IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 270

Tribunal Appeal No 15 of 2016

In the Matter of Order 55 of the Rules of Court (Cap 322, Rule 5)

And

In the matter of claims made under sections 115 and 119 of the Employment Act (Cap 91)

And

In the matter of the Decision of the Learned Assistant Commissioner for Labour Mr Stevenson Lim made on 22 July 2016 under sections 115 and 119 of the Employment Act (Cap 91), Case number 2016003282E-001/A201604167W-001)

Between

LIU HUAIXI

… *Applicant*

And

HANIFFA PTE LTD

… *Respondent*

GROUNDS OF DECISION

[Employment law] — [Pay] — [Failure to pay]

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Introduction

1 The applicant lodged a claim to the Commissioner for Labour against the respondent for a shortfall in the payment of his salary pursuant to s 119 of the Employment Act (Cap 91, 2009 Rev Ed) ("the Act"). On 22 July 2016, the Assistant Commissioner for Labour ("the Commissioner") dismissed the bulk of the applicant's claim. The Commissioner found the respondent only liable to pay the applicant the sum of $457.70 due to a mistake in the computation of his overtime. The applicant appealed to this court pursuant to s 117 of the Act. On 16 February 2017, after hearing counsel for the parties, I allowed the applicant's appeal in part and ordered the respondent to pay $6,500 to the applicant. I also ordered the respondent to pay costs of the appeal fixed at $8,000 inclusive of disbursements. I now give my reasons.

Background

2 The respondent is a company in the business of selling textiles, jewellery, electronics, toiletries, and food products. The applicant, who is from China, worked for the respondent on a work permit from 7 April 2014 to 23 March 2016.

3 During this period, the respondent employed the applicant in two different positions: as a warehouse assistant from 7 April 2014 to 12 July 2015, and as a supermarket storekeeper from 13 July 2015 to 23 March 2016. The applicant's employment ended on 23 March 2016. The parties did not agree whether the respondent or the applicant initiated the termination but that was not material to my decision.

4 This claim arose out of three sets of claims by the applicant against the respondent:

(a) Short payment of the applicant's salary from 28 March 2015 to 29 February 2016.

(b) Non-payment of the applicant's salary from 1 March 2016 to 23 March 2016.

(c) Compensation in lieu of notice for the respondent's termination of the applicant's contract.

5 Although the applicant was employed by the respondent from 7 April 2014 to 23 March 2016, the one-year statutory bar under s 115(2) of the Act meant that the Commissioner only had jurisdiction to consider claims arising up to one year before the date of complaint. Since the applicant only lodged his complaint with the Ministry of Manpower ("MOM") on

28 March 2016, the Commissioner could only consider the claim from 28 March 2015 to 23 March 2016.

6 The Commissioner dismissed the bulk of the applicant's claims. On claim (a), he was not convinced that the applicant's basic salary was $1,100 per month, as the applicant claimed. Instead, the Commissioner found that the applicant's basic monthly salary was $680. However, the Commissioner noted that the respondent had wrongly computed the pay due to the applicant for overtime work and for his work on rest days. Hence, he ordered the respondent to pay the applicant $457.70, which the respondent has since paid. On claim (b), the Commissioner found as a matter of fact that the applicant had received his salary for the period 1 March 2016 to 23 March 2016, and accordingly also dismissed that claim. Claim (c) for compensation in lieu of notice of termination was not pursued by the applicant before the Commissioner.

Issues

7 It was not disputed by the parties that an appeal to the High Court from the decision of the Commissioner is to be heard by way of rehearing and this court is not constrained to reviewing the decision below for jurisdictional or manifest error or unreasonableness: see O 55 r 2(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed); *Valentino Globe BV v Pacific Rim Industries Inc* [2009] 4 SLR(R) 577 at [10]–[11]. In particular, the court is not bound by any finding of the Commissioner. Accordingly, there were three issues before me:

(a) Whether the respondent paid the applicant the full salary that he was entitled to between 28 March 2015 and 29 February 2016.

(b) Whether the respondent paid the applicant his salary between 1 March 2016 and 23 March 2016.

