HONG KONG / JUDGMENT

# RE AFK HONG KONG LTD

COURT
Court of First Instance

DECIDED
15 November 2007

CASE / FILE NUMBER
HCCW435/2006

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bjbj HCCW 435/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 435 OF 2006

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IN THE MATTER of AFK HONG KONG LIMITED and IN THE MATTER of the Companies Ordinance, Chapter 32 of the Laws of Hong Kong

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Before: Hon Kwan J in Chambers Date of Hearing: 15 November 2007 Date of Decision: 15 November 2007

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D E C I S I O N

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This is an application by a creditor under rule 95 of the Companies (Winding-up) Rules to reverse or vary the decision of the liquidators in respect of a proof of debt. The applicant, Ms Chan Yuen Mei, was an accountant employed by AFK Hong Kong Limited ( the Company ). The Company terminated her employment on 25 August 2006 when she was on maternity leave. The Company was ordered to be wound up by the court on 15 November 2006 on the petition presented by a creditor on 17 August 2006. Ms Chan submitted a proof of debt for $112,334.33 on 29 January 2007. In her proof of debt, she referred to a letter from the provisional liquidators to her dated 16 January 2006 (this would appear to be an error in that the year should be 2007) regarding her employee entitlements of $115,283.62, which Ms Chan had altered in her reply confirming that the amount due should be $112,334.33. This comprised arrears of wages, wages in lieu of notice, annual leave, payment under section 15(2)(b) of the Employment Ordinance, Cap. 57, and severance payment, less wages paid, employee s contribution to the Mandatory Provident Fund and employer s contribution to the Mandatory Provident Fund. After taking into account the payment she received from the Protection of Wages on Insolvency Fund Board of $57,000.00, her total entitlement would be $55,334.33. The liquidators adjudicated her claim and admitted

$55,334.33, the balance of $57,000.00 was rejected as this amount was already paid to her by the Protection of Wages on Insolvency Fund Board, who has obtained a right of subrogation for the same. Of the amount admitted, $19,634.47 was classified as a preferential claim and the remaining sum of $35,699.86 was classified as an unsecured claim. Ms Chan wrote to the liquidators on 21 October 2007 stating that she would apply to the court to vary the decision of the liquidators. She contended that $35,699.86 represented her maternity leave and should be treated in the same way as annual leave entitlement as accrued holiday remuneration, in accordance with section 265(1)(cd) of the Companies Ordinance, Cap. 32. On 25 October 2007, she took out a summons seeking an order that the decision of the liquidators be varied and that the whole of her admitted claim in the amount of $55,334.33 should be classified as a preferential claim. In her supporting affirmation, she repeated that $35,699.86 represented the amount of her unused maternity leave. She asserted that of the $19,634.47 classified as a preferential claim, this included an amount for unused annual leave. She contended that unused maternity leave should be treated in the same way, and section 265(1)(cd) should also apply so that her whole accepted claim should be classified as a preferential claim. The liquidators wrote to Ms Chan on 9 November 2007 giving a detailed explanation of their decision and setting out the relevant statutory provisions. In the hearing today, Ms Chan repeated her stance as stated in her letter of 4 October 2007 and her supporting affirmation. As I have indicated to her, it is pertinent to look at the wording in the relevant statutory provisions. It would not be correct to equate unused maternity leave (which I understand would be payment under section 15(2)(b) of Cap. 57) with unused annual leave without regard to what the statutory provisions say. I set out the relevant statutory provisions. Section 15(1)(a) of Cap. 57 provides that after a pregnant employee has served notice of pregnancy on her employer, the employer shall not terminate her continuous contract of employment otherwise than in accordance with section 9 during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of confinement). Section 15(2)(b) of Cap. 57 provides that an employer who contravenes section 15(1)(a) shall be liable to pay to the female employee a further sum equivalent to the amount of wages which would have accrued to the employee during a period of one month. Here, payment under section 15(2)(b) due to Ms Chan was only $21,000.00, not $35,699.86 as she had thought, the remaining $14,699.86 clearly relates to unpaid wages. Even if her contention were right, the amount that should be classified as preferential claim should be $21,000.00 only. The provision relied on by Ms Chan as giving priority to this part of her claim is section 265(1)(cd). This states that in a winding up there shall be paid in priority to all other debts all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer on the termination of his employment before or by the effect of the winding-up order or resolution. Accrued holiday remuneration is defined in section 265(6) as including all sums which, by virtue either of his contract of employment or of any enactment (including any order made or any direction given under any ordinance), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday had his employment continued until he became entitled to be allowed his holiday. I should mention that in section 265(6), wages is defined as including in relation to any person, any

sum which, by virtue of his contract of employment, is payable to him as a Lunar New Year bonus, but does not include any accrued holiday remuneration. The last relevant provision is section 265(5C) which reads: Any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that time. The liquidators position is that payments under section 15(2)(b) do not fall within the definition of accrued holiday remuneration , but they do fall within section 265(5C), and should be treated as wages. Given that the cap provided for in section 265(1)(b) and (1B) for preferential claims in relation to wages has already been reached, the balance of the accepted claim of $35,699.86 should remain an unsecured debt. I am inclined to agree with the liquidators that payments under section 15(2)(b) do not come within the definition of accrued holiday remuneration . Under the statutory definition, accrued holiday remuneration refers to payments which would have been made in the ordinary course if the employment had continued and holidays taken, whereas payments under section 15(2)(b) would only become payable upon the wrongful termination of a pregnant employee. Section 15(2)(b) calculates the amount payable having regard to the amount of wages which would have accrued to the employee , this adds further weight to the argument that such payments should be treated as wages for the purpose of section 265. The overall effect of section 15(2)(b) is to compensate the employee for wages which would have been paid during her maternity leave, as well as providing additional compensation for wrongful termination; this is more akin to the type of remuneration provided for in section 265(5C). I would uphold the decision of the liquidators. The application is dismissed. As the liquidators do not ask for costs, I will make no order as to the costs of this application. (S Kwan) Judge of the Court of First Instance High Court The Applicant, acting in person, present Mr Cosimo Borrelli, joint & several liquidator, present PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M 1udk 1udk T U V i$&` r*pa 5<>| w[{t0 w[{t HCCW.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8


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Prepared on 26 October 2026 · Esheria