## DCEC 1181/2022

[2025] HKDC 302

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

## EMPLOYEES’ COMPENSATION CASE NO 1181 OF 2022

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IN THE MATTER OF AN APPLICATION BETWEEN

HE YU FEI（何郁飛） Applicant

and

XIONG XINXI（熊昕晰）trading as

TAILOR-MADE FURNITURE（造櫃王） 1st Respondent

SOONSTAR INTERNATIONAL (HK) LIMITED

（順時達國際 (香港) 有限公司） 2nd Respondent

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Before: Deputy District Judge Sabrina Ho in Court

Dates of Hearing: 21, 22 & 26 August 2024

Date of Judgment: 26 February 2025

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JUDGMENT

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***A. INTRODUCTION***

1. This is the trial of the application of the Applicant, Mr He Yu Fei (何郁飛), under the Employees’ Compensation Ordinance (“**ECO**”) for compensation under Sections 9, 10, and 10A thereof (“the **Application**”).

***B. BACKGROUND***

1. The following background facts are not in dispute.
2. The Applicant sustained personal injuries in an accident on 21 June 2021 (“the **Accident**”) in which the Applicant suffered an electric shock while fixing the electric light and fell off the wooden ladder. The Accident took place in the premises known as 4th Floor, Block B, Alexandra Industrial Building, 23-27 Wing Hong Street, Cheung Sha Wan, Kowloon, Hong Kong (“the **Premises**”).
3. The 1st Respondent, Ms Xiong Xinxi (Cici) (熊昕晰), is and was at all material times a shareholder and director of the 2nd Respondent, Soonstar International (HK) Limited (順時達國際 (香港) 有限公司).
4. In around March and April 2021, the 2nd Respondent became a tenant of the Premises.
5. At around 5 pm on 21 June 2021, the 1st Respondent asked the Applicant and Mr Chan Hey Yuet (陳起越) (“**Mr Chan**”) to attend the Premises after they finished work at the client’s place. At around 6:30 pm on the same day, the Applicant sustained the Accident.
6. After the Accident happened, the 1st Respondent accompanied the Applicant to receive treatment at the Caritas Medical Centre (“the **CMC**”). No ambulance was summoned to attend the Premises.
7. On 20 October 2022, a Certificate of Assessment was issued by the Employees’ Compensation (Ordinary Assessment) Board (“**Form 7**”), in which the following assessment was made by the Board:
8. The Applicant sustained injury in the right hand resulting in right middle finger stiffness, pain and weakness;
9. Periods of absence from duty was assessed to be from 21 June 2021 to 6 October 2022;
10. Loss of earning capacity permanently caused by the injury was assessed at 1%.
11. Upon the Applicant’s appeal, the assessment was reviewed. Under the Certificate of Review of Assessment (“**Form 9**”), the Board cancelled the Form 7 and made the following assessments:
12. The Applicant sustained right hand injury resulting in right middle finger stiffness, pain and weakness;
13. Periods of absence from duty were assessed to be from 21 June 2020 to 6 October 2022; from 15 November 2022 to 19 November 2022; from 22 November 2022 to 26 November 2022; and from 2 December 2022 to 10 December 2022 (total: 492 days);
14. Loss of earning capacity permanently caused by the injury was assessed at 1%.
15. Neither the Applicant nor the Respondents have appealed against the Form 9.

***C. THE PARTIES’ CASE***

1. As agreed between the parties, the following issues are before this Court:

**On Liability**

1. Whether the Applicant was an employee of the 1st Respondent or was he an employee of Mr Chan?
2. Alternatively, was the Applicant an employee at all?

**On Quantum**

1. What was the average monthly earnings of the Applicant at the material time?
2. Should the sick leave period as certified in the Form 9 be accepted?

