IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 95

Community Justice and Tribunals Appeal No 1 of 2019

Between

Lai Kwok Kin

… *Appellant*

And

Teo Zien Jackson

… *Respondent*

JUDGMENT

[Tort] — [Harassment] — [Protection order]

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Lai Kwok Kin
v
Teo Zien Jackson

[2020] SGHC 95

High Court — Community Justice and Tribunals Appeal No 1 of 2019
See Kee Oon J
13 March 2020

12 May 2020 Judgment reserved.

See Kee Oon J:

Introduction

1 This is an appeal against the decision of the District Judge ("the DJ") in *Lai Kwok Kin v Teo Zien Jackson* [2019] SGDC 276 ("the decision below") dismissing the appellant's application for a protection order ("PO") under s 12 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) ("POHA").

2 Section 12(2) of the POHA provides that a victim of harassment under ss 3 to 7 of the POHA can obtain a protection order ("PO") from a District Court provided that the court is satisfied on a balance of probabilities that:

> (a) the respondent has contravened ss 3, 4, 5, 6 or 7 of the POHA in respect of the victim (see s 12(2)(a) of the POHA);

(b) the contravention referred to in paragraph (a) is likely to continue, or the respondent is likely to commit a further contravention of ss 3, 4, 5, 6 or 7 of the POHA in respect of the victim (see s 12(2)(b) of the POHA); and

(c) the grant of a PO is just and equitable in all the circumstances (see s 12(2)(c) of the POHA).

3 In the proceedings below, the DJ declined to grant a PO on the basis that the threshold requirements under ss 12(2)(b) and (c) of the POHA had not been satisfied. Before me, the appellant contended that the DJ had erred in finding that the respondent's contravention was not likely to continue and that, accordingly, it would have been just and equitable to grant a PO.

4 Having heard the parties' submissions, I dismiss the appeal. I set out my reasons below.

Facts

The parties

5 The appellant is the managing director and founder of WeR1 Consultants Pte Ltd ("WeR1"). WeR1 is a financial communications company which is primarily engaged in raising the profiles of listed and unlisted companies to (a) financial and business media, and (b) the investment community. WeR1 also provides litigation public relations services. These services include advising their clients on media perception, potential questions from the media and how best to answer these questions.

6 The respondent is a former employee of WeR1. Prior to his employment with WeR1, he had studied and worked in the United States. He returned to

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Singapore in late 2017 and carried out ad hoc freelance writing projects before securing a job with WeR1.

Background to the dispute

7 The respondent started work with WeR1 on 18 May 2018. Shortly after commencing employment, the respondent had a run-in with two of WeR1's interns. This led to a meeting on 28 May 2018 between the respondent, the appellant, WeR1's Human Resource manager, and one Sarinderjit Kaur ("Ms Kaur"), the plaintiff's wife and co-director.

8 After this meeting, the respondent decided to resign, giving two weeks' notice as required under his employment contract. He notified Ms Kaur of his intention to do so via a Whatsapp message on 29 May 2018. The respondent was subsequently informed that WeR1 would accept his resignation but would not be paying him seven-days' worth of salary, notwithstanding that he had reported to work for the past seven days.

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9 On 30 May 2018, the respondent sent an e-mail to several of WeR1's staff members, including the appellant. In the e-mail, the respondent threatened the appellant as follows:

> … [I] cannot let you get away this time with this, its [*sic*] for your own good. you need to learn.
>
> now, I will not publicize this to your clients no matter what.
>
> …
>
> i will be going to MOM tomorrow afternoon. just FYI. please do the right thing. KK… life can be very simple. I mean no ill intentions – actually, what i am telling you to do now is even a matter of course – both legally and professionally. it is very clear.. or it should be, to any educated mind who is being very childish here.[1]

10 On 31 May 2018, the respondent sent a further e-mail to the appellant using another e-mail account. In this e-mail, the respondent suggested that the appellant was a "pig-headed" and "self-dece[iving]" person who made unintelligent arguments. The respondent also proclaimed that, armed with "official documentation" from the Ministry of Manpower, he could scan and paste a "government edict" on the appellant's Jobstreet or Facebook page, and send it to all the appellant's clients – but that he would not do so.[2]

11 On the same day, the respondent lodged a claim with the Ministry of Manpower against WeR1 for salary in-lieu of notice.

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1 Appellant's Bundle of Documents ("ABD") at p 142

2 ABD at pp 143-145

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12 On 4 June 2018, WeR1's solicitors sent a letter of demand to the respondent warning him to cease and desist from communicating with WeR1 or its staff, failing which legal proceedings would be commenced against him.

