

Chua Ah Beng v The Commissioner For Labour
[2002] SGHC 197

Case Number : OM 600004/2002
Decision Date : 30 August 2002
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Leslie Netto and S Magintharan (Netto Tan & S Magin) for the plaintiff; Wilson Hue (State Counsel) for the defendant; Michael Eu Hai Meng (ComLaw LLC) for the employers and employers' insurers
Parties : Chua Ah Beng — The Commissioner For Labour

Administrative Law – Judicial review – Application for orders of certiorari and mandamus – Whether to grant such orders in circumstances of case

Employment Law – Commissioner for labour – Workmen's compensation – Plaintiff sustaining injury while at work – Plaintiff claiming compensation under Workmen's Compensation Act (Cap 354, 1998 Ed) – Plaintiff suing employer under common law for damages – Dismissal of plaintiff's suit – Plaintiff declining to require court to assess compensation – Plaintiff seeking to revive statutory claim – Judicial interpretation of the Act – Whether plaintiff can claim under the Act – s 33 Workmen's Compensation Act (Cap 354, 1998 Ed)

Words and Phrases – "if he has recovered damages in respect of that injury in any court from his employer" – s 33(1) Workmen's Compensation Act (Cap 354, 1998 Ed)

Judgment

GROUNDS OF DECISION

1. In Originating Summons No. 601718 of 2001, the above Applicant (hereinafter "the Plaintiff") applied for and obtained the following consent order of Court on 14 January 2002 :

- (1) The Plaintiff be granted leave to issue a notice of motion for an order of certiorari to quash the decision of the learned Commissioner for Labour made on the 27th October 2001 with respect to Labour Case : 00-0236k wherein the learned Commissioner for Labour decided that the Plaintiff was barred from claiming his Workmen Compensation and refused to assess the compensation of the Plaintiff under the Workmen's Compensation Act ("WCA");
- (2) The Plaintiff be granted leave to issue a notice of motion for an order of mandamus directing the learned Commissioner for Labour to reinstate the aforesaid case and to assess the Plaintiff's claim under the WCA;
- (3) The Plaintiff is to file and serve within one week hereof the notice of motion pursuant to this order on the Attorney General's Chambers, the employers of the Plaintiff and the employers' insurers.

2. Following from the above, the Plaintiff filed this Originating Motion seeking the said orders of certiorari and of mandamus and praying that the costs of and occasioned by the motion be taxed and paid by the Defendant.

The Factual Background

3. The Plaintiff, 41 years of age, was employed by C & P Holdings Pte Ltd of 30 Penjuru Lane, Singapore 609197 as a heavy vehicle operator since 1981. In 1998, he was instructed by his employers to operate a heavy Kalmar crane.
4. On 17 March 2000, while he was checking the hydraulic oil pipes of the crane, he lost his balance and fell off an elevated platform

which was some 1.76 m high. He was sent to hospital subsequently where it was discovered that he had fractured C5 and C6 of his spinal cord. He now moves with difficulty and his four limbs are not able to function normally. He also has impaired sensation below the C5 level and has no control over his bowels.

5. The Plaintiff's employers lodged the Notice of Accident with the Workmen's Compensation Department and pursuant to that notice, the Commissioner for Labour assessed compensation at \$139,650 on 7 July 2000. His employers' insurers lodged a notice of objection to the assessment. Having taken legal advice, the Plaintiff also disputed the said assessment on the ground that the amount awarded was too low. His solicitors gave notice of objections on 20 July 2000, within the 14-day period stipulated in section 25 (1) WCA.

6. The Commissioner for Labour then required the Plaintiff to be medically examined by a medical practitioner of his choice for the purpose of re-assessment. Subsequently, the Commissioner for Labour informed the Plaintiff's solicitors that the employers' insurers' specialist report supported the earlier assessment and asked whether the Plaintiff was still disputing the amount assessed.

7. On 25 August 2000, the Plaintiff's solicitors notified the Commissioner for Labour that the Plaintiff had decided to proceed with an action in common law against his employers and asked that "in the premises, kindly allow our client's Workmen Compensation action to be kept in abeyance until the conclusion of the civil matter".