***C1. The Applicant’s Case***

***On Liability***

1. It is the Applicant’s primary case that he was employed by the 1st Respondent when the Accident happened. As an alternative, the Applicant contends that he was the employee of the 2nd Respondent at the material time.
2. The Applicant says that during his employment with the 1st Respondent, he only understood the 1st Respondent to be carrying out her business in the trade name of “Tailor-Made Furniture (造櫃王)” (“**Tailor-Made Furniture**”). He was not aware that the 2nd Respondent was the tenant of the Premises. He in fact was not aware of the existence of the 2nd Respondent during his entire employment.
3. The Applicant says that the 1st Respondent was the one who hired him and agreed that the Applicant would receive HK$1,350 for each day of work. The Applicant further says that all the instructions for his work were given by the 1st Respondent to him. All the tools and materials, including electric drills, electric saw, adhesive glue, etc. were provided by the 1st Respondent to him.
4. The Applicant says that prior to the Accident, the 1st Respondent paid him salary on two occasions, first, in the sum of around HK$5,000 to 6,000 (i.e. around 5 days’ salary), and second, in the sum of around HK$10,000 (i.e. around 10 odd days’ salary). The payments were made in cash on both occasions.
5. The Applicant denies that he was an employee of Mr Chan. He says that Mr Chan was only the one who introduced the 1st Respondent to him.

***On Quantum***

1. On the Applicant’s average monthly earnings, in the Amended Application §3 (6), he pleaded that:
2. For the month preceding the Accident, his monthly earnings were around HK$19,000 per month, subject to discovery;
3. On average during the 12 months (or any lesser period of employment with the employer) prior to the Accident was around HK$31,500 per month, subject to discovery.
4. On the period of sick leave, the Applicant relied on the assessment in the Form 9 and contends that he should be entitled to claim 492 days of sick leave.

***C2. The Respondents’ Case***

***On Liability***

1. The Respondents deny that they were the employer of the Applicant. The Respondents contend that the Applicant and Mr Chan were the 2nd Respondent’s independent contractors for the work at the Premises and the 2nd Respondent’s clients’ premises.
2. The Respondents say that the Applicant and Mr Chan used their own tools when carrying out work at the Premises or the 2nd Respondent’s clients’ premises. According to the 1st Respondent, she only liaised with Mr Chan concerning the work to be carried out, and she had never discussed the same with the Applicant: see 1st Respondent’s Witness Statement §9.
3. The Respondents contend that all the fees for the Applicant and Mr Chan for their work done for the 2nd Respondent were paid by the 2nd Respondent to Mr Chan’s bank account (A/C: 031745086) (“**Chan’s Bank Account**”).

***On Quantum***

1. The Respondents contend that the Applicant’s case that his monthly earnings were about HK$31,500 is not supported by any documentary or objective evidence.
2. Rather, the monthly earnings of around HK$19,000 per month should be adopted.
3. As to the period of sick leave, the Respondents say that 492 days is excessive, as the Applicant was capable of resuming work by May 2022 at the latest. The Respondents say that only 332 days of sick leave would be appropriate.

