

HONG KONG / JUDGMENT

NECKEL NILS v. DUAL VOLTAGE CO. LTD.

COURT

Court of First Instance

DECIDED

9 December 1996

CASE / FILE NUMBER

HCLA110/1996

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bjbj

LTA No. 110 of 1996

Headnote

Employment Ordinance - housing allowance - remuneration for work done or to be done - wages.

Housing allowance payable to an employee is the consideration for the services rendered by an employee towards the employer and is consideration for work done or to be done. It is therefore "wages" within the definition of "wages" in the Employment Ordinance.

A non-accountable housing allowance is not "the value of accommodation provided by the employer" and should not be excluded as "wages."

The disposal of the appeal needs no decision on whether an accountable housing allowance or a housing allowance payable on a reimbursement basis is "the value of accommodation provided by the employer."

The court is inclined to take the view that even an accountable housing allowance or one which is payable on a reimbursement basis is not "the value of accommodation provided by the employer." and therefore should not be excluded as "wages" under the Employment Ordinance.

IN THE SUPREME COURT OF HONG KONG

LABOUR TRIBUNAL APPEAL NO. 110 OF 1996

(On appeal from Labour Tribunal Claim No. LT436 of 1996)

BETWEEN

NECKEL NILS Claimant/

Respondent

and

DUAL VOLTAGE COMPANY LTD. Defendant/

Appellant

Coram: The Hon. Mr. Justice Yeung in Court

Date of Hearing: 29 November 1996

Date of Handing Down of Judgment: 9 December 1996

J U D G M E N T

This is an appeal by the appellant Dual Voltage Co. Ltd (the Employer) against the awards made in favour of the Respondent Nils Neckel (the Employee) in the sum of \$63,323.30 being the balance of wages in lieu of notice.

There is no dispute that on the 10 November 95 the Employee tendered his resignation to take effect on 31 December 95 and he was then dismissed on 20 November 95 with the payment of \$50,000.00 as wages in lieu of notice.

The Employer conceded that the period to cover should be up to 31 December 95 and to that extent there was a short payment. But the issue involved in this appeal is confined to whether in the computation of the wages in lieu of notice, the "housing allowance" should be included as part of the wages.

The Employee commenced his employment with the Employer on the 1 February 1991 under a written contract of employment dated 7 January 1991. Clauses 3 and 5 of the contract of employment provide as follows:-

3. Salary : The monthly salary will be HK\$12,000.00 payable 12 times during each calendar year.
5. Housing: The Company agrees to pay a monthly housing allowance of HK\$8,000.00. This allowance is all inclusive and any side-costs (e.g. management fees, utilities) are the responsibility and for the account of the employee.

On 20 August 1991, the Employee was given a promotion and in the Promotion letter, it was stated:-

"We are pleased to inform you that effective 1 August 1991, you will be promoted to the position as Sales Manager (Europe) and your monthly salary will be increased to HK\$23,500.00- (including Housing Allowance) simultaneously."

In August 1993, the Employee entered into a tenancy agreement with a landlord to commence from 3 September 1993 and the monthly rent was \$28,000.00

In May 1994, the Employer agreed to pay the Employee the difference in rent from September 1993 to April 1994 of \$18,000.00 per month.

It was further agreed that with effect from 1 April 1994, the Employee would be paid a monthly sum of HK\$80,000.00 of which HK\$50,000.00 would be salary and HK\$30,000.00 was described as housing allowance.

The housing allowance part of the salary was further increased to HK\$31,650.00 a month as from April 1995 and then HK\$34,650.00 a month as from August 1995. The reason for the increase was because the Employee had renewed the rental agreement at a higher rent of HK\$31,000.00 as from September 1995.

In making the award in favour of the Employee, the learned Presiding Officer came to the decision that the housing allowance part of the salary should be included as the wages of the Employee.

In support of the present appeal, Miss Pinto, on behalf of the Employer argued that the housing allowance part of the salary should not be included as the wages of the Employee. Miss Pinto rested her argument on the ground that such housing allowance was not remuneration payable to an employee in respect of work done or to be done. It was further argued that such housing allowance was "the value of accommodation provided by the employer" and should be excluded under the definition section of the Employment Ordinance Cap. 57.

"Wages" under the Employment Ordinance is defined as "all remuneration, earning, allowances, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment."

The housing allowance in question was payable to the Employee under the contract of employment in question. It was a payment to the Employee in his capacity as such and there was no other reason for such payment.

Miss Pinto suggested that housing allowance is analogous to other allowance such as annual leave pay, holiday pay, maternity allowance, sickness allowance, severance pay and long service pay which are not "payable in respect of work done or to be done."

With respect, severance pay and long service pay are payments relating to the termination of employment if other conditions are fulfilled and not to the provision of services under the employment. Similarly maternity allowance and sickness allowance are only payable upon the occurrence of special events and not as a result of provision of services by the employee. The annual leave pay and other holiday pay are just payments in lieu of holiday that an employee is otherwise entitled to and again are unrelated to the provision of service as such.

In *Delaney V. Staples* [1992] 1 All ER 944 Lord Browne-Wilkinson, in considering the meaning of wages made the following observation at P. 947,

"The proper answer to this case turns on the special definition of 'wages' in s 7 of the Act. But it is important to approach such definition bearing in mind the normal meaning of that word. I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word 'wages'. It follows that if an employer terminates the employment (whether lawfully or not) any payment in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under obligation to render services during that period."

The Employee was entitled to be paid the housing allowance because he was obliged under a subsisting contract of employment to render his services towards the Employer. The payment of housing allowance was referable to such an obligation and nothing else.