8. On 31 August 2000, the Commissioner for Labour replied :

"Since your client ... wishes to claim damages under the Common Law in respect of the above accident, please note that this office will take no further action on this matter. Please let us know the terms of settlement under Common Law and a copy of the Court Judgement, if any, in due course."

9. On 31 October 2000, an action (Suit No. 909 of 2000) was commenced in the High Court by the Plaintiff against his employers in respect of the accident that occurred on 17 March 2000. Kan Ting Chiu J heard the action and dismissed the claim with costs on 8 May 2001. However, the judge found that the case came within section 33 (3) WCA and asked the Plaintiff whether he wished to have compensation assessed under the WCA. The Plaintiff declined. He then appealed to the Court of Appeal.

10. On 25 September 2001, the Court of Appeal dismissed the Plaintiff's appeal in Civil Appeal No. 600061 of 2001. Section 33 WCA was not raised by the Plaintiff's solicitors before the Court of Appeal.

11. On 27 September 2001, the Plaintiff's solicitors informed the Commissioner for Labour about the outcome of the court proceedings and stated that "in view of the same please note that our client hereby continues with his claim under the WCA for the injuries suffered."

12. The Commissioner for Labour replied on the same day and, after noting the outcome of the court proceedings and pointing out section 33 (3) WCA, stated that "in view of the circumstances, we regret to inform you that your client cannot pursue his claim under the WCA."

13. On 4 October 2001, the Plaintiff's solicitors wrote to explain why they disagreed with the Commissioner for Labour's legal position and asked that the Plaintiff's case be re-assessed.

14. On 27 October 2001, the Commissioner for Labour replied in the following manner:

" 2 . Please be informed that your client is precluded from making an application for compensation under the WCA as he has already instituted an action against the employer under Common Law .

3. Section 33 (3) of the WCA provides an exception to the rule by allowing the claimant to seek compensation under the WCA through obtaining an order from the Court hearing his common law action or appeal when his common law

action or appeal was dismissed.

4. However, we note that your client did not ask the Court hearing his appeal to make an order for compensation under the WCA when his appeal was rejected.

5. In view of the above, we regret to inform that your client has no further recourse under the WCA for his above-mentioned accident."

15. This was followed by the Plaintiff's solicitors' letter of 5 November 2001 in which they reiterated their understanding of the law on the matter and informed the Commissioner for Labour that they would be applying to the High Court for judicial review.

THE PLAINTIFF'S CASE

16. Since it is not in dispute that the Plaintiff suffered the injuries in the course of his employment, section 3 (1) WCA provides that the employer "shall be liable to pay compensation in accordance with the provisions of this Act". The workman has an absolute right to compensation as none of the statutory exceptions in section 3 (5)(a) and (b) WCA (injuries sustained while under the influence of alcohol or non-prescribed drugs or through self-infliction) applies. However, the workman could not recover both damages under common law and compensation under the WCA (section 18).

17. It is clear from Parliamentary debates that the whole purpose of the WCA is to introduce a mandatory insurance scheme which would provide the injured workman statutorily assured compensation. Section 23 (1) WCA thus makes it mandatory for employers to have compulsory insurance to cover their liability under the Act and section 32 WCA provides that insurers are liable to pay the compensation specified in the Act.

18. Section 33 (3) WCA gives the workman a choice whether to ask the Court which dismisses his action to assess his compensation under the Act or to proceed with a claim for compensation to be assessed by the Commissioner for Labour. The WCA does not impose a duty on the workman to ask the Court to assess the compensation when his common law action is dismissed. Failure to proceed under section 33 (3) WCA therefore does not deprive the Plaintiff of his right to compensation under the WCA.

19. The earlier assessment was objected to by the Plaintiff. The assessment was therefore not final. It became dormant when the Plaintiff commenced his common law action. Kan J's decision in dismissing the action proceeded only on the issue of liability and not quantum.