***D. ANALYSIS***

***D1. Whether the Applicant was an employee of the 1st Respondent and/or the 2nd Respondent***

1. The legal principles governing whether there is an employment relationship between parties are held in the Court of Final Appeal case of *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951 at §§17-18 per Ribeiro PJ:
2. The modern approach to the question whether one person is another’s employee is therefore to examine all the features of their relationship with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked;
3. The above exercise involves a nuanced and not a mechanical approach of running through items on a check list to see whether they are present in, or absent from, a given situation;
4. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.
5. Having considered the features of the relationship between the Applicant, the 1st Respondent and 2nd Respondent, I find that the Applicant is the employee of the 1st Respondent.
6. First of all, I accept the Applicant’s case that throughout his employment, the 1st Respondent was the only person who contacted him, and that he was not aware of the existence of the 2nd Respondent at all.
7. The 1st Respondent accepted that at the Premises (which was a showroom), only the name of Tailor-Made Furniture was shown. The name of the 2nd Respondent was not shown in the Premises. Indeed, if one looks at the photograph of the entrance to the Premises, there was a large sign showing “Tailor-Made Furniture 造櫃王”. The 1st Respondent agreed during cross-examination that an outsider who attended the Premises would have the impression that it is Tailor-Made Furniture’s showroom, not that of the 2nd Respondent.
8. On the website “zgw.hk/index.html” (“the **Website**”), in which the Premises was listed as a contact address, only the name of Tailor-Made Furniture was shown. Similarly, on the Facebook page (“the **Facebook Page**”) in which the Premises was listed as the contract address, only the name of Tailor-Made Furniture was shown. On the Facebook Page, it was also stated that Tailor-Made Furniture had over 20 years’ experience of manufacturing tailor-made furniture. According to the 1st Respondent during cross-examination, this was a reference to her personal experience of working in the furniture related industry, as she had been in the field for around 20 years.
9. In the 1st Respondent’s oral evidence, she also accepted that she was the one who replied to the public’s messages on the Facebook Page. She was also the one replying to the emails from the public sent through the email address [zgwhkg@gmail.com](mailto:zgwhkg@gmail.com). She would also answer the phone calls made to the number 6110 2499 stated on the Website and the Facebook Page.
10. In the WeChat communication between the Applicant and the 1st Respondent (“the **R1 WeChat**”), the 1st Respondent had never referred to the 2nd Respondent or informed the Applicant that she was acting on behalf of the 2nd Respondent. The 1st Respondent used the Tailor-Made Furniture logo as her profile photo on WeChat, and used “zgw61102499” as her WeChat ID. According to the 1st Respondent, “zgw” is the Chinese pinyin of the name “造櫃王”. The 2nd Respondent did not feature in her WeChat profile.
11. While the 2nd Respondent was the tenant of the Premises (the 1st Respondent was named as the contact person of the 2nd Respondent under the tenancy of the Premises), this itself does not show that the 2nd Respondent was the entity carrying out the furniture manufacturing business. It is equally possible that the 2nd Respondent allowed the 1st Respondent to occupy the Premises to carry out her business.
12. Considering the above factors, it is clear to me that at all material times, it was the 1st Respondent who was using the trade name of Tailor-Made Furniture to carry out furniture manufacturing business at the Premises. Therefore, when the 1st Respondent engaged the Applicant’s services, she was acting in her personal capacity, not acting on behalf of the 2nd Respondent.
13. Second, I accept the Applicant’s case that it was the 1st Respondent who gave instructions to him and provided materials for his work:
14. In the R1 WeChat dated 4 June 2021, it was shown that the 1st Respondent was telling the Applicant that he had installed the faucet wrongly at the Premises. This was confirmed by the 1st Respondent during cross-examination;
15. In the R1 WeChat dated 6 June 2021, it was shown that the 1st Respondent was asking the Applicant (and Mr Chan) to install a wooden wall in the Premises. The 1st Respondent confirmed this and said that this was because the wooden wall was heavy;
16. In the R1 WeChat dated 21 June 2021, it was shown that the 1st Respondent asked the Applicant to take a photo of the electric plugs for her to take a look. In response, the Applicant sent the 1st Respondent a photo of the electric plugs. The 1st Respondent accepted during cross-examination that she asked for the photo to be sent as the Applicant was working at the client’s place. Notwithstanding the 1st Respondent’s denial, I am of the view that the 1st Respondent was supervising the Applicant’s work and giving instructions to him regarding his work at the client’s place.
