

HONG KONG / JUDGMENT

**LIU LE WEN v. CHAN SING AND ANOTHER**

COURT

District Court

DECIDED

21 May 2007

CASE / FILE NUMBER

DCEC1483/2005

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bjbj DCEC1483/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION EMPLOYEES COMPENSATION CASE NO. 1483 OF 2005

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IN THE MATTER OF AN APPLICATION BETWEEN: LIU LE WEN Applicant and CHAN SING 1st  
Respondent EMPLOYEES COMPENSATION ASSISTANCE FUND BOARD 2nd Respondent

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Coram : His Honour Judge Chow Date of Hearing : 19th July 2006 and 8th March 2007 Date of  
Handing Down Decision : 21st May 2007 DECISION This is the Applicant's application for leave to  
commence compensation application out of time. Section 14 (4) of the Employees Compensation  
Ordinance provides:- The Court may receive and determine any application for compensation in  
any case notwithstanding that the notice required by subsection (1) has not been given, or that  
the application has not been made in due time as required by that subsection, if it is satisfied that  
there was reasonable excuse for the failure so to give notice or to make an application, as the case  
may be. The accident in this case happened on 13 December 2002, but the Applicant only  
commenced the Employees Compensation application on 15 December 2005. Under section 14  
(1) of the Employees Compensation Ordinance, the time limit for commencement of the  
compensation application expired on 12 December 2004. Accordingly the compensation  
application was out of time for more than 1 year. The Applicant argues that he has a reasonable  
excuse for not commencing the compensation application within the statutory period because:-  
he was incapacitated by his physical conditions from travelling from Ching Yuan, China to Hong  
Kong to pursue his claim against the 1st Respondent; he was not aware of his rights to claim  
employees compensation against the 1st Respondent. Under paragraph 18 of his 1st affirmation  
dated 27 April 2006 the Applicant stated:- In view of the serious orthopaedic injuries that I  
suffered as a result of the accident, I have not been physically capable of travelling from Ching  
Yuan, China to Hong Kong to pursue my claim against my employer, Mr Chan Sing, for employees  
compensation. This contributed to the delay in making my claim against Mr Chan Sing in these  
proceedings. In his 1st affirmation, the Applicant failed to mention his visits to Hong Kong. After  
Miss Belinda Ng had filed an affirmation on behalf of the 2nd Respondent, he admitted that he

had traveled to Hong Kong on the following occasions:- Date of arrival No. of days staying in Hong Kong 05.01.2004 9 14.06.2004 7 07.07.2004 7 11.10.2004 6 25.12.2004 1 On his visits to Hong Kong, the Applicant was either accompanied by his brother or his sister. There is no reason why they could not accompany him to the court in Hong Kong to institute proceedings for employees compensation against the 1st Respondent. In paragraph 19 of his 1st affirmation, the Applicant said that the fact that he was unaware of his rights to claim employee s compensation against the 1st Respondent also contributed to the delay in making his claim. But ignorance is not a reasonable excuse. In *Wong Chick v. Swire Pacific Ltd* [1992] 1 HKC 571 at 579I 580B, it was held that:- The applicant s explanation for not having made an application before was that he did not know he was entitled to compensation. Ignorance of the fact that he was entitled to compensation for work injury or of the remedies available to him under the law is not a reasonable excuse for not lodging a claim within time. In *Roles v. Pascall & Sons* [1911] 1 KB 982, a worker did not give notice of his accident within the specified time. His reason for failure to give notice was that he did not know of the existence of the Workmen s Compensation Act or that he was entitled to compensation for injury by accident arising out of, and in the course of, his employment. The Court of Appeal found that the reason was not a mistake or a reasonable excuse. Cozens-Hardy MR held that:- Then is it a reasonable cause for a man not giving a notice that he is not aware of the Act of Parliament at all? In my opinion, it is not. I think that those words are intended to meet an entirely different class of case. If, for instance, the employer has been paying compensation for a time without any formal notice of a claim, that may be a very good, reasonable cause why the workman did not make a formal claim within the six months. The two grounds advanced by the Applicant cannot succeed. Therefore his application to seek court s leave to extend the time for him to commence employees compensation application must fail. Even if there is a reasonable excuse for the employees compensation within the statutory period, I have to consider whether I should exercise my discretion to extend the time sought by him. Prior to the accident the Applicant came to Hong Kong as a visitor on a two-way permit. He is not a person legally employable in Hong Kong, because under Regulation 2 of the Immigration Regulations, it shall be a condition of stay for a visitor that he shall not take any employment, whether paid or unpaid. According to section 17G (2) of the Immigration Ordinance, being such a visitor, he is not a person lawfully employable in Hong Kong. When he took up employment with the 1st Respondent, the Applicant committed a breach of his condition of stay and he obtained employment when he was not lawfully employable. Thus his employment contract with the 1st Respondent was unlawful. He was not insured for his employment. Section 2 (2) of the Employees Compensation Ordinance provides that in any proceedings for employees compensation where it appears to the Court that the contract of service was illegal, the Court may, if having regard to all the circumstances of the case it thinks proper so to do, deal with the matter as if the injured person had been a person working under a valid contract of service. In *Chan Xiu Mei v. Li Siu Wo and the Employees Compensation Board* (DCEC 645 of 2005) the Court reached the conclusion that due to policy considerations the discretion under section 2 (2) should not be exercised in favour of illegal workers. The Court took the view that:- The Hong Kong legislation is a complete ban of any illegal employment relationship. The parties cannot form any such contract at all. Hong Kong has placed great emphasis on stemming out illegal employees.