20. Clearly, the Commissioner for Labour's decision on 27 October 2001, affirming the earlier one made on 27 September 2001, is wrong and he should not have refused to assess the Plaintiff's compensation under the WCA.

THE EMPLOYER'S AND THE INSURERS' CASE

21. The Plaintiff is precluded by section 33 (1) WCA from applying for compensation as he has already instituted a common law action against his employers. Section 33 (2) WCA does not prohibit a workman from seeking recourse under common law the moment he makes an application for compensation under the WCA. Instead, his right to commence a common law action revives as soon as he withdraws his application under the WCA. The saving provision in section 33 (3) WCA could no longer apply to the Plaintiff as he has already elected, at the trial and on appeal, not to have his compensation assessed under the Act by declining Kan J's offer and by not requesting the Court of Appeal to make the assessment when his appeal was dismissed by that Court. Further, the Commissioner for Labour, unlike the Court, could not deduct costs from the amount of compensation assessed.

22. To allow workmen to require the Commissioner for Labour to make an assessment after the dismissal of their actions by the Court would open the floodgates and give rise to an escalation of common law claims. Workmen would regard the WCA only as a last resort for compensation. Why would a workman, it was asked rhetorically, opt for compensation under the WCA when he could proceed under common law first and then revert to the WCA if his action turns out to be unsuccessful? The Commissioner for Labour's decision not to assess the claim further could not therefore be impugned.

THE DEFENDANT'S CASE

23. The Commissioner for Labour has consistently taken the position in good faith that he is no longer able to award any compensation once a workman has pursued a common law action against his employers all the way to its conclusion. At that stage, compensation can only be ordered by the Court pursuant to section 33 (3) WCA. If the workman is allowed to bypass that provision, no workman will proceed under it because costs of the common law action would be deducted from the compensation while no set off is allowed against compensation made by the Commissioner for Labour (section 10 WCA).

24. The workman has an "absolute right" to compensation only in the sense that he does not have to prove negligence or other common law liability on the part of his employers. He must still comply with the conditions and the procedure laid down by the WCA.

THE DECISION OF THE COURT

25. Section 11 WCA specifies a one-year limitation period for making a claim for compensation with the possibility of extension where 'reasonable cause' exists. It reads :

"Notice and claim

11.

(1) Except as provided in this section, proceedings for the recovery of compensation for an injury under this Act shall not be maintainable unless –

(a) notice of the accident has been given to the employer by or on behalf of the workman as soon as practicable after the happening thereof; and

(b) a claim for compensation with respect to that accident has been made within one year from the happening of the accident causing the injury, or, in the case of death, within one year from the date of the death.

...

(4) The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, absence from Singapore or other reasonable cause."

26. Section 18 WCA allows an injured workman to take proceedings against a "stranger" (that is, some person other than his employer legally liable to pay damages) and to make a claim under the WCA but prohibits him from recovering both damages and compensation.

27. Section 33 WCA maps out the relationship between a common law action and a claim for compensation under the Act. It states :

"Limitation of workman's right of action

33. (1) Nothing in this Act shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted an action for damages in respect of that injury in any court against his employer or if he has recovered damages in respect of that injury in any court from his employer.

(2) No action for damages shall be maintainable in any court by a workman against his employer in respect of any

injury –

(a) if he has applied to the Commissioner for compensation under the provisions of this Act; or

(b) if he has recovered damages in respect of the injury in any court from any other person.

(3) If an action is brought within the time specified in section 11 in any court to recover damages independently of this Act for injury caused by any accident and it is determined in the action or on appeal that the injury is one for which the employer is not liable but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court shall, if the workman so chooses, proceed to assess the compensation and may deduct therefrom all or any part of the costs which, in its judgment, have been caused by the workman instituting the action instead of proceeding under this Act.

(4) In any proceedings under subsection (3) when the court assesses the compensation, it shall give a certificate of the compensation it has awarded and the direction it has given, if any, as to the deduction of costs and such certificate shall have the same effect as a judgment of the court."

