further. She added that on one occasion in about a month after the Applicant started to work for them, she discovered that he looked unwell. Upon enquiry, the Applicant allegedly told her that he injured himself in the course of fetching a still usable chair from a refuse collection centre near home. According to the Applicant, he said he first informed Mr. Yip of the accident when the latter joined him in the car in the morning when he sprained his back. Apparently Mr. Yip was pre-occupied with a telephone call. The Applicant fairly admitted that he could not be sure whether Mr. Yip heard him or not at that moment as Mr. Yip made no response. He has not consciously sought to repeat or to update Mr. Yip about his condition thereafter. However there should be no dispute that some sick leave certificates had been handed to the Yips. He admitted that Mrs. Yip did ask whether he was well one day in March but he denied having told her what she alleged. He explained that the stool, which was in fact a low chair, he used at the time of the accident was fetched from the car park and was returned to where it was after use. What he told Mrs. Yip was that he fell and sprained his back while washing the van. Mr. Wong for the Respondent queried how the Applicant could have not ensured that the Yips were duly informed of the accident and his condition. He queried how the Applicant could have just continued working and tolerated the deterioration of his condition, if that was as serious as that portrayed in his statements. He suggested that the reason was that the Applicant well knew that his condition was not the result of any accident at work. The answer of the Applicant was mainly his then concern not to jeopardise the job. Prior to working for the Yips, the Applicant had been a driver for another employer for years. Upon the death of his employer, he had to look for another job. Eventually, the Applicant managed to meet the father of Mr. Yip (Mr. Yip Senior) who was a business friend of his deceased employer. Arrangement was made so that the Applicant subsequently attended an interview with the Yips and eventually secured the job. Hearing him in court, I was impressed by him as someone who was keen at keeping this job as he claimed to be. I am not surprised, in view of his age and the fact that he has worked for the Yips only for about a month by the time of the alleged accident. He also impressed me as having honestly tried to cope with the pain and discomfort in order to keep working. According to him, the pain came on and off. Its degree also varied with his posture. He also sought injections from private medical practitioner. I do not rule out a little extent of exaggeration of his pain and symptoms in his statements. However I do not find this to have exceeded what a person in his circumstances might appear to be doing when asked to describe in detail the deterioration of his condition over months. The attitude and approach of the Applicant towards his job explained why he did not take full advantage of the sick leaves given to him by the doctors from time to time. The report of the accident to the Department was filed only when the Applicant was hospitalised in May 2000. According to the Applicant, it was only when the nurse informed him of this procedure and gave him the relevant form. The content of his subsequent letter to the Department withdrawing his claim also evidences such attitude of the Applicant then. Both in his statement and in court, Mr. Yip could not say much about the Applicant's complaint apart from denying knowledge about that. I

mentioned above Mrs. Yip's version of what the Applicant allegedly told her to have caused his injury. She could not give any details of this version. However she said that learning about the current application, she felt strongly that the Applicant was dishonest so much so that she told Mr. Yip what the Applicant allegedly told her in March 2000. Contrary to that, Mr. Yip confirmed in court that he only queried whether this was an industrial accident as claimed or simply the Applicant's own pre-existing physical condition. There was no other possibility insofar as he ever knew. In other words, he did not perceive anything like what Mrs. Yip said. Mr. Yip's position indeed formed the basis of the Respondent's report of accident has been received from the Applicant. If what Mrs. Yip said were right, one would have expected the Respondent to be able to state that the Applicant's injury was unrelated to his work. I am not inclined to accept the evidence of Mr. and Mrs. Yip in this respect. What I need to find is not whether the Applicant has informed his employer sufficiently but whether there was in fact such an accident causing him injury at work. Mr. Yip sought to demonstrate that the Respondent was reluctant to accede to the application only for a good reason. He suggested that the Respondent always discharged its obligation to pay employees compensation and he gave a few examples. He also referred to the insurance policy which, he said, covered the Respondent's liability to pay compensation to the Applicant, if so found by the court. I am not sure I agree with his construction of the terms of the policy. But again, whether the Respondent's liability was covered by insurance and whether the Respondent had complied with its obligation in the past were not really relevant to the determination of whether the Respondent should be liable in this case. The medical records