The denial of civil remedy fits well into this regime and magnitude of prohibition. Cases such as Ho Mei Wa (*supra*) and Li Chang Li (*supra*) have, nevertheless, gone much further to identify the need for a complete ban of illegal workers. To countenance an illegal contract of employment would be an invitation to the potential law-breakers and squarely against clear public policy. The view taken by the court in Chan Xiu Mei is a correct one. The nature and facts of that case are no different from those of the present case. Therefore the discretion under section 2 (2) of the Employees Compensation Ordinance should not be exercised in favour of the Applicant. In support of his contentions, the Applicant cited the case of Chan Cheuk Ting v. Analogue Engineering Co. Ltd and another [1986] HKLR 935, and submitted that the gist of the matter must be whether or not the Applicant was doing some lawful work at the material time; what the Applicant was doing at the material time was to use his labour and time to carry out renovation work, and so he was clearly earning honest money with his own labour, like any of the local workers. There is no element of illegality or unlawfulness in the work he worked. But the factual contexts of that case are different from those of the present case. In Chan Cheuk Ting the deceased was an illegal immigrant, who by using a false identity card, obtained employment. The trial judge found that his employer had no reason to believe that he was employing an illegal immigrant. Insurance was taken out for the deceased. The trial judge refused to exercise his discretion under section 2 (2) because he considered that the contract of insurance would not be binding on the insurer, and if he exercised his discretion, he would be imposing a substantial financial burden upon the respondents who were innocent parties. The Court of Appeal held that the trial judge was wrong in holding that if he had exercised his discretion the contract would not have been enforceable. If the judge had exercised his discretion and made an order that the employer pay compensation, no insurer could defeat the scheme of the Employees Compensation Ordinance by pleading, when the insured party sued to recover the compensation under the order, that he was not liable under the contract of insurance because the contract of service, which the Court had held must be treated as valid, was illegal and unenforceable. The exercise of discretion in that case was considered in the context of whether the contract of insurance would be binding on the insurer. That issue is simply absent in the present case. So the decision in Chan Cheuk Ting is simply not helpful to the Applicant. For all the reasons stated above, I dismiss the Applicant's application to extend time. Costs I make an order nisi for costs, to be made absolute in 14 days time, that the Applicant is to pay costs to the 2nd Respondent, to be taxed, if not agreed, with certificate for Counsel. The Applicant's own costs be taxed in accordance with Legal Aid Regulations. ( S. Chow ) District Judge The Applicant: represented by Julia Lau, instructed by Messrs. Vincent T.K. Cheung, Yap & Co., Solicitors. The 1st Respondent: absent, unrepresented The 2nd Respondent: represented ludk ludk L M N O P Q R S T U V (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# (&`#\$ ph333 :i#z :G&0 \*\mT \*V/< zo/< xC&1 ({m8 (;AJc BwA@Y P0} KW +r W~7gb WHyO ry=u^Kt yz{6 {H 8 W~7g xC&1 ({m8 WHyo ry=u & 6" ABC.dot setup Microsoft Word 9.0 |w| v Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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