## DCCJ 3925/2020

[2025] HKDC 335

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 3925 OF 2020

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BETWEEN

MA NGAI CHEUNG Plaintiff

and

COBOW CONTRACTING & Defendant

ENGINEERING COMPANY LIMITED

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Before: His Honour Judge Gary C. C. Lam in Court

Date of Hearing: 17 February 2025

Date of Closing Submissions: 19 February 2025

Date of Judgment: 28 February 2025

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JUDGMENT

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# I. INTRODUCTION

1. This is a trial of the plaintiff’s claim against the defendant for wages and other payments which the plaintiff claims are due and owing from the defendant as his employer. The claim is tried here in District Court instead of the Labour Tribunal because the performance of the employment contract (with the defendant according to the plaintiff, and with third parties according to the defendant) was outside Hong Kong and therefore conflicts of law elements may be involved: see [2021] HKDC 264 at §47.
2. The defendant had been legally represented until 20 March 2023, when the notice to act in person was filed on behalf of the defendant. Before the notice to act in person was filed, the defendant had already filed its defence, made discovery and exchanged its witness statement. It is fair to say that by that time, the matter was ready for trial.
3. On 28 June 2023, the defendant was wound up in HCCW 178/2023. On 16 October 2023, leave, however, was granted in HCCW 178/2023 by consent of the plaintiff and the joint and several provisional liquidators of the defendant for the plaintiff to proceed with the present action.
4. Since 20 March 2023, the defendant has been absent from all the hearings. The trial is no exception. Besides the court’s notice to the defendant, the plaintiff had also effected proper service of the papers for the trial on the defendant. I am satisfied that in the circumstances, the trial should still proceed.
5. The plaintiff still has to prove his case. The plaintiff himself is the only witness in the trial.

# II. BACKGROUND NOT IN DISPUTE

1. At all material times, the defendant has been a company incorporated in Hong Kong carrying on business for manufacturing and installation of glass and furniture. Further, it operated a factory for manufacturing glass and furniture in Conghua, PRC (the “Conghua Factory”).
2. The holding company of the defendant has been Cobow International Holdings (“CIHL”). The group of companies including the defendant and other subsidiaries of CIHL has been referred to as Cobow Group. In the Cobow Group, there are two more companies relevant for the present purposes, namely, Guangzhou Cobow Manufacturing Limited (“GCML”) and Shanghai Cobow Contracting Limited (“SCCL”), both of which are companies incorporated under the law of the PRC.
3. A director of the defendant has been Alaric Lai, who is the only witness for the defendant in the present action. Alaric Lai has also been the Chief Executive Director of CIHL. In his own words in §2 of his witness statement, he has been “responsible for recruitment of employees for Cobow Group”. By “Cobow Group”, it must be intended to refer to at least the defendant, GCML and SCCL, among other companies.
4. The plaintiff had been working for Cobow Group as a glass worker, although the dispute here is for which company of the Cobow Group. There is no dispute that the plaintiff’s employment started around mid-November 2009, because on 15 November 2009, Alaric Lai sent an email to recipients of “Cobow – [name]”, “Cobow GZ – [name]”, “Cobow SH – [name]” and “Cobow BJ – [name]”. There is no dispute that “Cobow GZ” refers to GCML and “Cobow SH” refers to SCCL, while Cobow BJ refers to a subsidiary in Beijing. The subject of the email was “Cobow Internal Memo (new member)”, stating:-

“各位，

理仅通知你们

由本月17号起马艺祥先生将正式任职于本公司

他主要任务是驻守《广州厂》协助管理有关《玻璃》项目之事

也会协助各工程部人员于各项工程项目上之相失事项

请大家好好合作和配合

如有任何问题，请随时与我联络

Best Regards,

Alaric TC Lai

…

Cobow Group

Unit B., 2/F North Point Industrial Building”

1. A few days later, by which the plaintiff had already been stationed in the Conghua Factory, the human resources staffer asked the plaintiff to sign a written employment contract for a 3 years term with GCML dated 17 November 2009
2. In about February 2010, the plaintiff was given his name cards. The front was as follows:-

“广州智涛家俱制品有限公司

Guangzhou Cobow Manufacturing Ltd.