28. Various authorities from the United Kingdom, Malaysia and India were cited by the Plaintiff and the Defendant. These deal with their equivalent of our WCA. I think it is sufficient to focus our attention on the decision of our Court of Appeal in *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1984]1 MLJ 104 and use it as the starting point for any discussion on the meaning of section 33 WCA.

29. In that case, an injured illiterate workman claimed that he had not applied for compensation under the WCA as he had affixed his right thumbprint to an application form under the misrepresentation that it was an acknowledgement slip. Two preliminary issues were tried before the High Court, the first pertaining to a question of fact and the second relating to a question of law. On the first question whether the workman had, on the evidence, made an application for compensation under the WCA, A. P. Rajah J found that he had not. On the second issue, the judge was of the view that "a workman's unilateral voluntary application for compensation under the Act can in the same way voluntarily and unilaterally be withdrawn by the workman thus enabling him to proceed and so maintain his action for damages in any Court".

30. The Court of Appeal agreed with the trial judge's conclusion on the factual issue. Addressing the employers' counsel's submissions that the mere application to the Commissioner for Labour by a workman operated to abrogate the workman's cause of action at common law for damages and that once an application had been made, it could not be withdrawn, the Court of Appeal said :

"Section 33 provides for a limitation of the workman's right of action but it does not specifically say that the workman's common law right of action for damages is automatically extinguished if he applies to the Commissioner for compensation under the Act. What it does say is that a workman shall not maintain an action for damages if an application for compensation has been made by him to the Commissioner.

It seems to us that it was never the intention of the legislature to deprive a workman of his common law rights against his employer. The scheme of the Act is not to abrogate a workman's common law cause of action but to enable him, if he wishes, to get a speedy remedy for the injury suffered by him. The Act sees to it that he does not get a double benefit – both compensation under the Act and damages under the common law for the one injury (Sec. 18).

A workman's cause of action in tort against his employer immediately vests in him under the common law and he has the right to bring proceedings in the court and this right continues in him until such time as he may be debarred from doing so by the law of limitation.

Under section 33 (1)(a) the worker is debarred from bringing a common law action for damages so long as there is an application by the workman before the Commissioner for compensation. But this debarment in no way affects the cause of action already vested in him. The Act does not prohibit the withdrawal of the application for compensation. As soon as the application for compensation is withdrawn, the right to maintain an action revives and the workman can then proceed with his action for damages in the court. The workman's right to compensation under the Act lies dormant while he pursues his common law action but should he lose the action he may choose to ask the court, under section 33 (2), [now section 33(3)] to assess compensation under the Act.

The Act does not expressly declare that an application to the Commissioner for compensation under the Act ipso facto abrogates a workman's common law right for damages.

We are in agreement with the learned Judge that the workman can withdraw his application for compensation under the Act and proceed and maintain his action for damages in the courts."

31. In my view, the following points emerge from the WCA and the above decision:

- (1) a workman may sue a "stranger" and make a claim under the WCA at the same time but may not be compensated twice for the same injury (section 18 WCA);
- (2) a workman may not make a claim under the WCA if he has sued his employer in Court [section 33(1)];
- (3) a workman may make a claim under the WCA if he discontinues his action before it has been determined by the Court. This is the logical converse of the situation in the *Ying Tai Plastic* case;
- (4) a workman may not make a claim under the WCA once he succeeds in his Court action against his employer [section 33 (1)]. Although the words "if he has recovered damages in respect of that injury in any court from his employer" could be interpreted to mean that the prohibition applies only when he has received the full monetary award of the Court, I think that the better view is to treat the cut-off point as the time of pronouncement by the Court in the workman's favour, regardless of whether the workman is ultimately able to get his employer to pay the damages awarded;
- (5) a workman may not sue his employer in Court if he has made a claim under the WCA [section 33 (2)(a) WCA]. The prohibition is against even commencing a Court action and then holding it in abeyance;
- (6) a workman may sue his employer in Court if he withdraws his claim under the WCA before it has been determined (the *Ying Tai Plastic* case);
- (7) a workman may not sue his employer in Court once he succeeds in his claim under the WCA. This is the logical follow-up from (5) and (6) above;

