

HONG KONG / JUDGMENT

# IP WAH v. CHEUNG CHUN CHIU

COURT

Court of First Instance

DECIDED

22 June 2007

CASE / FILE NUMBER

HCMP251/2007

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

bjbj 5\_/cnoMR

-----

Hon Yuen JA: I have had the benefit of reading in draft the judgment of Chu J. I agree with the reasons given and would also dismiss the application for leave. Hon Chu J: The applicant is the defendant in Labour Tribunal Claim No. LBTC 4988/2005. This is the applicant's renewed application for leave to appeal to the Court of Appeal against the Judgment of Chung J dismissing his appeal against the award made by the Presiding Officer of the Labour Tribunal. LBTC 4988/2005 In LBTC No.4988/2005, the claimant claimed against the applicant for wages in lieu of notice, annual leave pay, end of year payment, food allowance, severance payment and alternatively long service pay. The claimant's case was that he had since 1 March 1997 been employed by the applicant and he was orally dismissed by the applicant on 1 August 2005. The applicant disputed the claim on the basis that there was no employment relationship between him and the claimant. The applicant's case was that in September 1999, the claimant was laid off and \$20,000 severance payment had been paid to him. Since then, the claimant has become self-employed and it was agreed that he would pay the applicant \$150 for each car repaired by him on account of his use of the applicant's garage. The main issue before the Labour Tribunal was whether the respondent was an employee of the applicant after 1999. The credibility of the parties was also in issue. On 16 February 2006 after trial, the Presiding Officer found in favour of the claimant and awarded \$154,230.10 to him together with interest and made no order as to costs. On the issue of credibility, the Presiding Officer found the claimant's evidence credible and rejected the applicant's evidence, including his evidence that he had paid the claimant \$20,000 as severance payment. In disbelieving the applicant, the Presiding Officer relied on three sets of documents. They are: (1) an application to the Occupational Deafness Compensation Board dated 9 April 2004 in which the applicant stated he was the claimant's employer; (2) MPF statements showing that the applicant had registered the claimant as his employee; and (3) the tape recording of a conversation between the claimant and the applicant on 30 April 2005 together with its transcript. HCLA 9/2006 The applicant appealed against the award. There were four grounds of appeal. One of them was that the Presiding Officer erred in admitting into evidence the tape-recorded conversation and its transcript when the conversation was without prejudice

discussion. Chung J heard the appeal on 17 January 2007. On 26 January 2007, he handed down the Judgment. He rejected all the grounds of appeal except the one relating to the admissibility of the tape-recorded conversation and its transcript. In respect of the tape-recorded conversation, Chung J noted that it took place at a meeting, which admittedly was to discuss settlement of the Labour Tribunal claim. He held that the Presiding Officer had misdirected himself in failing to consider whether the conversation should be excluded under the without prejudice doctrine. He, however, considered that as the Presiding Officer's finding on credibility was also based on two other sets of documentary evidence, apart from the tape-recorded conversation, he was of the view that there was ample basis for the Presiding Officer to hold that an employment relationship existed between the parties. Applying Order 55 rule 7(7) of Rules of the High Court, he held that no substantial wrong or miscarriage had been occasioned by the misdirection on the tape-recorded conversation and dismissed the applicant's appeal. Application for leave to appeal to Court of Appeal On 2 February 2007, the applicant applied for leave to appeal to the Court of Appeal. On 12 February 2007, Cheung JA refused the application on paper without a hearing. The applicant now renews his application for leave before this Court. Section 35A(1) of the Labour Tribunal Ordinance, cap.25 provides: If any party is dissatisfied with a decision of the Court of First Instance on an appeal heard by leave given under section 32, such party may, within 7 days after the date of the decision, apply to the Court of Appeal for leave to appeal and, if the Court of Appeal considers that a question of law of general public importance is involved, it may grant leave. Accordingly, the applicant has to show that his appeal involves a question of law of general public importance before leave to appeal will be given. Questions of law formulated by the applicant

12. Three questions of law of general public importance were formulated in the applicant's Notice of Application for Leave to Appeal. They are: Whether Order 55 rule 7(7) RHC is applicable to appeals from the Labour Tribunal and whether Chung J was right as a matter of law to dismiss the appeal by applying Order 55 rule 7(7). Whether Chung J was right as a matter of law not to remit the matter to the Labour Tribunal for a new hearing or with directions, but to take up the function of the tribunal of fact in assuming that the Presiding Officer would have made the same finding on the issue of credibility, the evaluation of evidence and issue of the relationship between the parties. If Order 55 rule 7(7) RHC is applicable to appeals from Labour Tribunal, whether Chung J was right as a matter of law to conclude that no substantial wrong or miscarriage have been occasioned by the Presiding Officer's misdirection on the tape-recorded conversation. Applicability of Order 55 rule 7(7) RHC to Labour Tribunal appeals
13. The first two questions can be taken together. They essentially boil down to two questions. The first is whether Order 55 rule 7(7) RHC is generally applicable to Labour Tribunal appeals. The second is whether Chung J was correct in not remitting the matter back to the Labour Tribunal. Order 55 rule 1(1) RHC provides that the Order shall apply to every appeal which by or under any enactment lies to the Court of First Instance from any court, tribunal or person. Rule 1(5) further provides that references to Tribunal in Order 55 shall be construed as references to any Tribunal constituted by or under any enactment other than

any of the ordinary courts of law. Prima facie, Order 55 is applicable to appeals from the Labour Tribunal, being a tribunal established under the Labour Tribunal Ordinance.