(高宝集團成員 member of Cobow Group)

马艺翔

Ma Ngai-Cheung

經理（生严）”

1. At the back of the name cards was a list of the companies of Cobow Group, including the defendant.
2. Throughout, the plaintiff received his wages partly from the defendant in Hong Kong dollars and partly from GCML. The amounts received from Hong Kong were higher. For example, at the beginning of the employment, the plaintiff received HK$16,600 from the defendant and RMB4,800 from GCML.
3. On 11 July 2011, to increase his total amount of wages, Jess Tsoi, the general administrative manager of Cobow Group, proposed changes to these amounts to HK$10,000 and RMB10,500. In response, on 12 July 2011, the plaintiff emailed Jess Tsoi:-

“Dear Jess

請問本人強積金供款是否有變？

另請問可否把國內人民幣比例減少？

因本人在港是有供樓免稅額的。

謝謝

Best Regards,

馬藝翔

Ma Ngai Cheung

Guangzhou Cobow Manufacturing Ltd.”

1. On the same day, Jess Tsoi replied:-

“由於你是在國內工作， 已經受到國內的勞動部門及稅局關注， 他們不接受港澳同胞於國內工作， 國內人工會少於1 萬元，如果是少於的， 便有權要申報你香港的工資，扣除予香港繳交的， 餘下要於國內補繳。那麼你的稅金將會增加很多。此安排是方便你於國內工作及避免稅局調查你， 公司也是迫於無奈的。

有關強積金，個人及公司供款部份是不變的， 請放心。”

1. The MPF paid by the defendant decreased from HK$830 per month to HK$500 per month in July 2011. However, the defendant voluntarily paid an extra provident fund of HK$330 each month.
2. On 17 November 2012, the plaintiff and GCML signed another employment contract, the previous one having expired.
3. From 6 May 2010 to 23 April 2018, a staff of the defendant emailed to the plaintiff employer’s return for each year of assessment from 2009 until 2018. In each of the returns, the employee was the defendant.
4. In the Labour Tribunal proceedings, in Jess Tsoi’s witness statement filed on behalf of the defendant dated 8 October 2019, the witness wrote:-

“申索人自行於2017 年開始， 沒有按照公司的規定提交JOD DUTY SHEET , 故意不服從僱主合法合理命令，及慣常疏忽職責，公司決定以 ‘無故缺勤，罷工’ 處理。詳見附件《II 》公司亦於2018 年3 月31 日，與馬藝翔先生終止僱傭關係，因此申索人與本公司的正確僱傭關係應為2009 年11月17日至2018年3月31日。本公司承認，本公司的人員出錯，忘記刪除申索人之強積金戶口，至2019年3 月才發現及採取行刪除。…

另外表格2 項目E , 申索人提出的文件P124 至P. 224 報銷費用，內容明確寫明是於廣州廠及有關國內工程所產生， 一律與本公司無關。本公司已履行所有責任及支付相關費用。…

馬藝翔先生是直接由本公司的董事黎天翔先生安排， 不經正常招聘流程招聘回來，他與高寶營造工程有限公司的勞動合同是口頭形式。按照規定凡公司人員，都需每週提交Job Duty Sheet , 以供人事部記錄及計算出勤和工資。馬藝翔先生自2017 年1 月開始便沒有按規定按時提交及匯報有關他的工作記錄及出勤記錄亦沒有每雙週回公司報到及申報單據，更沒有向有關上司匯報工作情況。在這種種情況下， 公司決定以， ‘無故缺勤， 罷工’ 處理， 與馬藝翔先生終止顧雇關係。由於多次聯絡不上，公司以2018 年3 月31 日為最後受雇日期，工資結算亦到此日。

有關馬藝翔先生提出的， 在廣州廠上班，根據資料， 廣州廠已於2016 年2 月開始停廠， 到年尾亦出現完全性停廠， 2016 年馬藝翔先生向公司提交的JOD DUTY SHEET 亦零零碎碎，公司認為馬藝翔先生於2017 年6 月開始，已己沒有為本公司提供任何勞動服務工作。所以本公司未能接納一位嚴重缺勤及漠視公司規則者，在沒有提供任何工作服務的情況下，可以享有工資報酬。

馬藝翔先生與本公司的勞資糾紛，不是存在裁員或被公司無理停工的條件， 純粹是僱員故意不服從僱主合法合理命令，及慣常疏忽職責而被解僱。長期服務金或遣散費是不存在。

另外，根據本公司的資料及一貫的標準， 年終雙糧是按照公司業務情況， 個別通知才被給予…”

1. On 30 July 2020, the plaintiff commenced the present claim.
2. In 2020, GCML closed its business and was wound up.
3. In 2021, SCCL ceased its business and commenced winding-up procedures.
4. In 2023, the defendant was wound up.

