Xuyi Building Engineering Co *v* Li Aidong and another and another appeal
[2010] SGHC 236

Case Number	: District Court Appeal Nos 49 of 2009 and 4 of 2010
Decision Date	: 17 August 2010
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Steven Lee and Alvin Chia (Hilborne & Co) for the Appellant in DCA 49 of 2009 and Respondent in DCA 4 of 2010; K Subramanian and N Srinivasan (Hoh Law Corporation) for the Respondents in DCA 49 of 2009 and Appellants in DCA 4 of 2010.
Parties	: Xuyi Building Engineering Co — Li Aidong and another

Employment Law

17 August 2010

Kan Ting Chiu J:

1 The two appeals before me originated from claims by two employees, namely Li Aidong and Xu Yuecheng (collectively "the employees"), against their former employer, Xuyi Building Engineering Co ("Xuyi") for non-payment of their salary in arrears, overtime pay, additional payments for work during work on public holidays and rest days, and unauthorised deductions of salary during their period of employment. In the same action, Xuyi counter-claimed that the employees had terminated their employment without adequate notice and claimed against them for payment in lieu of notice.

2 The claims and counter-claims were dealt with under Part XV of the Employment Act (Cap 91, 2009 Rev Ed) ("the Act") and were heard by an Assistant Commissioner of Labour (the "AC"). On the employees' claims, the AC held that the salary system by which Xuyi was to pay the employees was time-based and consequently, the employees were entitled to additional payments for overtime work, and work on public holidays and on rest days. Conversely, the AC found that Xuyi was entitled to payment in lieu of notice as the employees failed to give sufficient notice before they left their jobs. Dissatisfied with the AC's decision, both sets of parties appealed.

Facts

3 On 1 March 2008, the China Shanghai (Group) Corporation for Foreign Economic and Technological Cooperation (the "China Agent") signed an agreement with Xuyi whereby the China Agent was to recruit Chinese workers for Xuyi.

4 The two employees were recruited by the China Agent, and they came to Singapore and to work for Xuyi. Under the employment agreements, Xuyi was to pay the employees under a "Job Value System" ("JVS"). The system which was set out in cl 3.1 of the employment agreement was that:

> 3.1 [Xuyi] mainly enforces the by the job salary system based on teams and groups as the unit or the by the time salary system based on the quantity of projects taken up and completed. The by the job salary quota or the quota of quantity of the project taken up and completed shall be executed in accordance to the regulations by the employer. The salary shall be determined based

on a combination of the quota [the employee] completed, the working attitude and the quality of the project completed. On the premise of a perfect work record attendance record, the monthly salary shall be around S$1250 to S$1500 (including perfect work attendance award). Due to the execution of the by the job salary system and the quantity of projects taken up and completed, [the employee] shall not enjoy the benefit of annual paid leave and medical paid leave

The average salary standard for the worker of the entire company is $1375 every month

Xuyi's explanation of the implementation of the system is set out in [10] hereof.

5 After working for about a year, the two employees decided to leave their jobs, but they did not give sufficient notice of termination as required by s 10 of the Act. Instead, they lodged claims with the Commissioner of Labour for arrears of salary, and Xuyi counterclaimed from them payment in lieu of notice under s 11 of the Act.

Issues on appeal

6 There are five main issues in these appeals before the court:

(a) Whether the JVS was a time-based or task-based payment system for the purpose of the Act;

(b) Whether the employees were entitled to additional payments for overtime work and work during public holidays and rest days;

(c) What was the employees' basic rate of pay;

(d) Whether the employees were entitled to be paid for the half-hour safety meetings that they were required to attend; and

(e) Whether Xuyi was entitled to payments for salary in lieu of notice.

Time-based or task-based system of payment

7 In a time-based system, an employee is paid on an agreed amount for a period of work, *e.g*. $X an hour, and for task-based work, an employee is remunerated with an agreed amount for a specific task, *e.g*. $X for tiling a room. The distinction between the systems was important in the dispute between Xuyi and the two employees because an employee paid on a time-based system is entitled to additional payments for overtime work and work on rest days under ss 37 and 38 of the Act.

8 However, s 39 of the Act exempts an employer from paying the additional payments for task-based work. The provision states:

Task work

> 39. Nothing in this Part shall prevent any employer from agreeing with any employee that the salary of the employee shall be paid at an agreed rate in accordance with the task, that is, the specific amount of work required to be performed, and not by the day or by the piece.

Sections 37, 38 and 39 are within Part IV of the Act which applies to workmen and employees who come under s 35 of the Act. The effect of s 39 of the Act is that where a payment is agreed for a task, the worker shall be entitled to the agreed payment, but shall not be entitled to overtime or rest day payments.