17. The R1 WeChat also suggested that the materials for the installation, including the faucet and the electricity plugs, were provided by the 1st Respondent to the Applicant, as it appeared that the 1st Respondent was familiar with what the above items were or how the items should be installed.
18. Third, the 1st Respondent accepted that it was an agreement with the Applicant that he would receive HK$1,350 daily for his work, irrespective of how many pieces of furniture he would assemble each day. This is a further indication that the Applicant and the 1st Respondent were under an employment relationship, such that the Applicant would earn a fixed amount of income on a day that he attended work irrespective of the amount of work he carried out.
19. Fourth, the Respondents claimed that Mr Chan was an independent contractor of the 2nd Respondent and the Applicant was Mr Chan’s work partner/a co-contractor. However, the Respondents failed to produce any documentary evidence to support the allegation. While the 1st Respondent alleged during cross-examination that there were WeChat records and running account slips proving the sub-contracting relationship between the 2nd Respondent and Mr Chan, these alleged documents were not before the Court. Further, while the Respondents said that all the fees paid to the Applicant and Mr Chan for their work were deposited into Chan’s Bank Account, the only bank account statement of the 2nd Respondent before the Court was for the period from 7 July 2021 to 7 August 2021. It did not cover the period before the Accident took place. In the said bank account statement, 2 payments to Chan’s Bank Account were recorded (one on 27 July 2021 for HK$15,000, another on 5 August 2021 for HK$10,000), however, there was no evidence as to what these payments relate to.
20. Fifth, the 1st Respondent admitted that after the Accident took place, she told the Applicant to tell the staff at the CMC that the Accident happened at her residence at 康輝大廈 when she well knew the Accident happened at the Premises (as she was present at that time). The 1st Respondent’s explanation for providing the above false information was that she thought that it was “unlucky” for injuries to happen in the Premises when it was newly decorated. I reject the excuse as being incredible. I take the view that the 1st Respondent asked the Applicant to tell the above lie as she was aware that the Applicant was employed by her and that the Applicant suffered the Accident during his employment with her. As the 1st Respondent did not take out any labour insurance for the Applicant, as an initial reaction, the 1st Respondent wanted to conceal the fact that the Accident happened in the Premises.
21. Lastly, reading the R1 WeChat and the WeChat messages between the Applicant, the 1st Respondent and a “小靜” of the logistics department (物流部小靜) in a WeChat group chat “飛哥的單據” (“the **Receipt WeChat**”) as a whole, as well as considering the Applicant and the 1st Respondent’s respective evidence about them, it is clear to me that the 1st Respondent initially accepted her liability to compensate the Applicant for his injuries suffered from the Accident, and had procured a part payment in the sum of HK$15,000 of compensation to be paid. The 1st Respondent only retracted from her position subsequently when the amount of the compensation increased.
22. For example, as shown in the R1 WeChat:
23. On 22 June 2021 (a day after the Accident), the 1st Respondent told the Applicant that she would pay the Applicant the fees for the days which he had to take rest, as she was feeling bad about it“看看我到時候我補回這幾天你休息的費用你吧，我都很不好意思”;
24. On 6 July 2021, in response to the Applicant’s indication that he would like to know how the Accident would be dealt with, and said that his basic compensation for absence from duty should be protected, the 1st Respondent asked the Applicant to put forward a compensation proposal（“你看看想要怎樣賠償吧”,“是的，明白；所以一開始我就說過了，你出個方案吧；因為我也沒有處理過這種情況；我自己的同事我都有給他們買勞保的；你出方案給我就好了，沒事的，以後大家都還是要長期合作的”）;
25. On 6 July 2021, the 1st Respondent stated that since the Applicant and Mr Chan were working for her shop, she should make the compensation. If they were working for her client, that would be counted as sub-contracting, and they would need to bear the consequence/expenses（“外判出去的，是屬於自顧人士，因為你們是在幫我鋪頭做事；所以我是需要賠償的; 如果你是做我客戶的；你就自己背了；因為是外判的”）;
26. On 19 July 2021, when the Applicant sent the medical expenses receipts to the 1st Respondent, she agreed to pay them. The 1st Respondent then started the Receipt WeChat and instructed 小靜 to settle the reimbursement. The 1st Respondent informed 小靜 that there would be further expenses which the Applicant would list out, and such payments have to be paid（“小靜；這個是飛哥的單據，我們需要支付的；還會有後期的費用；上次我有支付一個180，我沒有了；是要做到賬上[的]啊；然後還有一些後續的費用；到時候飛哥列單出來；我們需要支付”）;
27. In the Receipt WeChat:
28. On 20 July 2022:
29. 小靜 sent out a calculation of the number of days from 22 June 2021 to 30 July 2021 (i.e. 39 days), and the total amount of compensation for the Applicant for his absence from duty (“6月22日-7月30日，9 + 30=39天，1,350 x 39 = 52,650”);
30. 小靜 asked the Applicant if he can give a discount to them for the above compensation. The Applicant declined, saying that this is work injury, not a transaction. The 1st Respondent instructed 小靜 to make the payment, only informing the Applicant that the payment had to be made by instalments as she does not have so much money at that time.

