## DCPI 736/2011

[2019] HKDC 1386

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 736 OF 2011

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BETWEEN

CHENG KWING YEUNG (鄭炯揚) Plaintiff

and

HONG KONG HAM HOLDINGS LIMITED Defendant

(香港火腿廠控股有限公司)

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Before: Deputy District Judge Jonathan Chang in Chambers (Open to Public)

Date of Hearing: 12 February 2019

Date of Decision: 22 October 2019

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DECISION

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1. By Judgment dated 31 December 2018 ([2018] HKDC 1631) I awarded damages in the total sum of $680,633 (“Judgment Sum”) with interest to the plaintiff for his injury sustained at work on 27 April 2008 at the defendant’s factory as its employee.
2. The Judgment Sum comprises a sum of $554,385.38 being the agreed employees’ compensation received by the plaintiff (“EC Sum”). The net award to the plaintiff, giving credit for the EC Sum, is therefore $126,247.62 (“Net Award”).
3. I also made a costs order *nisi* that the plaintiff shall have the costs of the action, including any reserved costs, to be taxed if not agreed on a party and party basis, with certificate for counsel. There shall be legal aid taxation for such costs.
4. By summons dated 14 January 2019, the defendant applied to vary my costs order *nisi* in the Judgment as follows:-
5. the defendant do pay the plaintiff’s costs of the action up to 27 May 2011 on a party and party basis, to be taxed if not agreed;
6. the plaintiff do pay the defendant’s costs of the action from 28 May 2011 onwards on an indemnity basis, to be taxed if not agreed, with certificate for counsel; and
7. the plaintiff do pay the defendant enhanced interest on disbursements (such disbursements to be taxed if not agreed) already incurred at the date of 9% per annum from the respective dates of their payment up to the date of Judgment.
8. The defendant also sought an order that interest on the Judgment Sum be paid only up to and including 27 May 2011 and be assessed at $14,992.57.
9. The basis of the application is that the plaintiff failed to achieve a more favourable result in the Judgment than the defendant’s sanctioned payment made on 29 April 2011 in the sum of $150,000. The defendant contended that given the Net Award is lower than the sanctioned payment, the sanctions set out in O 22, r 23 of the Rules of the District Court shall apply after 27 May 2011 being the last day for the plaintiff to accept the sanctioned payment without leave of the court.
10. The defendant’s Notice of Sanctioned Payment (“Notice”) relevantly states as follows:-

“Take notice that the Defendant HONG KONG HAM HOLDINGS LIMITED has paid an amount of HK$150,000.00 into Court in settlement of the whole of your claim.

The said sum of HK$150,000.00 is paid inclusive of interest on top of the EC compensation payment of HK$522,764.62 already received by the Plaintiff, making a total sum of HK$672,764.62 and is paid in satisfaction of all causes of action in respect of which the Plaintiff claims.”

1. The Notice refers to the EC Sum received by the plaintiff being $522,764.62, not the EC Sum which the parties eventually agreed at the trial before me which was $554,385.38. It appeared that the EC Sum stated in the Notice came about in the following manner:-
2. On 21 January 2011, the defendant made a sanctioned payment of $300,000 on top of the advanced payments of $222,764.62 to the plaintiff (making a total sum of $522,764.62) in full and final settlement of all of the plaintiff’s claims in employees’ compensation case DCEC 672/2010 (“EC Claim”) arising from the same accident in this action. The plaintiff accepted this on 31 January 2011, thereby settling the EC Claim.
3. In the Statement of Damages dated 19 May 2011, the Revised Statement of Damages dated 12 June 2012, and the Answer to the Revised Statement of Damages dated 12 July 2012, the parties adopted $522,764.62 as the EC Sum for which credit must be given in any final award that may be made in this action.
4. The trial before me was the re-trial of the action. At the first trial, after completion of the evidence on 7 March 2013, when the judge was discussing with counsel on the timetable for lodging written closing submissions, Mr Sakhrani who was also counsel for the defendant in the first trial raised with the judge the suggestion that the EC Sum received by the plaintiff might be greater than the figure adopted by the parties:-

“Your Honour, I am very grateful. Your Honour, a point has risen unexpectedly and admittedly belately, but it’s a point and we have to deal with it … my instructions are that during the plaintiff’s sick leave, he was actually paid full salary, not just four-fifth, and that when credit was given for the EC award, only four-fifth was taken into account, not the full salary. So we take the view that in assessing the plaintiff’s damages, if the full salary was paid during the sick leave, then the full salary should be taken into account, not just the four-fifth. Now, I don’t know the position of the plaintiff who appears is, but I would simply like a direction that we be allowed to produce the proof that the whole salary was paid during the period of sick leave. It’s just a matter of documents to prove that. And if you require us to tender it as part of the evidence, then I will ask your leave to render it as part of the evidence.”