13 The respondent received the letter of demand on 7 June 2018. On the same day, he sent a Short Message Service ("SMS") message to the appellant saying "Btw kk … I just received ur nonsensical lawyers letter. First of all… go ahead n sue me already…" and "Btw … check ur facebook page tonight".[3] He then proceeded to post adverse reviews of WeR1 on its Facebook page and on Google Reviews. In these posts, the respondent referred to the appellant by his initials ("KK") and criticised him by claiming, *inter alia*, that the appellant "contradicts himself when it suits the whims of his mood".[4]

14 The respondent also created a blog entitled "WeR1 Consultants" and posted a text post entitled "A Cautionary Tale" on that blog. The contents of this blog post were largely similar to the contents of the respondent's adverse reviews.[5]

15 Shortly thereafter, WeR1 disabled the reviews on its Facebook page, such that the respondent's Facebook review was no longer accessible by members of the public.

16 On or around 9 June 2018, the respondent deleted his Google review on his own accord. He also voluntarily deactivated his Google Plus account, on the

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3 ABD at para 68

4 ABD at p 149

5 ABD at pp 156-158

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assumption that this would cause his blog post to be deleted as well.[6] The respondent then sent an e-mail to the appellant informing him that he had removed the adverse reviews and wished to resolve the dispute as soon as possible. The concluding paragraphs of this e-mail read: [7]

> [A]s a gesture of goodwill, i have already taken down the reviews. i only meant to send a message, whcih [*sic*] is that I really do not want to have to drag this out – but would be inclined to do what i have to do in protecting my rights if i really have no other choice.
>
> …
>
> I honestly hope we can just settle this asap. i have already found another job.. and everything else in my life except for this issue is going well. again, there really is no need for vindictiveness on either party. thanks.

17 Between 9 June 2018 and 18 June 2018, there were no further communications between the respondent and the appellant, or between the respondent and any of WeR1's staff members. On 12 June 2018, the appellant reported the respondent's blog to the blog administrators for harassment and/or bullying. On 18 June 2018, the appellant commenced DC/PHA 69/2018, seeking a PO under s 12 of the POHA to prohibit the respondent from doing the following things in relation to the appellant:

> (a) using threatening, abusive or insulting words or behaviour and/or making/publishing any threatening, abusive or insulting communication (including but not limited to any words, image, message, expression, symbol) causing harassment, alarm and/or distress to the appellant; and

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6 ABD at p 14, paras 47 to 48

7 ABD at p 148

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(b) using threatening, abusive or insulting words or behaviour and/or making/publishing any threatening, abusive or insulting communication (including but not limited to any words, image, message, expression, symbol) which is heard, seen or otherwise perceived to cause harassment, alarm and/or distress to the appellant.

Events following the commencement of the action

18 On the same day that the action was commenced, the appellant applied for and obtained an expedited protection order ("EPO") against the respondent. The parties then attended several pre-trial conferences ("PTCs") before the Deputy Registrar.

19 During the PTC held on 13 August 2018, the respondent was informed by the appellant that (a) his blog post remained live even though he had deactivated his Google Plus account; and (b) his Facebook review had not been taken down from WeR1's Facebook page. In response, the respondent stated that he was prepared to remove both reviews. As such, the appellant directed his colleague to re-activate WeR1's Facebook review tab so as to facilitate the removal of the Facebook review.

20 On the same day, the respondent took down his blog post. However, as the Facebook review still had not been removed two days after the PTC, the appellant assumed that the respondent was unwilling to take down the Facebook review and instructed his colleague to disable WeR1's Facebook review tab again.

21 The appellant also took issue with the fact that Google searches against the respondent's defunct blog continued to show the following caption: "Why WeR1 Consultants is the worst PR agency in town". To resolve this problem,

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the respondent wrote to Google and blogger.com on 20 November 2018 and 4 December 2018 respectively to request for the removal of the cached link to the respondent's blog from the Google search engine.

22 As the parties were still unable to reach a compromise, the case proceeded to trial.

The decision below

23 In the decision below, the DJ held that the respondent's conduct contravened ss 3 and 4 of the POHA as his instant messages, e-mail messages, online reviews and blog post had been intentionally created to harass the appellant, and had in fact caused him to suffer harassment, alarm and distress. The DJ also found that the respondent's conduct had "gone beyond the ambit of reasonable conduct". Accordingly, the first threshold requirement under s 12(2)(a) of the POHA was satisfied.

24 The DJ then proceeded to consider the second threshold requirement under s 12(2)(b) of the POHA and found, on a balance of probabilities, that the respondent's contravention was not likely to continue. In arriving at this conclusion, the DJ took into consideration the following:

(a) The respondent had failed to remove his Facebook review because he had not been able to access the review tab on WeR1's Facebook page. He did not know that the review tab had subsequently been re-activated for him to delete his Facebook review.

(b) The cached link to the respondent's deactivated blog was effectively a dead link. Whilst the cache did reveal the caption "Why

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WeR1 consultants is the worst PR agency in town", this caption was not insulting, threatening or abusive vis-à-vis the appellant.

(c) All things considered, the respondent had tried his level best to resolve the matter and appease the appellant.