(c) Whether the respondent was liable to the applicant for compensation in lieu of notice of termination.

I will address each of these issues in turn.

Issue (a): Short payment of salary

Applicant's submissions

Basic monthly salary

8 Counsel for the applicant, Ms Sharleen Eio ("Ms Eio"), submitted that the applicant's basic monthly salary was $1,100 and not $680. This sum of $1,100 did not include additional amounts for housing allowance, for working overtime, and for working on the applicant's rest days and on public holidays.

9 This was based on two documents. First, Ms Eio relied on the In-Principle Approval ("IPA") submitted by the respondent or its agent to the MOM. The IPA stated that the applicant's "basic monthly salary" would be $1,100. This sum expressly excluded a further $200 of housing allowance per month. Ms Eio submitted that the IPA should be the starting point in determining the applicant's basic monthly salary. This was because of the status of the IPA in the Employment of Foreign Manpower (Work Passes) Regulations 2012 (Cap 91A, S 569/2012) ("Employment Regulations"). Regulation 4(3) of the Employment Regulations provides that the applicant's work permit (which is the final version of the IPA) is subject to the conditions laid down in Parts III and IV of the Fourth Schedule.

10 Under the Fourth Schedule, para 4 of Part III provides that the amount declared in the work pass application (*ie*, the IPA) shall be paid to the employee, unless it is revised in accordance with para 6A of Part IV. Paragraph 6A of Part

IV in turn allows the employer to reduce the employee's salary to a sum below what is declared in the work pass application if two cumulative conditions are satisfied: the employee must give prior written agreement, and the employer must inform the Controller of Work Passes in writing. Ms Eio submitted that since neither condition had been fulfilled in this case, the basic monthly salary of $1,100 described in the IPA remained as the amount agreed between the parties.

11 In Ms Eio's submission, this amount reflected on the IPA which had to be paid could not be construed as including overtime pay or other forms of allowances because of para 6B of Part IV of the Fourth Schedule, which defines the term "basic monthly salary". The definition excludes, among other things, "any form of overtime payment, bonus, commission or annual wage supplements".

12 The second document that Ms Eio relied on was the letter appointing the applicant as an employee, which also reflected that the applicant's "monthly salary" was $1,100. Ms Eio submitted that this document was signed by the respondent's agent and therefore binding on the respondent.

13 In response to the Commissioner's finding that the applicant had acquiesced to a lower basic monthly salary of $680, Ms Eio submitted that this clearly contradicted para 6A of Part IV of the Fourth Schedule read with para 4 of Part III of the Fourth Schedule, which prescribed two procedural requirements for the employer to lower the employee's basic monthly salary (see above at [10]). Allowing the parties to orally acquiesce to lowering this salary, as the Commissioner did, would circumvent this statutory framework entirely. So the applicant's signature on the two cash vouchers of 7 May 2014 and 9 June 2014 could not have indicated his consent to be paid a lower amount

for those same months (since they were not given prior to the reduction), and even if they did, they would still have failed the second procedural requirement of informing the Controller in writing.

Number of hours worked

14 Ms Eio tendered a table of hours worked in total in the months of March 2015 to March 2016. She based this on the applicant's handwritten records. The Commissioner had rejected this in favour of the respondent's thumbprint logs, which reflected a lower number of hours worked in all the relevant months. Ms Eio submitted that the thumbprint logs were inaccurate as the applicant had not been allowed to sign in to the system on some days, despite having actually worked for many hours. She also submitted a different set of rest days upon which the applicant actually worked.

Respondent's submissions

Basic monthly salary

15 In contrast, counsel for the respondent, Mr Namazie Mirza Mohamed ("Mr Namazie"), submitted that the Commissioner was correct in finding that the applicant's basic monthly salary was $680. According to Mr Namazie, the contract between the parties was oral and not written. This oral contract was concluded between the applicant and the respondent during an online interview prior to the applicant's employment. During this teleconference, the applicant was interviewed by one Jose Varghese ("Mr Varghese"), a manager of the respondent, and one Lim Kuan Heng Charles ("Mr Lim"), an employment agent working for BT Employment Agency ("BT"). BT was the respondent's employment agent. It was during this interview that the applicant had been informed by Mr Varghese and Mr Lim that he would be paid $1,300 per month.