# III. PLAINTIFF’S CLAIM

1. According to the plaintiff, in about mid-November 2009, he and Alaric Lai on behalf of the defendant entered into an oral agreement (the “Oral Agreement”). The Oral Agreement contained the following terms:-
2. The defendant agreed to employ the plaintiff, and the plaintiff agreed to work for the defendant, as a technical manager commencing on 17 November 2009;
3. The plaintiff shall work in Conghua Factory or other cities, countries or locations as designed by the defendant from time to time;
4. The wages shall be HK$22,000 per month;
5. The plaintiff shall be entitled to end of year payment in the sum equivalent to one-month wages; and
6. The defendant would reimburse the plaintiff all expenses paid by the plaintiff for travelling, food and beverage, accommodations, tools and materials in the course of employment.
7. The plaintiff claims that a few days after the commencement of the employment, the defendant requested the plaintiff to agree, and the plaintiff agreed, that the wages were to be partly paid in the PRC and partly in Hong Kong, set at RMB4,800 and HK$16,600 for each month. In the statement of claim, the plaintiff refers to this agreement as the 1st Supplemental Agreement.
8. The second supplemental agreement was entered into on 11 July 2011, to increase the total of the wages with the split of RMB10,500 and HK$10,000.
9. For the whole course of employment, the plaintiff mainly stationed in Conghua Factory. He would sometimes travel to other places for work, including Shanghai and Dubai.
10. All went uneventful until July 2015. According to the plaintiff, since about July 2015, the defendant had “seriously delayed and/or defaulted payment” to the plaintiff. As at December 2017, the outstanding wages were (1) RMB10,500 per month for 19 months from November 2015 to May 2017; and (2) HK$22,000 per month for 7 months from June 2017 to December 2017.
11. The plaintiff says that in December 2017, the plaintiff demanded Alaric Lai to pay the outstanding wages. Alaric Lai replied that the defendant would pay very soon because the defendant would receive funds from the sale of a land soon. In reliance on this, the plaintiff continued to work for the defendant, and travelled to Xian in May 2018.
12. In about October 2018, the operation of the Conghua factory also came to halt.
13. According to the plaintiff, on 17 December 2018, the plaintiff met Alaric Lai in Hong Kong. The plaintiff demanded payment of the outstanding wages and other payments. Despite Alaric Lai’s promise to make an interim payment to the plaintiff in the sum of HK$200,000 on the next Monday, the plaintiff received no such payment at all. On 24 December 2018, the plaintiff tried to call Alaric but the latter did not answer the calls. In late January 2019, the plaintiff managed to reach Lai by phone, and Lai promised that he would deposit the HK$200,000 on the coming Friday. However, again, the plaintiff did not receive a penny from the defendant at all.
14. The plaintiff claims that as at 31 March 2019, the following were outstanding :-
15. Wages: HK$620,380;
16. Payment in lieu of notice: HK$22,000;
17. End-of-year payment: HK$44,000;
18. Annual leave payment: HK$55,828.65;
19. Compensation of leave pay for 14 rest-days: HK$11,846.15;
20. Long service payment: HK$137,464.84; and
21. Reimbursement of various expenses which the plaintiff incurred since January 2015: RMB292,732.42.
22. As a result, on 31 March 2019, pursuant to section 10A(1) of the Employment Ordinance (Cap 57), the plaintiff terminated the employment.
23. Subsequently, the plaintiff commenced claim in the Labour Tribunal, but later discontinued it.
24. On 30 July 2020, the plaintiff commenced the present action.

# IV. DEFENDANT’S DEFENCE

1. The defence denies the existence of the Oral Agreement. The defence is that it was GCML, but the defendant, who employed the plaintiff in November 2009. The defendant referred specifically to the following:-
2. The written employment contract signed between the plaintiff and GCML dated 17 November 2009;
3. The agreement signed by the plaintiff to join the Trade Union of GCML dated 17 November 2009;
4. The GCML’s application on 29 January 2010 for employment permit for the plaintiff to work in the PRC; and
5. The grant of such employment permit to the plaintiff.
6. According to the defendant, after the decline of manufacturing works in GCML in 2014, the defendant decided to work for SCCL. As a result, on 1 June 2014, the plaintiff and SCCL entered into a written employment contract.
7. The defendant explains that the defendant paid on behalf of GCML and subsequently SCCL part of the wages to the plaintiff because “the salary tax rate in PRC is higher and it is more convenient to the Hong Kong employees as their major expenses were incurred in Hong Kong, not PRC”: see Alaric Lai’s witness statement §20.