9 In the hearing before the AC, Xuyi contended that the JVS was akin to that of the task work regime under s 39 of the Act and as such it was exempted from making additional payments for overtime work and work on rest days. The employees, on the other hand, contended that they were remunerated on a time-based system, with an expected monthly salary of $1,250 to $1,500 referred to in cl 3.1 of their agreements, and that they were therefore entitled to additional payments for overtime work and work on rest days, and public holidays.

10 Xuyi had argued that a task-based system was in operation. The evidence adduced by Xuyi was that:

> The workers are divided into groups of 2 to 5 persons initially. Each group will be allocated jobs at the beginning of the day. For example, the job is to construct a staircase from level 3 to level 4 and a group of 5 workers are assigned to this job. If the job can be completed within a day and the value of the job is $300.00, this amount will be shared among them, not equally, but based on each worker's contribution using hours of work for calculation

but it did not produce record of any agreement between it and the employees whereby the latter agreed to perform a task for an agreed sum before work commenced.

11 This absence of evidence lead to the AC to hold that:

> I am of the view that Section 39 is not applicable in this case because there was no agreed rate for the job upfront and the amount of work to be done was also not specified.

12 The AC was correct in this finding. In order to classify a remuneration system as task-based, the two essential elements must be identified: first, the task or job to be performed, and second, the amount of payment for the performance of that task. The system described by Xuyi did not show that the workers had the opportunity to agree on the payment for the task. For there to be a proper task-based agreement, the employees should be told in advance about the task involved, and the payment offered. It is not sufficient that they be informed at the beginning of the day; the employees must have the time to agree to the task and the payment. It is significant that Xuyi's account of the system referred to notification of the task and the value, but not the employees' acceptance.

13 Employers are entitled to take advantage of the task work system to avoid having to make the payments prescribed in Part IV of the Act, but they must observe the letter and spirit of s 39 of the Act. In view of the disparity between parties in bargaining power, employers cannot contrive superficial task-based arrangements to deprive their employees of the additional payments. Task work systems should only be given effect to where the tasks and payments are clearly set out, and the employees have accepted them before undertaking the task.

Additional payments

14 With the finding that the JVS was not task-based, Xuyi has to make additional payments for overtime work and work on rest days provided in Part IV of the Act.

15 There is another form of additional payment which the employees had claimed, *i.e.* work on public holidays. Section 88(4) of the Act provides that:

> [A]ny employee may be required by his employer to work on any holiday to which he would otherwise be entitled under that subsection and, in such event, he shall be paid an extra day's salary at the basic rate of pay for one day's work in addition to the gross rate of pay for that day and to a travelling allowance, if payable to him under the terms of his agreement with his employer, for one day.

16 Section 88(4) is not within Part IV, and is in Part X of the Act which applies to all employees who come under the Act. This provision was previously s 44 of the Act and came under Part IV of the Act but moved out of it when the Act was amended in 2008.

17 Mr Gan Kim Yong, Acting Minister of Manpower explained in the Parliamentary debates on the amendment that:

> [T]his Bill will enhance employment standards and benefits, and keep pace with employment practices. Paid public holidays and sick leave are well-established industry norms provided by nearly all employers. However, the Act currently only prescribes these benefits for those employees covered under Part IV. Clause 28 will extend these benefits to all employees covered under the Act. This amendment will maintain the flexibility of employers requesting employees to work on public holidays for an extra day's wage, or substitute a public holiday with another working day.

18 It would appear that public holiday payments are due under a task-based system if an employee is required to work on a holiday. However, it is unclear how the payment is to be computed as "day's salary" as contemplated in s 88(4) of the Act is set in a task-based system of payment. Perhaps the parties can circumvent this difficulty by agreeing on a "day's salary" to be used for this purpose.

Basic rate of pay

19 Having established that additional payments are to be made to the employees, the two employees' basic rate of pay has to be determined. The employees contended that the basic hourly rate should be calculated with reference to the range of $1,250 to $1,500 as set out in cl 3 of the employment agreement. The employees took the low end of the range, $1,250, multiplied it by 12 months, and divided the result by the 52 number of weeks in a year and the 44 hours of work in a week, borrowing the formula set out in s 38 (6)(a) of the Act. Under this formula, the basic hourly rate is $6.56 per hour.

20 Xuyi argued that the formula cannot be used to compute the basic rate of pay because the $1,250 mentioned in cl 3.1 was the monthly salary on "a perfect work attendance record", which would include overtime work and overtime payments.

21 If the salaries of the workers were to be decided as time-based, another clause in the employment agreement, cl 3.2, should apply. Clause 3.2 states:

> Employer shall under normal circumstances not execute time based system. The employer shall

> have the right to arrange or not to pre-arrange [the employees] to undertake work base on the time based system. The standard work time shall be 20 Singapore Dollars for every working day of 8 hours that is, 2.5 Singapore Dollars every hour. For the convenience of calculation, time based salary standard shall be calculated according to the length of time that [the employee] is at work and use the salary standard of 28 Singapore Dollars for every working day of 8 hours or a salary standard of 3.5 Singapore Dollars every hour. This is a salary standard of average hours and this standard has already included and taken into a round up consideration on the situation of the workers working overtime and working during public holidays. The workers shall not make additional request for any overtime salary or allowance. At the same time, this salary standard had already included and taken into consideration of the living expenses of the workers during their stay in Singapore and the management fee in the domestic country.