However, this sum would comprise of $680 in basic monthly salary, $200 in housing allowance, and the balance was to be for overtime pay.

16 Mr Namazie submitted that this oral contract was not affected by either the IPA or the letter of appointment. The letter of appointment had never been seen by the respondent or its agent prior to this dispute, and was not signed by the applicant or the respondent. While the letter bore the signature of one "Employment Hub Pte Ltd", Mr Namazie submitted that this entity was unrelated to either the respondent or its agent. The respondent's employment agent was BT, and not "Employment Hub Pte Ltd".

17 As for the IPA, Mr Namazie acknowledged that the IPA stated a sum of $1,100, but he submitted that there had been a mistake in entering the applicant's basic monthly salary into the IPA. This was supported by two documents. First, Mr Lim filed an affidavit stating that there was a mistake in the IPA. And second, Mr Namazie tendered a payslip which was given to another Chinese worker employed by the respondent for a similar role as the applicant, one Cheng Long ("Cheng"). This payslip indicated that Cheng's basic monthly salary was also $680. According to Mr Namazie, this was evidence that the respondent had hired other Chinese workers in the same position as the applicant for a similar monthly salary of $680. It was extremely unlikely that the applicant, who was essentially in the same position as Cheng, would be paid a much higher basic pay of $1,100 per month (excluding other allowances).

18 Mr Namazie further submitted that it was even more unlikely that the respondent had agreed to pay the applicant $1,100 per month in light of the applicant's behaviour. The applicant's claim was that he had been paid a shortfall in salary since 2014, although the statutory time-bar limited his claim to the period from 28 March 2015. However, the applicant did not make any

claim or complaint about the short payment until March 2016. According to Mr Namazie, this showed that the applicant did not truly believe that his basic monthly salary was $1,100. Rather, the applicant had taken out these proceedings to exact a measure of revenge on the respondent, as the respondent had refused to renew the applicant's work permit.

19 In response to Ms Eio's submissions on the Employment Regulations, Mr Namazie replied that this was irrelevant. He submitted that the Employment Regulations could not be used in civil claims, as they were meant for the MOM to prosecute errant employers. The inquiry turned on the actual consensus between the parties, and not on the Employment Regulations.

Number of hours worked

20 Mr Namazie relied on the respondent's thumbprint logs for the number of hours worked by the applicant. He submitted that these were computerised records based on capturing the applicant's thumbprint as he signed in and out of the system for work. These records were an objective measure of the number of hours worked. In contrast, Mr Namazie submitted that the applicant's handwritten records would naturally be self-serving and were not verified by any independent party. It was therefore unsafe to rely on those records.

My decision

Basic monthly salary

21 This issue turned on whether the basic monthly salary agreed between the applicant and the respondent was for $1,100 or $680. The problem was that there was no written contract of employment between the parties. To support his case, the applicant exhibited a letter of appointment which provided for a

basic monthly salary of $1,100 per month. However, neither the applicant nor the respondent was named in that document. There was a stamp labelled "Employment Hub Pte Ltd" but this was not the name of the respondent or its agent. The applicant did not adduce any further evidence to link this "Employment Hub Pte Ltd" to the respondent. Hence, this document did not constitute a contract of employment between the parties.

22 Since there was no documented version of the contract, the determination of the contract's terms depended on indirect evidence. Unsurprisingly, the oral evidence of both sides was contradictory and I had to turn to other evidence for corroboration.

23 The only objective evidence available was the IPA, which supported the applicant's position that his monthly basic salary was $1,100. I therefore needed to decide the weight to be given to the IPA.