(8) a workman may not sue his employer in Court once he succeeds in his Court action against someone other than his employer in respect of the same injury [section 33 (2)(b) WCA]. The comments I have made earlier on the words "if he has recovered damages" apply here as well;

(9) a workman who fails in his Court action against his employer or in the appeal therefrom may require the trial Court or the appellate Court, as the case may be, to assess the compensation which would have been payable under the WCA. This is subject to the following conditions :

(a) the Court action must have been brought within the one-year period specified in section 11 (1)(b) WCA;

(b) the Court may deduct from the compensation amount some or all of the costs incurred in the Court action which are payable to the employer. This creates an exception to section 10 WCA which prohibits any set off to be made against any compensation payable to the workman;

(10) if the workman in (9) above so chooses, he may make a claim under the WCA. This is subject to the following :

(a) his claim is made within the one-year period specified in section 11 (1)(b) WCA; or

(b) he manages to persuade the Commissioner for Labour that the failure to make the claim within the said period was occasioned by mistake, absence from Singapore or other reasonable cause [section 11(4) WCA].

32. In my opinion, it is not clear from the provisions of the WCA whether or not a workman who has made a claim under the WCA but fails in that claim may then commence an action in Court against his employer. If his only recourse is to appeal to the High Court against the decision of the Commissioner for Labour pursuant to section 29 WCA, what is the legal position if the High Court dismisses his appeal? I note that the *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia* by Michael F Rutter (1993, 2nd edition) at [1323](d) has the following proposition for which the author says support may be found in section 33 WCA :

"If the plaintiff fails in a statutory claim (or a common law action), he can then pursue the other remedy."

33. On 19 October 1971, the Minister for Labour, in moving the second reading of the Workmen's Compensation (Amendment) Bill, stated in Parliament :

"... the most important amendment to the Ordinance relates to the quantum of workmen's compensation. I would like to stress that the Ordinance is an essential piece of legislation which assures the workers that, in the event of accidents arising out of or in the course of employment, they or members of their families would be compensated financially."

Bearing this in mind, I am more inclined to hold the view that a workman who has applied for compensation under the WCA but fails in his claim (whether before the Commissioner for Labour or on appeal) may then commence an action against his employer.

34. I appreciate the force of the arguments of the Defendant and of the Employers/Insurers that the WCA seeks to avoid double proceedings and double recovery and that assessment by the trial/appellate Court under section 33 (3) WCA should be the last recourse for an injured workman. However, section 33 (3) WCA clearly confers on the workman who is unsuccessful in the Court action/appeal a choice whether to ask the Court to assess the compensation. The question immediately arises, what if the workman decides not to so ask the Court? What is the alternative contemplated by the WCA? According to the reasoning of the Defendant and of the Employers/Insurers, there is no alternative – either he accepts the compensation assessed by the Court or he takes nothing at all. Why would a workman elect to take

nothing? Could it be because he believes the costs of the Court proceedings would wipe out any compensation? If that is the case, surely he could at least try to persuade the Court not to set off the costs against the compensation in that event. After all, the Court has the discretion whether to deduct all or any part of the costs [section 33 (3) and (4) WCA]. I am not persuaded that the WCA intended to confer on the workman Hobson's choice. The logical answer must therefore be, the workman may proceed to make a claim under the WCA in the usual way if he prefers the assessment to be done by the Commissioner for Labour. Of course this is subject to what I have set out earlier concerning the one-year period for making such a claim and the other procedural requirements.

35. The Court in *Jeremiah Depuis v Haulbowline Industries Limited* [1964] IR 341, when confronted with the words "if the plaintiff so choose" in their equivalent of section 33 (3) WCA, said:

"It was also submitted that the words, 'if the plaintiff so choose', in sub-s 3 of s 60, indicate that the workman is free to commence separate proceedings under the Act, thus avoiding the sanction of a deduction in respect of the employer's costs of the unsuccessful action. These words, I agree, do perhaps create some difficulty; but the difficulty is as nothing when set beside the difficulty which the respondent's construction would create. The Act, at s 72, prohibits any claim being set off against a weekly payment under the Act. Sub-sect 3 of s 60 modifies this provision to the extent indicated in the sub-section. This modification is fair in all the circumstances. The respondent's construction would render sub-s 3 valueless and nugatory – in effect, strike it from the Act."