In my view, the housing allowance in question was consideration for work done or to be done under a contract of employment. It was payable to the Employee in respect of work done or to be done. It was therefore within the definition of wages in the Employment Ordinance.

Miss Pinto's argument against such a view must fail.

In concluding that the housing allowance in question did not come under the exception of "the value of any accommodation..... provided by the employer;", the learned Presiding Officer took the view that "the value of accommodation" referred only to cases in which the employer provided quarters or a house and did not include other form of payment to cover the accommodation expenses paid by an employer to an employee.

Miss Pinto suggested that it was illogical and unsatisfactory that if an employer rented a flat and let the employee to live in it, such expenses would not be taken into account as the "wages" of the employee whereas if an equal amount was paid to the employee so that he could rent the flat on his own, such an amount would be considered as part of the "wages" in the calculation of wages in lieu of notice or other payments under the Employment Ordinance.

Miss Pinto argued that no distinction should be drawn between the situation whereby the employer provided accommodation, education, food, fuel and the like in kind and the situation whereby the employer reimbursed the employee for the amounts paid by the employee initially for such expenses. She argued that they should both be excluded as "wages."

She further suggested it could not be the intention of the legislation that other exception such as education, food, fuel, light, medical care or water should be excluded if provided in kind by the employer and would be included as part of wages if the employer reimbursed the employee for amounts initially paid by him.

It was not difficult to appreciate the force of such an argument even though "the value of accommodation provided by the employer" seems to suggest that it only applied to situation when the employer actually provided accommodation for the employee and not just granting him a housing allowance.

It was fair to point out that by receiving housing allowance and rent a flat in his own name, the employee had to expose himself to more liability than living in a quarter provided by the employer and thus reducing the liability of the employer. Such liability on the employee would continue even after the termination of the employment.

In any event, the wording of the legislation is clear, it only excludes from wages "the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer."

If it had been the intention of the legislation to exclude payment by the employer to the employee to cover such items, it would have been spelled out in the legislation. Perhaps instead of excluding "the value of accommodation provided by the employer", it should exclude "payment by the employer for accommodation to the employee".

There are in fact similar UK provisions. Under s.7(1)(a) of the 1986 Wages Act, "wages" of an employee includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."

By way of exclusion, ss.4 provides :- "For the purposes of this part, any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document....."

Despite the able submission of Miss Pinto, I am firmly of the view that the UK provision only excludes as wages the monetary value of payment in kind or benefit in kind. Actual payment is not excluded irrespective of the purpose of such payment.

While I accept that UK legislation may not be of too much assistance, the wording of the Employment Ordinance is such that I am more inclined to take the view that it only excluded housing benefit from "wages" if it was benefit in kind and actual payment as housing allowance was not excluded.

Having said that, there could well be a distinction between a situation whereby an employee is paid an non-accountable housing allowance and a situation whereby the payment was made on an accountable or reimbursement basis.

For the purpose of the present appeal, I do not find it necessary nor desirable to decide on the issue as to whether the accountable payment or the reimbursement by the employer for expenses incurred by the employee for accommodation, education, food, fuel, light, medical care or water should be considered as "the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer" and therefore should be excluded as "wages".

We are not dealing with a situation in which the Employee was reimbursed by the Employer for the expenses he incurred in renting the flat. We are not even dealing with a situation in which the Employee had to account for the housing allowance paid to him by the Employer.

The facts of the case indicated that the Employee was simply paid an additional allowance on top of his wages as "housing allowance." There was no contractual obligation on his part to spend the entire allowance or any part thereof on housing. I accept that the actual amount paid to the Employee was calculated with reference to the amount of rental incurred by him when there was a subsequent increase in the rent, but the payment of the housing allowance was not on a reimbursement basis and there was no contractual obligation for the Employee to spend the housing allowance on the rent and nothing else.

The initial contract of employment dated the 7 January 1991 stipulated that a housing allowance of \$8,000.00 was to be paid to the Employee in addition to the monthly salary of \$12,000.00. The letter of promotion dated 20 August 1991 increased the total payment to \$23,500.00. There was no reference to the actual amount of rent paid or payable by the Employee at all.

The increase of the allowance in September 1995 was made with reference to the actual rental and ancillary expenses of the Employee. But the payment remained non-accountable.

Theoretically, the Employee was entitled to rent another flat which cost more or less than the housing allowance he received. He could also buy his own flat and continue to receive the housing allowance from the Employer. There was no restriction on how he should spend the housing allowance.

Miss Pinto's suggestion that the Employee must spend the allowance on housing and that if he incurred rental of amount less than the allowance, it was only the lesser amount which the Employer would pay was factually incorrect.

I am firmly of the view that a non-accountable housing allowance payable to an employee under a contract of employment is not "the value of accommodation provided by the employer." Such payment is not excluded from "wages" under the Employment Ordinance.

Having reached the aforesaid conclusion, the learned Presiding Officer had come to a correct decision in including the housing allowance payable to the Employee as "wages" in the computation of wages in lieu of notice.

The appeal is therefore dismissed. I also order that the Employer is to pay to the Employee costs of the appeal in the sum of \$1,000.00

The order on costs is an order nisi to be made absolute 14 days after the handing down of this judgment.

(W. YEUNG)

Judge of the High Court

Miss Josephine Pinto instructed by M/s Barlow Lyde & Gilbert for Defendant/Appellant

Mr. Neckel Nils, the Claimant/Respondent, appearing in person

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