24 The starting point would be the legislative intention behind the IPA, and how this intention is achieved through the requirements of the IPA. The relevant parliamentary debates reveal that there are two such policy objectives. The first is to ensure that foreign workers are kept informed of their employment terms, including their salary components. This was stated by the Minister of State for Manpower Tan Chuan-Jin in the following terms (*Singapore Parliamentary Debates, Official Report* (29 February 2012) vol 88 (Minister of State for Manpower Tan Chuan-Jin, for the Deputy Prime Minister and Minister for Manpower)):

> MOM has also put in place measures to ensure that foreign workers are kept informed of their salary components prior to entering Singapore. Since June 2011, employers have been required to declare the foreign worker's basic monthly salary, allowances and deductions when making their Work Permit applications. These declarations are clearly stated in the copy

> of the In-Principle Approval (IPA) letter that Work Permit holders are required to present to immigration officers in order to gain entry into Singapore. To further ensure that Work Permit holders understand their employment terms, we have provided IPA letters in native languages for foreign workers and will be doing so this year for foreign domestic workers as well.

25 It can be seen from the above quote that the IPA is intended to keep foreign workers informed of their salary components in clear terms. When applying to the MOM for a work permit, the employer is required to declare the foreign worker's basic monthly salary, allowances, and deductions. This is one of the bases upon which the MOM approves (or rejects) the application.

26 There is also a second policy objective, which is to shift more responsibilities of employing foreign workers onto the employers. This was noted by Acting Minister for Manpower Tan Chuan-Jin in another parliamentary statement (*Singapore Parliamentary Debates, Official Report* (11 September 2012) vol 89 (Acting Minister for Manpower Tan Chuan-Jin)):

> Currently, the Minister may prescribe conditions that apply during the validity of the work pass. These conditions prescribe in detail the duties pertaining to all aspects of the foreign employee's entry, work, stay and conduct while employed in Singapore, as well as his departure upon the cessation of employment. To broaden the scope of employers' responsibilities where necessary, section 29 has been amended to allow the Minister to impose pre- and post-employment conditions under the EFM (Work Passes) Regulations. An example of which is the pre-employment condition that requires employers to ensure that the In-Principle Approval (IPA) letter in native language is sent to foreign workers prior to their departure, to keep them informed of their actual employment terms and reduce their reliance on unscrupulous middlemen.
>
> …

27 This extract not only reiterates the importance of keeping foreign workers informed of their actual employment terms, but also notes that the reason why IPA duties are added to employers is to broaden their scope of their

responsibilities, and in the process, to allow employees to rely less on middlemen. Clearly, Parliament envisaged that the burden of ensuring that the information about employment terms – exhibited through the IPA – rests on the employer.

28 These two policy concerns manifest themselves in three requirements for IPAs set out in the Employment Regulations. First, para 6B of Part IV of the Fourth Schedule defines basic monthly salary in a very specific fashion. It is the remuneration payable every month that does not vary from month to month and excludes allowances (however described) and also excludes payment for working outside the employee's normal working hours. By specifically defining basic monthly salary, foreign workers are able to know exactly what they are getting.

29 Second, para 6A of Part IV of the Fourth Schedule further provides two safeguards for an employee: before an employer is entitled to reduce the employee's basic monthly salary to an amount that is less than that stated in the IPA, the employer must (a) obtain the employee's prior written consent, and (b) inform the Controller of Work Passes in writing. This limits potential "errant employers" from abusing the system by, for instance, declaring higher salaries than they are actually paying their foreign workers: see *Singapore Parliamentary Debates, Official Report* (11 September 2012) vol 89 (Acting Minister for Manpower Tan Chuan-Jin).

30 Third, apart from knowing specifically what they are entitled to and knowing that it cannot be easily modified, foreign workers must actually be given this pay. Paragraph 4 of Part III of the Fourth Schedule provides that the foreign employee must always be paid save for when he is on no-pay leave, or when the pay is modified in accordance with para 6A of Part IV.

31 From the foregoing, it is clear that an employer is required to declare the actual basic monthly salary of the foreign worker in applying for a work permit and to maintain the payment of such sum for the duration of that employment unless modified in accordance with the Employment Regulations. Given the statutory intent of the IPA, the court would take as factual an employer's declaration of the basic monthly salary in the IPA because he must be presumed to be truthful when he made the declaration.