“小靜： 請問這個誤工費能不能給我們算少點【表情】

Applicant: 這是工傷，不是買賣。【表情】

R1: ＠物流部小靜 付啦，不過現在應該沒有這麼多錢，可能會要分幾次付呢＠AnSon Ho

小靜： 飛哥，你銀行戶口信息麻煩發我登記，費用可能要晚幾天分多幾次付”

1. On 27 July 2021, 小靜informed the Applicant that a payment of HK$15,000 had been paid and asked the Applicant to acknowledge receipt. While the above payment was made from the 2nd Respondent’s bank account to the Applicant’s bank account, the 1st Respondent did not expressly inform the Applicant about that, nor tell the Applicant that the 2nd Respondent was the entity which should bear the liability to compensate the Applicant.
2. On 1 August 2021, in the R1 WeChat, the Applicant provide a further sick leave certificate to the 1st Respondent. On 4 August 2021, the 1st Respondent sent a message to the Applicant saying that the amount of sick leave that the Applicant had to take had exceeded her expectation and asked for a proposal from the Applicant for her to make a one-off compensation to the Applicant.

“飛哥： 你好！

我想同你聊下這個賠償的事情，因為現在看來已經超出我的承受範圍滿多的了，當然，這個事情大家都不想，我也是覺得我能承受的範圍，我不會說任何的話，我咬咬牙，抗一抗就過去了，但是現在好像已經不是了，所以我想跟你聊一下我們直接談這個賠償的事情，可以嗎？

說實在話，去年我把我所有的錢都虧光了，然後正好政府有低息貸款，所以我就賭一把，借了錢來開這個鋪的…我現在想做最後垂死掙扎一下，看看我還有沒有希望，我想一次性談好，需要賠償你多少錢吧，可以嗎？如果不可以的話，我也是沒有別的選擇了，只能申請公司破產。帶著我女兒回大陸了。”

1. On 11 August 2021:
2. The Applicant suggested a lump sum of HK$300,000 as a one-off compensation. In response, the 1st Respondent said that she could not afford the amount as it was too large;
3. The 1st Respondent said that the suggested lump sum of HK$300,000 amounted to 9.26 months of compensation for absence from duty due to work injury (工傷工資), calculated with reference to the Applicant’s daily payment of HK$1,350 and the “four-fifth” fraction typically used for calculating compensation in cases of temporary incapacity under Section 10 of the ECO（“*30萬用來支付工傷工資，其實是支付了300,000/(1,350 x 5/4) (sic) = 278天，9.26個月的工傷工資。”*）. I do not accept the 1st Respondent’s explanation during re-examination that she adopted the “four-fifth” fraction only on the assumption that the Applicant was an employee. Considering the 1st Respondent’s conduct as a whole and reading the WeChat messages in context, the 1st Respondent was aware and accepted that the Applicant was her employee;
4. When the Applicant said the above would not have happened had the 1st Respondent purchased insurance, the 1st Respondent claimed that insurance company would not accept these kinds of short-term insurance. She then said she would not shift the blame, but the amount proposed was too large.

“Applicant: 我想三十萬吧，這能保障些。

R1: 【表情: 哭】

Applicant: 我也不知道什麼時候可以完全[痊]癒。這樣的價錢或許能保障些吧。

R1: 其實滿打滿算，你一個全部都有工開

R1: 全部都是1,350/天

R1: 222天，是7.4個月

Applicant: 現在是你要一次性的解決方案。

R1: 我知道

R1: 但是我們不是商量不是

Applicant: 對呀

R1: 每個人心理都會有一個數這樣會好點嘛是吧

R1: 或者這個是我的習慣吧。

Applicant: 嗯...我知道，這也是我沒死，傷痕累累的所謂的價格。

R1: 其實工傷是會有一個標準的，工傷是五分之四的工資。

R1: 你不要介意啊

Applicant: 我沒介意，你什麼問題都可以講。我們都想着和平解決這個問題。

R1: 30萬用來支付工傷工資，其實是支付了300,000/(1,350 x 5/4) (sic) = 278天，9.26個月的工傷工資。

R1: 講句實在話，30萬對於我來說真的滿難的

Applicant: 但是你要是買保險的話，大家都不會講這些。我想想你不是說你都有買保險嗎？而且還教我買保險，怎麼這次出了事就沒買了。

R1: 對於這種短期的保險，保險公司其實不會接的

R1: 而且講句良心話啊

R1: 我真的不是為了省錢而要你們做這些事情的

R1: 我不會去推卸責任也不會去責怪為什麼.....”

1. While there were some messages in R1 WeChat in which the 1st Respondent suggested the Applicant to purchase employees’ compensation insurance for himself as well as his workers in the future, and the Applicant replied by saying that he had informed Mr Chan about it, and would ask Mr Chan to set up a company and purchase the employees’ compensation insurance: see R1 WeChat 6 July 2921 13:30 to 13:40. Reading such messages in context, at most the 1st Respondent was referring to the need of the Applicant to purchase insurance in the future. In the light of the Applicant and the 1st Respondent’s other conversations as highlighted above, I am persuaded that the R1 WeChat and the Receipt WeChat on the whole support the Applicant’s case that there was an employment relationship between the Applicant and the 1st Respondent when the Accident happened and the 1st Respondent was fully aware of her liability to compensate the Applicant.