1. Ms Tsui who also appeared as counsel for the plaintiff in the first trial objected to the above course on the ground of lateness when the plaintiff had given evidence and no question was asked of him as to the salary received by him during his sick leave period:-

“Your Honour, I have to say it’s very late at this stage to ask for his kind of evidence. When the plaintiff was in the box, there was -- first of all, there’s no such evidence in the trial bundle as about the payment. And actually, honestly, I have never seen those payment. I am not aware of this at all. And even when the plaintiff was in the box, there was no question about on – to ask him … whether he received full payment or not.”

1. In the end Mr Sakhrani proposed to produce the relevant documents to the plaintiff and, failing agreement on the revised figure for the EC Sum, address the matter in closing submissions:-

“May I do it this way, let us get our paper -- we’ve made the point in court today, nobody is being taken by surprise. Let us proceed we can produce the documents, we will send it to the other side and each party can consider their position. And I am simply putting a marker down that on the next hearing, I may seek leave to adduce this evidence.”

1. By letters dated 13 March 2013 and 2 April 2013, the defendant’s solicitors supplied payment receipts and bank statements to the plaintiff’s solicitors purporting to show that the plaintiff had received: (1) a total sum of $241,980.38 as his salary from May 2008 to May 2010; and (2) a sum of $12,405 as reimbursement of medical expenses, giving a total sum of $254,385.38. Adding the defendant’s sanctioned payment of $300,000 for the EC Claim would give $554,385.38 which was the EC Sum eventually agreed by the parties at the re-trial before me, as opposed to the lower amount of $522,764.62 in the Notice and the pleadings.
2. It is unclear to me whether the additional documents were admitted into evidence in the first trial. They were not included in the trial bundles for the re-trial before me. It is also unclear whether the parties had agreed to any revised figure for the EC Sum in any formal manner. The judge found against the plaintiff on liability and did not address quantum. The question of the correct EC Sum was thus apparently left in abeyance.
3. At the re-trial before me, Ms Tsui opened the plaintiff’s case on the basis that $522,764.62 was the EC Sum for which credit should be given in the final award. Mr Sakhrani did not take issue with that figure during Ms Tsui’s oral opening, but his written closing submissions stated that the total credit to be given for the EC Sum should be $554,385.38 on the basis of that the plaintiff “actually received $241,980.38 by way of periodical payments, plus medical expenses of $12,405 and the remainder of the EC award of $300,000”, adopting the position put forward by the defendant at the first trial which, as stated above, was left unresolved.
4. Naturally the dispute over the EC Sum was brought up when counsel appeared before me for oral closing submissions.
5. Mr Sakhrani made the point that the relevant documents had already been provided to the plaintiff at the first trial and so it was simply a matter for the plaintiff to ascertain precisely how much he had received from the defendant as the advanced payments. The plaintiff had carriage of the action and since this was a re-trial, the amount of $554,385.38 should have been the agreed figure as the plaintiff never challenged or disagreed with this figure which was supported by documents.
6. Ms Tsui contended that the plaintiff did not agree or accept the additional documents at the first trial and the defendant did not pursue on the matter, and since the judge did not deal with quantum, the matter “just rested there”. She therefore advanced her case based on the pleaded figure, namely $522,764.62 as the EC Sum received by the plaintiff.
7. I remarked at the hearing that the additional documents that the defendant provided to the plaintiff after the first trial was not before me and I was not given any indication prior to parties’ closing submissions that there would be a dispute over the pleaded EC Sum:-

“COURT: No. In all fairness to Ms Tsui, I think -- in her opening did she refer to the ECC amount? Yes. Now, I do not recall, upon receiving her opening, did you take issue whether this is the amount.

MR SAKHRANI: Because our figure is correct, it’s been agreed on the last occasion --

MS TSUI: No, it hasn’t. No, it’s not agreed.

COURT: No, it’s stated in Ms Tsui’s opening the 522 figure based on the pleaded figure.

MR SAKHRANI: No, but that is the point, that is the pleaded point. She should be focusing on what they have actually received.

COURT: No, Mr Sakhrani, my point is if there’s any issue arising from this figure, which I all along thought is an agreed figure, this new figure, 554, only arose in your closing. I do not have any of the underlying documents and I have never seen any of the underlying documents. Again, it’s water under the bridge but --

MR SAKHRANI: But it’s naughty. Your Honour knows where the 522 has come from and why they are pushing a pleading point, and they should not be doing it. It’s forensic advocacy rather than helping the court reach the truth. That’s what the disappointment is.