32 In the present case, for the respondent to succeed, it would need to produce evidence that the sum stated in the IPA to be the basic monthly salary did not correctly reflect the sum declared in the application for work permit. No such evidence was adduced and therefore the applicant succeeded in proving his case that his basic monthly salary was $1,100.

33 Indeed, I would go so far as to state that even if there was a written contract of employment which provides for a monthly basic salary of less than the sum stated in the IPA, the burden would lie on the employer to show why the IPA figure does not reflect the true salary. For example, the employer may adduce evidence to prove that the sum stated in the IPA is different from the amount declared by him in the application for the work permit and somehow an error had been made in the IPA by MOM. Or the employer can admit that he had made a false declaration in the work permit application, thereby attracting other consequences for himself. I do not intend to limit the possibilities save that they probably lie somewhere between these two extremes. Given the statutory framework of the IPA, the amount stated in it would constitute *prima facie* evidence of the basic monthly salary of the employee.

34 Accordingly, the respondent had failed to displace the *prima facie* position that the employment terms were those stated in the IPA. I therefore

held that the applicant's basic monthly salary, excluding any form of allowances, was $1,100.

Number of hours worked

35 On the question of the number of hours worked, I preferred the evidence of the respondent to that of the applicant. The former was a contemporaneous document of thumbprint logs recorded by a computer in real time, whereas the latter was a self-serving document produced by the applicant. The only complaint by the applicant of the respondent's document was that there were occasions when he was not permitted to sign in with his thumbprint, which was a bare assertion.

36 Accordingly, I found that the applicant's work hours should have been calculated based on the respondent's thumbprint logs. There was no dispute on the method of computation and therefore, the applicant's claim of $8,675.44 would be reduced by $751.60. Ms Eio also agreed that there should have been a further reduction of $457.70 to the applicant's claim, on account of payment already made by the respondent to the applicant pursuant to the order of the Commissioner of Labour, which gave a total reduction of $1,209.30.

Issue (b): Non-payment of March 2016 salary

Applicant's submissions

37 Ms Eio submitted that the applicant had not been paid his salary from 1 March 2016 to 23 March 2016, despite the respondent producing a payslip showing that $1,046.53 had been paid for March 2016. Ms Eio did not produce any positive evidence to support this submission. She instead relied on the applicant's request to the Commissioner for the respondent to produce video

footage to show that the applicant had actually physically received his payslip. In Ms Eio's submission, this showed the applicant's belief in his claim that he had not received payment for March 2016.

38 In addition to the payslip from the respondent to the applicant for $1,046.53, the Commissioner had also relied on a letter of release signed by the applicant. The Commissioner found no good reason why the applicant would have signed the documents other than the fact that he received his pay as stated. In response to this, Ms Eio submitted that the applicant had only signed these documents as the respondent was holding the applicant's March 2016 salary "hostage" unless he signed the documents. Accordingly, although he had signed the documents, he had done so without full and free consent.

39 Finally, Ms Eio also noted that the respondent also pressed the applicant to sign another longer document, apart from the payslip and the letter of release. However, no further details about this alleged document were provided to me.

Respondent's submissions

40 Similar to its submissions before the Commissioner, Mr Namazie relied on the signed payslip for March 2016 and the letter of release as evidence that the applicant had been paid his salary. This was corroborated by the evidence of one Usilappan Dharumalingam, an accountant in the respondent's employ who was responsible for preparing the payslip. He witnessed the applicant signing both documents and receiving his salary. And as to the alleged longer document, Mr Namazie submitted that this document was fictional and that the respondent never requested the applicant to sign any such document.

My decision

41 The only evidence that was before me on this matter were the two documents: the March 2016 payslip, which the applicant had signed, and the letter of release, which the applicant had also signed. I therefore found that the *prima facie* evidence was that the applicant had been.

42 The applicant claimed that he was forced to sign these documents in order to receive his March 2016 salary. But the applicant did not adduce any evidence to corroborate this assertion. More significantly, the applicant's claim here was undercut by his own submissions. The applicant claimed that there was a second, longer document which the respondent also pressed him to sign, but which he did not sign. If this were truly the case, it would not have made sense for him to sign the March 2016 payslip or the letter of release.