As I have said earlier, the Court retains the discretion whether to deduct costs and if so, how much thereof, from the compensation. Since the provision on deduction of costs is not mandatory, I respectfully disagree that the interpretation put forward by the Plaintiff in the present case would render our section 33 (3) WCA valueless and nugatory. The employer is also not barred from enforcing any order as to costs made in his favour in some other way.

36. My attention was also drawn to the Official Report of Parliamentary debates on 28 November 1980 where the Acting Minister for Labour, in moving that the Workmen's Compensation (Amendment) Bill be read a second time, said :

"Finally, section 33 (2) [now section 33 (3)] of the WCA allows a workman to claim compensation, having failed in his claim at common law, provided he filed his common law claim within the time specified in section 11, that is, six months from the happening of the accident. A number of claimants have indicated that this period gives them very little time to decide whether to claim at common law or under the Act. Clause 3 of the Bill, therefore, seeks to extend this period from six months to one year."

With respect, I do not think it can be said (I quote from the Defendant's submissions) that "it is clear from the above quote that Parliament takes the position that a workman who has lost his common law action can claim compensation only if he complies with the then section 33 (2) [now section 33 (3)]. It would follow that section 33 (3) is the only avenue open to such a workman". The Acting Minister for Labour was merely explaining why the period of time specified in section 11 should be extended to the present one year. I do not see how that part of his speech supports the Hobson's choice argument advanced.

37. I therefore hold that the workman in the present case may still apply for compensation under the WCA (if he is able to comply with the conditions in the WCA) and that section 33 (3) WCA gives him the choice to have the compensation assessed by the Court or by the Commissioner for Labour. I would qualify the "no double proceedings, no double compensation" principle advanced in submissions to read as "no concurrent proceedings, no double proceedings when workman succeeds, no double compensation".

38. The matter does not end here. The Plaintiff is asking the Court to order the Commissioner for Labour to reinstate and to assess his claim. The Defendant very candidly informs me that the practice adopted thus far is to allow applications under the WCA (such as the Plaintiff's in this case) to lie dormant while the workman pursues his remedy in Court. This practice obviously cannot stand in the light of what I have said about section 33 (2)(a) WCA. As long as an application exists before the Commissioner for Labour, whether it is active or

dormant, the Plaintiff cannot maintain his action in Court. In the *Ying Tai Plastic* case, the Court of Appeal said the "right to compensation under the Act lies dormant while he pursues his common law action." It is the "right to compensation" and not "the claim filed" that lies dormant. The Court of Appeal also made it clear that the right to maintain a court action revives only when the application under the WCA is withdrawn.

39. I accept that no objection was taken on this point in the earlier Court proceedings and that the Plaintiff was not put to an election of remedies. However, section 33 (2)(a) WCA is a mandatory statutory bar to Court proceedings. The only logical solution in these circumstances is to hold that the Plaintiff is deemed to have withdrawn his claim under the WCA when he informed the Commissioner for Labour that he was going to commence an action in Court. There is therefore no application before the Commissioner for Labour to restore for assessment and no order of certiorari or of mandamus will therefore be made. The Plaintiff is out of time under section 11 (1)(b) WCA but he has the avenue open to him in section 11 (4) where he can seek to persuade the Commissioner for Labour to excuse the delay within the terms of that provision. I add here that the withdrawal of an earlier application under the WCA should not be a bar to a further application if it otherwise complies with the WCA.

40. The Plaintiff has succeeded where the construction of section 33 (3) WCA is concerned but has failed in his application to obtain the remedies prayed for. The points raised by all parties are important and the arguments put forward have been fair. I also have no doubt that the position taken by the Commissioner for Labour in this case is taken in good faith. In the circumstances, I make no order as to costs for these proceedings.

Sgd:

TAY YONG KWANG

JUDICIAL COMMISSIONER