Although two rates were spelt out, only one could be applied. There were no obstacles to the parties agreeing that the basic hourly rate of pay is to be $2.50. However, the alternative rate of $3.50 computed on the "salary standard" that purported to be inclusive of overtime work and work during public holidays was inconsistent with s 38(4) and s 88(4) of the Act and was inapplicable.

22 The AC did not use the prescribed $2.50 hourly rate and encountered difficulties in arriving at the basic salary. He stated in his grounds of decision:

> [T]here is no formula in the Employment Act for the computation of basic salary. The most appropriate formula that can be applied with modification is under Section 38(6)(b) ...

(Section 38(6)(b) of the Act sets down the formula for working out overtime payment for employees employed on piece rates, and it takes into account the weekly pay the employee receives.)

23 The AC modified the formula to use the agreed monthly pay instead of the weekly pay contemplated by s 38(6)(b) of the Act, and overlooked the fact that the payments of the two employees were not piece-rated. Well-intended as it was, the AC's methodology was not acceptable. The payments must be worked out in accordance with the provisions of the Act. Extra-legislative improvisations cannot be employed. In this case, it was also unnecessary because the basic rate of pay of $2.50 an hour set out in the employment agreement should be used.

24 After I made my finding that the employees are to be paid on a time-based basis at the basic rate of $2.50 per hour, I directed counsel for the parties to work out the amounts that were due to the two employees, including the additional payments. Ironically, it turned out that Xuyi had paid the two employees slightly more under the JVS than it would have paid on the time-based system.

Half-hour safety meetings

25 This issue arises from the half-hour safety meetings that the employees were required to attend before the start of work each day. The AC found that the employees were to be paid for their attendance at these meetings. Section 2(1) of the Act defines "hours of work" as:

> [T]he time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements exclusive of any intervals allowed for rest and meals

As the employees were required by Xuyi to attend the meetings, the half-hours involved were working time. The AC's finding was absolutely correct.

26 There was another aspect of the AC's ruling on the meeting hours that called for attention.

After he found that the half-hour meeting time was working time, he added a half-hour to each day, although the half-hour was already clocked on the employees' time cards and regarded as working time. The correct position is for the clocked times to be used, without the reduction of a half-hour as Xuyi proposed, and without adding another half-hour.

Payment in lieu of notice

27 In the proceedings below, Xuyi counter-claimed against the employees for payments of salary in lieu of notice. While Li indicated to Xuyi his doubts over continuing his employment, Xu left Xuyi's employment without any word. If the employees were obliged to give notice, the full statutory period of notice was not fulfilled because s 11(1) of the Act provides that:

> Either party to a contract of service may terminate the contract of service without notice or, if notice has already been given in accordance with section 10, without waiting for the expiry of that notice, by paying to the other party a sum equal to the amount of salary at the gross rate of pay which would have accrued to the employee during the period of the notice and in the case of a monthly-rated employee where the period of the notice is less than a month, the amount payable for any one day shall be the gross rate of pay for one day's work.

28 The issue in this case was whether the employees were entitled to terminate their employment without notice. Section 11(2) of the Act provides that:

> Either party to a contract of service may terminate the contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

The employees argued on appeal that they were not required to give notice of termination under the Act since Xuyi committed a fundamental breach of their employment contract by refusing to pay them for salary for four months that was owed to them.

29 In response, Xuyi stated that cl 3.4 of the agreement provided that the salaries were only paid to the workers after every three months of work, and were on every fourth month. Insofar as the payment periods were expressly spelt out and were not in contravention of the Act, Xuyi was not in breach of the contract in the scheduling of the payments.

30 Xuyi's breach was that it failed to compute the employees' payments in compliance with the Act, and that can bring s 11(2) of the Act into play. The provision refers to "any wilful breach" of a condition of the contract of service. Counsel for the employees equated that to a fundamental breach. I do not think that was apt, and I would consider a wilful material breach would suffice. Sections 37, 38 and 88 of the Act apply to the employment agreements and operate as conditions of the agreements. A considered decision not to pay an employee in accordance to those provisions of the Act is a wilful material breach. Accordingly, the employees did not have to give notice of their resignation.

Conclusion

31 I ordered that:

(i) the employees were entitled to payment to be computed on the basic rate of $2.50 per hour together with the additional payments. (I did not order the excessive payments to be refunded because Xuyi had not claimed for any repayment and because it was solely responsible for making the payments.)

(ii) the AC's order of payment in lieu of notice of termination by the two employees be set aside, and

(iii) the parties are to bear their own costs in the appeals.

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