43 I accordingly found that the respondent did pay the applicant $1,046.53 for March 2016. The applicant's claim would be further reduced by this sum.

Issue (c): Payment in lieu of notice of termination

Applicant's submissions

44 At the hearing before me, Ms Eio informed me that the applicant was only claiming for payment in lieu of two days' notice. She submitted that this would be for a sum of $84.62, being two days' worth of the applicant's basic rate of pay of $42.31. Ms Eio relied on s 10(3)(*b*) of the Act, which provides that an employee shall be given not less than one week's notice of termination if he has been employed for more than 26 weeks but for less than two years. No such notice was given, as the applicant was informed that his employment was terminated on 23 March 2016 with immediate effect.

Respondent's submissions

45 Mr Namazie submitted that no payment was necessary since the applicant chose to stop working. It was not the respondent who terminated the applicant's employment. According to Mr Namazie, the respondent had decided not to renew the applicant's work permit one month before it was due to expire on 27 March 2016. This was communicated to the applicant. The applicant had attempted to persuade the respondent to change its mind on multiple occasions, but the respondent did not relent. In those circumstances, the applicant requested to cease work early on 23 March 2016, so that he would have time to settle his affairs before taking his pre-booked flight out of Singapore on 29 March 2016.

46 Indeed, Mr Namazie submitted that there was no reason why the respondent would terminate the applicant's employment just four days before his work permit was due to expire.

My decision

47 The facts before me were that the applicant's employment was terminated on 23 March 2016, given that the respondent had issued a payslip for the period of 1 March 2016 to 23 March 2016. The respondent did not adduce any evidence that it had given notice to the applicant. As I earlier noted, it is incumbent on employers like the respondent to keep written documentation, not only to protect themselves, but also to ensure that their employees are fairly treated. Not only was there no such documentation in this case, but the only available documents were the March 2016 payslip and the letter of release. Both were only signed on 26 March 2016, which indicated to me that the respondent did not give sufficient notice.

48 Since the respondent did not give sufficient notice under s 10(3)(*b*) of

the Act, the applicant was entitled to two days' worth of his gross rate of pay under s 11(1) of the Act. In principle, the *gross* rate of pay as defined under s 107A(1) of the Act is distinct from the *basic* rate of pay under s 107A(2). But in this specific instance, the two were the same amount of $42.31. Accordingly, the respondent would need to pay the applicant a sum of $84.62.

Overall sum

49 On the basis of the findings I have made on each of the issues, I granted the applicant's claim, subject to the following reductions:

(a) $1,209.30, being the adjustment based on number of hours worked and part payment (at [36] above); and

(b) $1,046.53, as I have found that the applicant was paid his March 2016 salary (at [43] above).

50 Accordingly, I ordered the respondent to pay the applicant the sum of $6,500 (after rounding up).

Costs

51 Ms Eio asked for costs on the basis that the applicant had succeeded in his application. Mr Namazie submitted that since Ms Eio took up the case *pro bono*, there should be no order as to costs.

52 I saw no reason in principle why the court should not award costs purely because the successful party is represented by counsel acting *pro bono*. Indeed, if costs were ordered on the ordinary basis, it would promote *pro bono* work. This was also the case in *SATS Construction Pte Ltd v Islam Md Ohidul* [2016] 3 SLR 1164, where Debbie Ong JC awarded costs to counsel acting *pro bono*,

as "*pro bono* and legal aid services are provided to enhance access to justice and it is fair for the providers of such services to be paid for the work they have done by virtue of costs orders" (at [17]). This was precisely the case here. I therefore ordered the respondent to pay costs to the applicant, which I fixed at $8,000 inclusive of disbursements.

Lee Seiu Kin
Judge

Eio Huiting Sharleen (TSMP Law Corporation) for the applicant;
Namazie Mirza Mohamed and Ong Ai Weern (Mallal & Namazie)
for the respondent.