## DCPI 1405/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1405 OF 2005

(formerly HCPI No. 792 of 2004)

--------------------

##### BETWEEN

TAI YUK WONG Plaintiff

and

CHONG KWOK FUNG 1st Defendant

KERRY DISTRIBUTION (HONG KONG) 2nd Defendant

LIMITED

--------------------

Coram : Her Honour Judge Yuen in Chambers

Date of Hearing : 8th May 2006

Date of Decision : 8th May 2006

Date of Handing Down of Reasons for Decision : 24th May 2006

Reasons for Decision

1. This is an application by the defendants for leave to appeal against my assessment of the plaintiff’s personal injuries compensation.
2. The grounds of appeal have been set out in their application for leave to appeal. In gist, the defendants are of the opinion that I have erroneously accepted the injuries sustained by the plaintiff to be causal in bringing about the non-renewal of the plaintiff’s contract of employment.
3. The defendants felt I have wrongly acted on the belief that the employer was prevented from assessing the performance of the plaintiff on account of the plaintiff’s sick leave granted since his accident on 29 July 2003 when the defendant had, despite his entitlement of sick leave, resumed work from 13 Jan 2004 to 31 March 2004.
4. While the statement made in the appraisal report of 26/4/04 that “Mr. Tai worked under my supervision from 13.1.2004 to 31.3.2004” was non-specific as to the number of days that the plaintiff had actually worked in the Lease Enforcement team, the plaintiff (through his legal representative in the present hearing) accepted that he did resume work within that period.
5. I do accept I made no reference to the fact that the plaintiff has resumed his duties between 13 Jan 2004 and 31 March 2004, acting on the belief that the plaintiff would have taken his sick leave as recommended by his doctor.
6. Nevertheless it was quite clear from the letter of the plaintiff’s employer of 30 Dec 2003 that the employer’s decision not to further extend the plaintiff’s employment was reached on 30 Dec 2003, prior to the plaintiff’s resumption of his duties in Jan 2004.
7. The employer’s decision (made on 30 December 2003) not to grant further extension beyond 31 March 2004 was made during the time when the plaintiff was taking sick leave from 30 July 2003 to 31 Dec 2003 with the exception of the period from 14/8/03 to 20/8/03 when the plaintiff was at work.
8. The former performance assessment on the plaintiff had been positive. The supervising officer of the plaintiff recommended extension of the plaintiff’s employment contract for continuing service in the plaintiff’s staff report on 5 Feb 2003. The plaintiff’s performance prior to his accident had earned him 3 extensions of his employment for a total duration of 1 ½ years since 19/9/02.
9. The plaintiff’s 5 months sick leave period in 2003 (30/7/03- 13/8/03 & 21/8/03 – 31/12/03) deprived the plaintiff’s employer a proper chance to assess the plaintiff’s performance for almost 5 months prior to 30 Dec 2003.
10. The appraisal officer of the plaintiff wrote on 26/4/04 to state the plaintiff’s performance was satisfactory and recommended the plaintiff for further employment provided vacancies in the Land Executive grade and other related post were available to the plaintiff.
11. On the evidence presented in the hearing the Land Executive post has not been removed from the Lands Department. The non-renewal of the plaintiff’s contract of employment is not on account of the elimination of the Land Executive post. There is no record of sudden deterioration in the plaintiff’s work attitude or performance. The natural inference to accept is the plaintiff’s output at work was lowered on account of his persistent pain, which reduced his relative competitiveness to other land executives, weakening the plaintiff’s position in the selection process for re-employment.
12. The letter of non-renewal dated 30 Dec 2003 as well as the previous letter of non-renewal of 19 June 2002 were worded in similar terms, i.e. that further employment was not available on account of the “existing and projected resource”. Projected resource is always one of the forefront considerations of an employer. The plaintiff was given a total of 1 ½ year’s extension despite the employer’s concern about the projected resources in 2002. The plaintiff’s reduced competitiveness on account of his persistent pain remained a casual and active factor in bringing about the non-renewal of the plaintiff’s employment.
13. Assuming the Court of Appeal were to accept the defendants’ argument about the fact that I have not averred to the plaintiff’s resumption of duties between 13 Jan 2004 and 31 March 2004 and to remit the case back to me for further consideration in light of this fact, I would still have come to same conclusion that the plaintiff’s injuries from his traffic accident and his residuary pain lowered his competitiveness in the selection process for re-employment.
14. I am of the opinion that the intended appeal has no reasonable prospect of success. The present leave to appeal application I decline.
15. Costs to follow event. The plaintiff is entitled to the costs of and incidental to this application with its quantum to be taxed if not agreed.

( M. Yuen )

District Judge

Ms. Cheung Wai Yee of Messrs. Chau & Associates for the Plaintiff.

Mr. Paul Yip instructed by Messrs. Li, Kwok & Law for the 1st and 2nd Defendants.