There should be no dispute that the medical records concerning the Applicant recorded that he sprained his back when washing a van. The exception was the record of the Applicant's admission to the hospital on 17 May 2000. The nursing assessment form of that date recorded that the reason for admission was sprain back after lifting heavy object. Mr. Wong for the Respondent relied heavily on this, saying that this was what the Applicant told the hospital within 15 minutes of his admission. He argued that this record had to be accurate and this also corroborated Mrs. Yip's evidence of what the Applicant allegedly told her. The hospital, in its letter in February 2006, was not able to explain this record being different from the others. The Applicant explained that the nurse filled in this nursing assessment form during the streaming of the incoming patients, an admission practice in the government hospitals. In the discharge summary 2 days later, the attending doctor did however make the record that he sprained his back while washing a van. Whatever explanation there might be for the record in the nursing assessment form, I do not attach much weight to that. The Applicant has in fact given the same consistent account of what caused his injury since the first medical record dated 19 March 2000. This pre-dated his admission to the hospital and his report to the Department in May 2000.

Conclusion

Having heard the Applicant in court, I found the Applicant to be consistent and straightforward in his evidence. He remained fair and was not shaken during cross-examination. Considering all the evidence, including those specifically analysed above, I find that the Applicant was injured in the accident on 14 March 2000 as he said. As the accident arose in and out of the course of his

employment with the Respondent, the Respondent should be liable to pay compensation.

QUANTUM Pursuant to the previous direction, parties have filed their respective schedule of quantum of compensation. The dispute highlighted was confined to the Applicant's monthly income and the interest claimed. Monthly income There was no dispute that the Applicant's salary at the time of the accident was HK\$12,800.00. The Applicant started work on 8 February 2000 and was dismissed on 21 June 2000. On top of his salary and payment in lieu of 1 month's notice, he also received pro rata year-end payment. The Applicant contended that the year-end payment (i.e., the 13th month's salary) should be taken into account in computing his pre-accident monthly income for the purpose of the present assessment. The Respondent objected, contending that such payment was and could only be gratuitous in nature. Both parties referred to Part IIA of the Employment Ordinance, Cap.57 which governs the liability of an employer to make the year-end payment. Section 11B(1) reads as follows: Subject to any agreement to the contrary and to subsection (2) [which is not relevant to the present case], this Part shall apply to an employee employed under a continuous contract if an end of year payment is payable by the employer to that employee by virtue of a term or condition (whether written or oral, express or implied) of the contract of employment. If the end of year of payment is contractually payable as aforesaid, the presumption under section 11AA(1) applies. It reads as follows: It shall be presumed that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless there is a written term or condition in the contract of employment to the contrary. Parties' argument therefore focused on whether it was agreed (expressly or impliedly) that there would be the end of year payment. There was no dispute that the Applicant attended an interview with the Yips on 3 February 2000. The Yips tested his driving. The Applicant received a telephone call subsequently which required him to report duty on 8 February. The Applicant did. According to the Applicant, Mr. Yip said during the interview that he needed to talk to Mr. Yip Senior (who introduced the Applicant) about his salary. Mr. Yip did mention double pay and bonus, which he understood to refer to all together 14 months of salary every year. There was also mention of his daily working hours and weekly leave. Mr. Yip disputed such allegations. The Applicant was asked to attend the Respondent's office and to sign his employment letter. That letter transpired to be a job application form. Though the form was dated 3 February 2000, the Applicant said confidently that that happened actually 1 week after his commencement of employment. In the form, he left the space for his expected salary blank, in view of what was said by Mr. Yip during the interview. However he did fill in his past working experience (as driver) and the past salary of HK\$12,000.00. It was common ground that there was no other material discussion between the Applicant and Mr. Yip or his company about terms of his employment since then. Insofar as the Applicant's employment was concerned, the contract was assumed at the time when the engagement was confirmed either orally (during the telephone confirmation) or at the latest when he actually reported duty on 8 February 2000. The contract took effect and was performed prior to the signing of the job application. This document, in the circumstances, became partly a record of the engagement. In ascertaining the terms of the contract, the court is entitled to consider the conduct of the parties subsequent to the time of contract. Evidence of these post-contractual circumstances is admissible for such purpose: see Chitty on Contract (29th ed.) Vol.1 at para.12-126. According to