COURT: Let’s leave the solicitors to work out something.

MR SAKHRANI: Sure.”

1. After taking instructions, Ms Tsui agreed to adopt the figure of $554,385.38 put forward by Mr Sakhrani as the EC Sum. I commend the sensible and practical approach adopted by Ms Tsui which spared the need for the court to receive further evidence on the EC Sum by recalling the witnesses for the plaintiff and the defendant at such a late stage.
2. It is clear to me from the chronology set out above that the plaintiff has all along been advancing his case based on the pleaded EC Sum of $522,764.62. There was no application by the parties at any stage to revise this agreed figure in the pleadings even though ultimately it was agreed at the conclusion of the re-trial. The defendant who now seeks to rely on its sanctioned payment has also all along adopted the same figure in the Notice and has never amended it.
3. In my view, in deciding whether the plaintiff has achieved a better result in the Judgment than the defendant’s sanctioned payment, one must first consider what the defendant has offered to settle the claim as set out in the Notice, namely the total sum of $672,764.62, and compare this figure with the Judgment Sum. It is artificial and wrong in principle to just compare the Net Award with the sanctioned payment of $150,000.
4. The above is also reinforced by O 22, r 8(2)(d) requiring a notice of sanctioned payment to state whether any interim payment has been taken into account, so that the offeree would not be left in doubt as to the total amount put forward by the offeror to settle the case and evaluate his position accordingly.
5. After all, a sanctioned payment is not made in a vacuum but as part of a defendant’s offer to settle, so the precise basis and terms upon which the sanctioned payment is made must be ascertained.
6. For the above reasons, I take the view that the plaintiff did achieve a more favourable result in the Judgment (namely, the Judgment Sum of $680,633) than the total sum which the defendant has offered to settle as set out in the Notice (namely, $672,764.62).
7. In any event, in exercising my discretion I decline to grant any of the sanctions set out in O 22, r 23 sought by the defendant, guided by the factors set out in O 22, r 23(6) which include:-
8. the terms of any sanctioned payment;
9. the information available to the parties at the time when the sanctioned payment was made; and
10. the conduct of the parties with regard to the giving of information for the purpose of enabling the payment to be evaluated.
11. Given the possible sanctions under O 22, all sanctioned offers and payments must be expressed in clear terms and leave parties in no doubt as to what has been offered, and any party seeking to benefit from his sanctioned offer or sanctioned payment must lay all his cards on the table to enable the other party to properly consider whether to settle.
12. Lord Woolf MR pointed out in *Ford v G K R Construction Ltd & Ors* [2000] 1 WLR 1397 at 1403F-H as follows:-

“If a party has not enabled another party to properly assess whether or not to make an offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have been reached if there had been proper disclosure, that is a material matter for the court to take into account in considering what orders it should make. This is of particular significance so far as defendants are concerned because of the power of the court to order additional interest in situations where an offer by a claimant is not accepted by a defendant. We have to move away from the situation where the litigation is conducted in a manner which means that another party cannot take those precautions to protect his or her position which the rules intend them to have.”

1. Here, the defendant has never notified or warned the plaintiff that it was offering to settle the plaintiff’s claim for a total sum other than that set out in the Notice, namely $672,764.62.
2. Specifically, the defendant has never notified or warned the plaintiff that for settlement purpose the EC Sum would be $554,385.38 and not $522,764.62 in the Notice and the pleadings, when the defendant could do so either by amending the Notice and the pleadings or by way of a simple letter to the plaintiff to clarify the matter.
3. In the premises, the plaintiff was justified in advancing his case all along based on an agreed EC Sum of $522,764.62 (even though the EC Sum agreed at the re-trial was $554,385,38), and adopting this figure the Net Award would come to $157,868.38 which exceeds the defendant’s sanctioned payment of $150,000.
4. In other words, it was not unreasonable for the plaintiff not to have accepted the defendant’s sanctioned payment. It is unjust to grant any of the sanctions sought by the defendant against the plaintiff.
5. For the above reasons, I dismiss the defendant’s summons with costs to the plaintiff, to be taxed if not agreed, with certificate for counsel. There will be legal aid taxation for the plaintiff’s costs.

( Jonathan Chang )

Deputy District Judge

Ms Jennifer Tsui, instructed by Cheng, Yeung & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Ashok Sakhrani, instructed by Munros, for the defendant