***D2. The average monthly earnings of the Applicant at the material time***

1. The average monthly earnings of the Applicant is relevant to the Applicant’s claim under Sections 9 and 10 of the ECO.
2. I accept the Applicant’s daily wage before the Accident happened was HK$1,350. This was also admitted by the 1st Respondent during cross-examination.
3. As to the number of days which the Applicant worked in the month immediately before the Accident, I agree with the Applicant’s submissions that it should be **26 days**:
4. According to the 1st Respondent’s evidence in cross-examination, the Applicant started working on 17 May 2021 (a Monday) and he worked from Monday to Saturday every week up to the day when the Accident happened on 21 June 2021;
5. In May 2021, the Applicant worked from 17 May 2021 to 31 May 2021. As the 1st Respondent confirmed during her oral evidence, the Applicant had 2 day-offs on 21 May 2021 and 25 May 2021 respectively. There was also a public holiday on 19 May 2021 for the Buddha’s Birthday. Therefore, the Applicant worked for a total of **10 days**;
6. In June 2021, the Applicant worked from 1 June to 19 June 2021, with a public holiday on 14 June 2021 for Dragon Boat Festival. Therefore, the Applicant worked for a total of **16 days** in June 2021 before the Accident took place on 21 June 2021;
7. In total, the Applicant worked for **26 days** for the month immediately before the Accident took place.
8. The daily wage of the Applicant was accepted by the 1st Respondent. The number of days which the Applicant had worked in the month before the Accident happened was calculated based on the 1st Respondent’s evidence summarised in §47 above. The Applicant is entitled to rely on the above evidence to calculate the amount of his monthly earnings. As to the Applicant’s pleas in §3 (6) of his Application about his monthly earnings[[1]](#footnote-1), they were only estimates, as the Applicant had made clear in the Application that they were approximates and “subject to discovery”.

***D3. The period of sick leave which the Applicant is entitled to claim for***

1. The period of sick leave is relevant to the Applicant’s claim under Section 10 of the ECO, which provides that:

“(1) Where temporary incapacity whether total or partial results from the injury, the compensation shall be the periodical payments hereinafter mentioned, or a lump sum calculated accordingly, **having regard to the probable duration, and probable changes in the degree, of the incapacity. Such periodical payments shall be, or shall be at the rate proportionate to, a monthly payment of four-fifths of the difference between the monthly earnings which the employee was earning at the time of the accident and the monthly earnings which he is earning, or is capable of earning, in some suitable employment or business during the period of the temporary incapacity after the accident**.

(2) **For the purposes of this section a period of absence from duty certified to be necessary by** a registered medical practitioner, a registered Chinese medicine practitioner, a registered dentist, **an Ordinary Assessment Board or a Special Assessment Board shall be deemed to be a period of total temporary incapacity irrespective of the outcome of the injury**.

…” (Emphasis added)