Appeals from the Labour Tribunal are not among the appeals excluded under Order 55 rule 1(2). Order 55 rule 1(4) states: The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these rules or by or under any enactment.

18. Order 55 rule 7(7), which is the subject of concern in the applicant's intended appeal, states: The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.
19. Miss Chan argues that Order 55 rule 7(7) is inconsistent with the intention of section 35(2) of the Labour Tribunal Ordinance. This is because under section 35(2), the Court of First Instance has no power to reverse or vary the determination made by the Tribunal on questions of fact or to receive further evidence. In addition, the Labour Tribunal is the sole tribunal of fact with the duty to investigate issues of facts and evaluate the evidence and appeals from the Labour Tribunal must be on point of law. In Miss Chan's submission, however, rule 7(7) empowers the Court of First Instance to evaluate the evidence and make findings of fact and is therefore in conflict with section 35(2).
20. I do not agree with the argument. Section 35(1) of the Labour Tribunal Ordinance provides: On an appeal for which it has granted leave under section 32, the Court of First Instance may-
  - (a) allow the appeal;
  - (b) dismiss the appeal; or
  - (c) remit the matter to the tribunal with such directions as it thinks fit, which may include a direction to the tribunal for a new hearing. The section therefore confers a discretion on the Court of First Instance. The effect of Order 55 rule 7(7) is to provide guidance on the exercise of the judicial discretion under section 35(1). It does not confer on the Court of First Instance power to make findings of fact or to reverse or vary the tribunal's determinations of fact. There is thus no inconsistency between Order 55 rule 7(7) and section 35(2) or other provisions in the Labour Tribunal Ordinance. The point of law that the applicant seeks to advance in the intended appeal, namely, Order 55 rule 7(7) does not apply to Labour Tribunal appeals generally, has no prospect of success. The decision not to remit Miss Chan also argues that even if rule 7(7) is applicable, it should be subject to section 35 of the Labour Tribunal Ordinance. It is said that Chung J's decision not to remit offends section 35(2)(i) in that it amounts to a variation of the basis of the Presiding Officer's determination on the issue of credibility. The argument is untenable. What the Court of First Instance cannot do under section 35(2)(i) is to reverse or vary the Tribunal's determination of fact. In applying Order 55 rule 7(7), Chung J had not varied or reversed the Presiding Officer's determination on credibility of the witnesses. Neither had he varied any finding of fact made by the

Presiding Officer. The decision not to remit the matter to the Labour Tribunal is not inconsistent with section 35(2) of the Labour Tribunal Ordinance. Application of Order 55 rule 7(7)

24. Under the third question, Miss Chan argues that Chung J had applied the wrong test in applying Order 55 rule 7(7) when he said that there was ample evidence to justify the Presiding Officer's conclusion that an employment relationship existed between the parties. Miss Chan submits that the proper test should be as stated by Sir John Donaldson MR in *Dobie v. Burns International Security Services (U.K.) Limited* [1985] 1 W.L.R. 43 at 49B-C: Once you detect that there has been a misdirection, and particularly that there has been an express misdirection of law, the next question to be asked is not whether the conclusion of the tribunal is plainly wrong, but whether it is plainly and unarguably right notwithstanding that misdirection. It is only if it is plainly and unarguably right notwithstanding the misdirection that the decision can stand. If the conclusion was wrong or might have been wrong, then it is for an appellate tribunal to remit the case to the only tribunal which is charged with making findings of fact.
25. The first point to note is that whether Chung J had applied the correct test does not give rise to a question of general public importance for the purpose of granting leave to appeal to the Court of Appeal.
26. Further, it cannot be said that Chung J, in concluding that there was ample evidence to support the Presiding Officer's decision, had approached the issue by asking whether the Presiding Officer's decision is plainly wrong.
27. As noted above, the Presiding Officer's determination on the issue of credibility was based on three sets of documentary evidence. Apart from the tape-recorded conversation, the others were contemporaneous documents in which the applicant had admitted the claimant was his employee. They are cogent and weighty evidence to support the claimant's case that he was throughout an employee of the applicant. The decision of the Presiding Officer is therefore well supported by these documents alone.

## Conclusion

28. For the above reasons, the applicant's application for leave should be dismissed. (Maria Yuen) (Carlye Chu) Justice of Appeal Judge of Court of First Instance Miss Terry S C Chan instructed by Messrs Hampton, Winter & Glynn for the defendant (applicant). PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk &`#\$ r p# (#p# r p# {1x3 {1x3 Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title 0aEO 0aEO 0aEO 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=57540](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=57540)

**CASE PAGE**                <https://chat.esheria.ai/case-law/hong-kong/ip-wah-v-cheung-chun-chiu-2007>

Prepared on 24 October 2026 · Esheria