the Applicant, he subsequently discovered his salary in the amount of HK\$12,800.00 upon receipts of that in his bank account. This was similar to the amount which he used to earn and would have expected from the Respondent. Upon his dismissal, the pro rata year-end payment was documented in the Respondent's letter to the Applicant dated 21 June 2000. It contained the layoff payment breakdown including this amount labelled as double pay pro-rata. By signing the letter, not only did the Applicant acknowledge receipt of the amount, but he also bound himself to the following provisions of the letter: I hereby confirm that I have no outstanding claims whatsoever for compensation, loss of office or otherwise against you in respect of my employment with you or the termination thereof and I irrevocably waive such claims (if contrary to my understanding such claims do exist) that I may have against you. Obviously the letter was drafted in a meticulous manner with a view to bearing the intended legal effect for the benefit of the Respondent. I can hardly accept that in the same document, the Respondent for some reason would be so care free to label the payment as pro rata year-end payment if it was never intended as such. Further, if this sum were only meant to be gratuitous, the Respondent would not have had to compute the amount as the double pay on a pro rata basis. It was clear from the evidence that Mr. Yip was not personally involved in the details of staff management of the Respondent. In ascertaining the position of the Respondent vis-à-vis the Applicant under the employment contract, I prefer reliance on the Respondent's own document to Mr. Yip's unilateral assertion of his understanding. I find that the Respondent always understood its contractual obligation to make the end of year payment to the Applicant. The presumption under section 11AA of Cap.57 applies so that the Applicant would have been entitled to such payment had the employment not terminated. Mr. Wong for the Respondent had an alternative argument. He submitted that even if the Respondent was contractually bound to make the end of year payment, the amount of such payment was entirely up to the Respondent. This, he even argued, could have been nil. He relied on *Bruce Gordon Hut v Special Assets Limited*, unrep., HCA 2668/2002, 15/9/2006. Mr. Wong referred to section 11 F of Cap.57 which stipulates how the proportion of the end of year payment should be computed in case the contract of employment was, among other situations, terminated. It reads as follows:

- (1) Subject to subsections (1A) and (1B), where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period- the contract of employment is terminated- at any time during the payment period; or [not relevant to the present case] or [not relevant to the present case], the employee shall be paid a proportion, calculated in accordance with subsection (2), of the end of year payment that would have been payable under this Part if he had been employed by the same employer for the whole of the payment period. (1A) If it is a term or condition of a contract of employment that the employee is on probation, the period of such probation or a period of 3 months, whichever is the shorter, shall be excluded from the calculation of the 3 months period under subsection (1). (1B) [not relevant to the present case]

- (2) The proportion of the end of year payment payable under subsection (1) shall be the proportion specified in that behalf in the contract of employment; or if a proportion is not so specified, the sum which bears the same proportion to a full month's wages of the employee as his period of service under the contract of employment in the payment period bears to that payment period. Mr. Wong suggested that not counting the Applicant's probation period (pursuant to section 11F(1A)), the applicant has worked for less than 3 months for the Respondent. Therefore, the computation on a pro rata basis under sections 11F(1) and (2) did not apply. This, he submitted, reinforced his argument that the payment made should only be considered as discretionary in nature. First, it was not clear whether probation was a term of the employment contract between the Applicant and the Respondent. In the Applicant's job application form, there were writings about a 3-month probation period under the section FOR OFFICE USE. This section was obviously filled in by the Respondent. The Applicant said that during the interview on 3 February 2000, Mr. Yip made no mention of a probation period. When he became aware of such probation period, he did not find this requirement to be unreasonable. In saying that, the Applicant was referring to the mention of such probation period in the Respondent's witness statements Mrs. Yip's statement, as one can see. Even assuming that the probation period was a term of the employment contract, it only means that adherence to the computation on a pro rata basis pursuant to section 11F would not be required. But the reality was that the Respondent did choose to compute and pay on such pro rata basis. That was reflective of the Respondent's position. When the court in *Bruce Gordon Hut* said that the employee could not challenge the amount of year-end payment (which the employer was contractually bound to make), he was referring to the situation where the contract also provided that the amount should be determined by the employer completely at its discretion. This is not quite the present case where Mr. Wong only referred to section 11F. More importantly, one should not lose sight of the method of calculating earnings for the purpose of computing employees' compensation. Section 11(1) of the Employees Compensation Ordinance, Cap.282 provides that: Subject to this section, for the purposes of this Ordinance the monthly earnings of an employee at the time of the accident shall be the earnings- for the month immediately preceding the date of the accident; or computed in such manner as is best calculated to give the rates per month at which the employee was being remunerated during the previous 12 months if he has been so long been employed by the same employer, but, if not, then for any lesser period during which he has been employed by the same employer, whichever calculation is more favourable to the employee. (emphasis added) For the purpose of these proceedings, I am entitled to take into account the pro rata end of year payment, which was actually received by Applicant, in the computation to best calculate the average monthly earnings of Applicant for the period of his work for the Respondent; and I shall adopt such calculation as being more favourable to the Applicant than his salary for the month preceding the accident. In the circumstances, I accept that the multiplicand should be $\text{HK\$}12,800.00 \times 13/12 = \text{HK\$}13,867.00$. Interest The Respondent complained that the Applicant has been guilty of delay in prosecuting the claim so that no interest should be awarded for such delay. Specifically, according to the schedules of quantum of compensation filed, the Respondent