# V. ISSUES

1. The issues are:-
2. Whether the plaintiff was employed by the defendant, or whether the plaintiff was employed by GCML and subsequently SCCL; and
3. If the plaintiff was employed by the defendant, how much would the defendant be liable to pay the plaintiff?

# VI. WHETHER THE PLAINTIFF WAS EMPLOYED BY THE DEFENDANT

1. For the issue of whether the plaintiff was employed by the defendant, the plaintiff’s counsel, Mr Kevin Leung, refers me to *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951. That case is a case on the Court’s approach in determining whether a person is an employee or an independent contractor. Such is not the issue here. In my view, to determine the issue here, the question involved is a question of contractual construction, and for this question, the Court has to determine the parties’ intention objectively.
2. Having considered the evidence, I find that at the material times, the plaintiff was employed solely by the defendant. I do not need to set out each piece of evidence I have considered, but I do highlight the following considerations I have in coming to this finding:-
3. The plaintiff’s claim of the Oral Agreement is consistent with and supported by his oral evidence. There is no evidence to traverse the same.
4. On 11 July 2011, when the plaintiff’s wages were decreased as to the Hong Kong dollars and increased as to the RMB, the plaintiff’s immediate concern was his MPF, and the defendant’s reply, by Jess Tsoi’s email and by conduct, was to make up the MPF difference by the defendant’s voluntary payment. There may be explanations for the defendant’s voluntary payment, for example, as incentives for the plaintiff to continue to work with the mainland companies in the Group. But there is no such explanation in the witness statement of Alaric Lai (director of the defendant), the only witness statement filed on behalf of the defendant, and in any event, the defendant is absent from the trial.
5. On this MPF point, I note that the original RMB wages were not matched with any MPF. The plaintiff’s explanation is that it was like that and he as an employee did not query. I accept such explanation as inherently probable – an employee usually would not confront with the employer over such minor sums in the light of, or in the hope for, the long term employment relationship.
6. The Inland Revenue Department tax return forms for the financial years from 2010-2011 to 2017-2018 listed the defendant as the plaintiff’s employer.
7. In Jess Tsoi’s witness statement filed on behalf of the defendant in the Labour Tribunal mentioned in §19 above, Jess Tsoi effectively confirmed that there was an employment contract between the plaintiff and the defendant. The only doubt she tried to cast upon the contract was that the plaintiff was employed by the defendant via Alaric Lai not following the proper procedures. Assuming that this were true, it would be an internal matter for the defendant, but generally would not invalidate the contract between the plaintiff and the defendant.
8. His annual leave application forms (attached to the plaintiff’s witness statement as “Appendix I”) were standard forms under the name of the defendant, and were sent to the defendant for approval.
9. The plaintiff explained that the contracts signed with GCML and SCCL were signed as formality only so that the plaintiff would be granted the work permit to work in the PRC. There is no evidence to traverse the same. I have no reason to reject that in the light of the considerations above.
10. For completeness sake, the email mentioned in §9 above and the name card mentioned in §11 above are neutral to me. For the email, Alaric Lai sent on behalf of the “Cobow Group” without specifying which company the plaintiff would work under. For the name card, while the job title for the plaintiff was a manager of GCML, the name card was representation made by the Group to third parties. As between the plaintiff and the defendant, what matters is their intention as to how the plaintiff would represent himself for the purpose of discharging his duties to the defendant. If their intention would be that they would like the plaintiff to represent himself that way, this does not mean that the contract between the plaintiff and the defendant would change to a contract between the plaintiff and GCML.
11. In the circumstances, the defendant is liable to pay the plaintiff. The question is how much.