1. In the present case, the Respondents did not take out any appeal against the Form 9. There is a dispute between the parties as to whether in such circumstances, the period of absence from duty certified in the Form 9 (i.e. 492 days) is conclusive (as contended by the Applicant). Alternatively, whether the assessment in Form 9 only creates a rebuttable presumption of the period of absence from duty (as contended by the Respondents).
2. Having considered the authorities cited by the parties, I am of the view that under Section 10 (2) of the ECO, the said presumption is rebuttable, as recognised by the Court of Appeal in *Yu Tat Kam v Chu Tung Shing* [2009] 6 HKC 411 (CA). However, in the same case, the Court of Appeal also held that the burden is on the employer to prove that circumstances existed for a reduction in compensation under Section 10(1) and observed that it would only be in rare circumstances where an employer would be able to prove potential earnings where total incapacity has been certified because **(a)** it is not only physical disability that incapacitates an employee from working – an employee may be incapacitated by discomfort or pain preventing him from concentrating; and **(b)** an employee is expected only to undertake employment which is suitable for him.
3. In the present case, the Respondents have failed to rebut the assessment under the Form 9 that 492 days of sick leave is appropriate.
4. First of all, the Respondents did not adduce any evidence showing that the Applicant actually worked or earned money during the period of sick leave certified under the Form 9.
5. Second, the Respondents have not adduced any expert evidence to show that the Applicant was capable of earning in some suitable employment or business since May 2022.
6. Third, while the Applicant’s bone fracture at the middle finger had fully healed by 26 November 2021, as the Applicant said in his oral evidence, his still felt painful in his hand, and this is supported by the Applicant’s consultations at the CMC Orthopaedic, Traumatic Surgery O&T Traumatic Clinic (“the **O&T Clinic**”), see below. As the Court of Appeal observed in *Yu Tat Kam*, it is not only physical disability which may incapacitate an employee from working – an employee may be incapacitated by discomfort or pain as well.
7. Fourth, there is no evidence to show that the Applicant was merely “seeking sick leave certificates” rather than seeking to cure his conditions when he attended his medical appointments: *cf* *Ko Wai Fan v Tung Wah Group of Hospitals* [2022] 6 HKC 436 at §§61-63:
8. As shown in the Consultation Summaries issued by the CMC Orthopaedic, Traumatic Surgery O&T Traumatic Clinic (“the **O&T Clinic**”) dated, 8 October 2021, 26 November 2021 and 17 December 2021 respectively, future appointments were pre-arranged by the attending doctor, with the last pre-arranged appointment being scheduled on 28 January 2022.
9. In the subsequent Consultation Summaries issued by the O&T Clinic dated 25 March 2022, 20 May 2022 and 12 August 2022, it was recorded that the stiffness in his finger had gradually improved with some residual stiffness, but the Applicant was still unable to touch his palm. The Applicant was still given active treatment by the attending doctor, with Paracetamol prescribed in addition to Heparinoid to treat the Applicant’s pain in the consultation dated 12 August 2022;
10. From February 2022 onwards, the Applicant started receiving occupational therapy at the Tuen Mun Hospital. According to the work rehabilitation assessment carried out on 18 May 2022, the Applicant was assessed to have the following barriers returning to his previous job: **(a)** mild pain in his middle finger; and **(b)** marginal manual handling capacity and work tolerance. He was only recommended to resume his previous job with major duty modification.
11. In the circumstances, I find that 492 days of sick leave is appropriate.

***D4. Section 9 of the ECO***

1. Following from my findings above, the amount of Section 9 ECO compensation payable by the 1st Respondent to the Applicant is:

HK$1,350 x 26 days x 1% x 96 = **HK$33,696**

***D5. Section 10 of the ECO***

1. As for the Section 10 ECO compensation, it should be:

(HK$1,350 x 26 days) x 492/30 x 4/5 = **HK$460,512**

***D6. Total amount of compensation***

1. By reason of the aforesaid, the total amount of compensation which the 1st Respondent should pay the Applicant is **HK$479,857**:

**Amount (HK$)**

Section 9 33,696

Section 10 460,512

Section 10A 649

\_\_\_\_\_\_\_

494,857

Less: Advanced payment 15,000 (see §41(b)\*)

\_\_\_\_\_\_\_

**TOTAL: 479,857**

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***E. Disposition and Costs***

1. I order the 1st Respondent to pay HK$479,857 to the Applicant.
2. The Applicant is entitled to interest at half judgment rate from the date of the Accident (i.e. 21 June 2021) to the date of judgment and thereafter at judgment rate until the date of payment.
3. As to costs, I invite the parties to make written submissions on the appropriate costs order in light of my findings above, including whether a *Bullock* costs order should be granted as indicated by the Applicant in the oral closing submissions. I give the following directions:
4. The Applicant do lodge and serve a written submissions on costs, with no more than 3 pages in 12 fonts;
5. The Respondents do lodge and serve a reply written submissions on costs, with no more than 3 pages in 12 fonts.

( Sabrina Ho )

Deputy District Judge

Ms Julia Lau, instructed by KCL & Partners, assigned by the Director of Legal Aid, for the Applicant

Mr Brian Tsui, instructed by Chak & Associates LLP, for the 1st and 2nd Respondents

1. Of about HK$19,000 per month (subject to discovery) for the month immediately preceding the accident; and of about 31,500 per month (subject to discovery) on average during the 12 months or any lessor period of employment with the employer prior to the Accident) [↑](#footnote-ref-1)