contended that interest for the following periods should be disallowed: 1 July 2000 to 31 March 2002; and 1 April 2005 to 31 March 2007. During trial, Mr. Wong confirmed that the Respondent only took issue over 2 lesser periods of delay: the period between the Applicant's dismissal in late June 2000 and his restoration of the claim filed with the Department in November 2001 (the 1st Period); and the period after the filing of the witness statements near the end of 2005 until the filing of the notice of intention to proceed in early February 2007 (the 2nd Period).

The 1st Period This was a substantial period of delay. According to the Applicant's statement, his approaching the Department in November 2001 to restore his claim was apparently a conscious decision. Prior to that, he experienced difficulties in coping with his work, family burden and his health condition. His mood was low. However, in court, the Applicant explained that he was unaware of his right until he happened to come across a person apparently with legal knowledge who advised him. He mentioned this for the first time in his oral evidence. Even assuming what he said was true, I am not satisfied that there was anything preventing the Applicant from making enquiry with the Department in view of his previous experience in dealing with the Department. When he was in the hospital, he had his son filed the accident report with the Department. He also made telephone enquiry with the Department. In June 2000, he himself wrote to the Department to withdraw the claim. I am more inclined to believe that the Applicant did not act during this period after his dismissal because of his lack of motivation, as he too appeared to acknowledge in his statements.

The 2nd Period The last witness statement in these proceedings was filed in November 2005. By consent summons filed on 22 November 2005, the application for fixing date of trial was adjourned sine die. Nothing has happened since then until the Applicant filed the notice of intention to proceed on 5 February 2007. Mr. Cheung referred to the processing by the Legal Aid Department and that counsel was assigned only in October 2006. This did not suffice as reasonable excuse for the delay as the Applicant was for all practical purposes legally represented during this period. The bottom line was that the Respondent should not bear the consequence of the Applicant's own delay. The Respondent should not be made to pay interest for these periods.

AWARD I order as follows: Section 9 compensation shall be in the sum of $\text{HK\$}13,867.00 \times 48 \times 5\% = \text{HK\$}33,280.80$. Section 10 compensation shall be $\text{HK\$}13,867.00 \times 388/30 \times 4/5 = \text{HK\$}143,477.30$. Section 10A compensation shall be in the agreed sum of $\text{HK\$}2,544.00$. Interest shall run at half the judgment rate from the date of accident to the date of judgment save and except the periods between July 2000 and November 2001 inclusive and between December 2005 and October 2006 inclusive. Interest since the date of this judgment shall run at the judgment rate until full payment. Notwithstanding the argument on interest (which did not take long), the Applicant has effectively succeeded in the substantial part of these proceedings. I am of the view that he should have costs of this application including any costs reserved. Such costs shall be taxed, if not agreed. The Applicant's own costs shall be taxed in accordance with legal aid regulations. I certify the engagement of counsel. This costs order is nisi and shall become absolute in 14 days in the absence of application.

(Simon Leung) District Judge Representation: Mr. Wallace Cheung instructed by Messrs. S H Tam & Co. on the instruction of the Director of Legal Aid for the Applicant Mr. Jason Wong

instructed by Messrs. Winston Chu & Co. for the Respondent PAGE A B C D E F G H I J K L M
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