# VII. HOW MUCH WOULD THE DEFENDANT BE LIABLE TO PAY THE PLAINTIFF?

1. It is convenient to set out here again the amounts in the plaintiff’s claim:-
2. Wages: HK$620,380;
3. Payment in lieu of notice: HK$22,000;
4. End-of-year payment: HK$44,000;
5. Annual leave payment: HK$55,828.65;
6. Compensation of leave pay for 14 rest-days: HK$11,846.15;
7. Long service payment: HK$137,464.84; and
8. Reimbursement of various expenses which the plaintiff incurred since January 2015: RMB292,732.42.
9. Before I shall deal with each of them in turn, I note that even in the witness statement of Alaric Lai, the only witness statement filed on behalf of the defendant, Alaric Lai did not say anything about the amounts in the plaintiff’s claim.

## A. Wages

1. I have considered §95 of the plaintiff’s witness statement. There is no evidence to the contrary. I accept that the monthly wages were HK$22,000 and the wages in arrear were in total of HK$620,380.

## B. Payment in lieu of notice

1. The defendant did not give any notice for the termination of the employment with the plaintiff who had worked for the defendant for more than 4 weeks with at least 18 hours each week. By virtue of sections 3 and 5 of the Employment Ordinance, the employment contract between the plaintiff and the defendant was continuous. Thus, by virtue of section 6 of the Employment Ordinance, the plaintiff is entitled to a one month wage of HK$22,000 in lieu.

## C. End-of-year payment

1. End-of-year payment is the plaintiff’s entitlement but not at the defendant’s discretion, given that there was no written term to the contrary: see section 11AA of the Employment Ordinance.
2. I have considered §96 of the plaintiff’s witness statement. There is no evidence to the contrary. I accept that the end-of-year payments for 2017 and 2018 should be HK$22,000 x 2 = HK$44,000 and it is outstanding.

## D. Annual leave payment

1. I have considered §§97 and 98 of the plaintiff’s witness statement. In particular, I have examined the annual leave application forms attached thereto as “Appendix I”. I accept that the plaintiff had only enjoyed 18 days of annual leave.
2. The defendant had employed the plaintiff for under “a continuous contract for not less than 12 months”. As a result, the plaintiff is entitled to annual leave from 17 November 2009 to 31 March 2019 of a total of 89.25 days (that is, 7 + 7 + 7 + 8 + 9 + 10 + 11 + 12 + 13 + 14 x 4.5/12) by virtue of section 41AA of the Employment Ordinance.
3. Therefore, the remaining annual leave should be (89.25 – 18) days = 71.25 days.
4. By section 41C of the Employment Ordinance, the daily rate of the annual leave should be HK$22,000 x 13 / 365 = HK$783.56.
5. Therefore, the outstanding annual leave payment should be HK$783.25 x 71.25 = HK$55,828.65.

## E. Compensation of leave pay for 14 rest-days

1. I have considered §§99 and 100 of the plaintiff’s witness statement. In particular, I have examined the leave application forms attached thereto as “Appendix J” and the handwritten record by the defendant’s staff that the plaintiff still had 14 days of leave as at May 2017. I accept this record to be true.
2. The plaintiff had four rest days each month.
3. Therefore, the amount under this head should be HK$22,000 / (30 – 4) x 14 = HK$11,846.15.

## F. Long service payment

1. I accept §101 of the plaintiff’s witness statement that his employment with the defendant was 9 years and 136 days long. By virtue of sections 31R and 31V, his long service payment should be HK$22,000 x 2/3 x (9+136/365) = HK$137,464.48. It is of course not yet paid by the defendant.

## G. Reimbursement of various expenses which the plaintiff incurred since January 2015

1. The evidence in relation to the reimbursement claim is set out in §§102-104 of the plaintiff’s witness statement and the 工程人員報銷單 in Appendix K thereto. The applicants in most of the 工程人員報銷單 were not the plaintiff but some other people. In his oral evidence, he explained that he paid those people from his own pocket first. There is nothing to contradict his such evidence, and so I accept the same.
2. Therefore, I accept that the defendant should reimburse the plaintiff HK$292,732.42.

## H. Total amounts

# VIII. CONCLUSION

1. In the premises, I order that the defendant do pay the plaintiff the sums set out in §43 above, with judgment interest accruing thereon from today. I also make a costs order *nisi* that the defendant do pay the plaintiff costs of the action (including any costs reserved), to be taxed if not agreed, with certificate for counsel.

( Gary C C Lam )

District Judge

Mr Kevin Leung, instructed by CL & Co Solicitors, for the plaintiff

The defendant was not represented and did not appear