25 Correspondingly, the DJ found that granting a PO would not be just and equitable under s 12(2)(c) of the POHA. While the respondent's communications and conduct amounted to harassment, the offending communications had stopped by 9 June 2018 and the remnants of the respondent's online posts/reviews (with the exception of the hidden Facebook review) had been removed by December 2018. Furthermore, there was no evidence that the respondent's actions had caused any major emotional or psychological impact on the appellant.

26 The requirements under s 12(2) of the POHA are conjunctive in nature. As such, the appellant's application for a PO necessarily failed since he had not met the requirements under ss 12(2)(b) and (c) of the POHA.

The parties' cases on appeal

The appellant's case

27 On appeal, the appellant focused his submissions on the DJ's interpretation and application of the requirement under s 12(2)(b) of the POHA. Specifically, the appellant urged the court to adopt a "pre-emptive" approach towards the s 12(2)(b) requirement.[8] Based on this "pre-emptive" approach, the

[8] Appellant's Skeletal Submissions ("ASS") at para 32

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court would adopt the "starting position" that a PO ought to be granted once the requirement under s 12(2)(a) of the POHA is made out.[9]

28 The appellant also contended that any consideration of the likelihood of harassment continuing under s 12(2)(b) of the POHA must necessarily exclude the duration subsequent to the filing of the appellant's application and the issuance of the EPO.[10] Alternatively, even if the DJ had not erred in considering the respondent's conduct during the pendency of the proceedings, such conduct ought to have supported the grant of a PO instead.[11]

29 In relation to the requirement under s 12(2)(c) of the POHA, the appellant submitted that the court ought to have placed greater emphasis on the respondent's harassing acts and the consequences of these acts, as opposed to his subsequent mitigating acts.[12] Following this approach, it would have been just and equitable to allow the appellant's application for a PO.

The respondent's case

30 The respondent averred that the DJ had not erred in considering acts which had taken place during the pendency of the suit.[13] Further or alternatively, even if the DJ was required to disregard these acts, she had correctly concluded that the respondent's contravention of ss 3 and 4 of the POHA was unlikely to continue, and the second threshold requirement under s 12(2)(b) of the POHA

[9] ASS at para 48

[10] ASS at para 27

[11] ASS at para 61

[12] ASS at para 65

[13] Respondent's Skeletal Submissions ("RSS") at para 54

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was thus not fulfilled.[14] Correspondingly, the DJ had been correct to find that it was not just and equitable for a PO to be granted within the meaning of s 12(2)(c) of the POHA.[15]

31 Tangentially, the respondent also pointed out that the appellant had rejected the respondent's global settlement offer, which had been communicated "without prejudice" to the appellant, without any legitimate basis. The respondent submitted that this amounted to an abuse of process on the appellant's part, which the court ought not to condone by granting a PO pursuant to s 12(2) of the POHA.[16]

Issues to be determined

32 Based on the foregoing, there are three primary issues relating to s 12(2)(b) of the POHA for me to consider:

(a) Whether the DJ should have adopted a "pre-emptive" approach in assessing the likelihood of harassment continuing?

(b) Whether the DJ had correctly taken into account the respondent's conduct subsequent to the filing of the Appellant's application and the grant of the EPO? Assuming that this approach was correct, a related issue was *how much weight* ought to be placed on such conduct in determining whether to grant a PO?

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[14] RSS at para 58

[15] RSS at para 69

[16] RSS at para 138

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(c) Whether the DJ had erred in her assessment of the evidence and her eventual determination that the respondent's contravention of the relevant POHA provisions was not likely to continue?

33 Assuming the first two issues are resolved in the appellant's favour, I will also have to consider the issue of whether it was just and equitable for a PO to be granted under s 12(2)(c) of the POHA.

34 Finally, I will briefly touch on the arguments pertaining to the respondent's reference to "without prejudice" correspondence.

Section 12(2)(b) of the POHA: Whether the respondent's contravention was likely to continue

"Pre-emptive" assessment of the likelihood of continued harassment

35 I first consider the issue of whether the DJ should have adopted a "pre-emptive approach" in assessing the likelihood of the respondent's harassment continuing.

The "pre-emptive" approach under the Women's Charter

36 The appellant's proposed "pre-emptive" approach draws inspiration from the approach that has been taken towards the issuance of POs under s 65 of the Women's Charter (Cap 353, 2009 Rev Ed) ("WC").

37 Section 65(1) of the WC provides as follows:

> **65.**—(1) The court may, upon satisfaction on a balance of probabilities that family violence has been committed or is likely to be committed against a family member and that it is necessary for the protection of the family member, make a protection order restraining the person against whom the order is made from using family violence against the family member.

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There are thus two limbs which must be satisfied before a court can issue a PO under s 65 of the WC:

> (a) first, family violence has been committed or is *likely* to be committed; and
>
> (b) second, the issuance of a PO is *necessary* for the protection of the family member in respect of whom the PO is sought.

38 Courts have explicitly alluded to the necessity of taking a "pre-emptive" approach towards the application of this provision. The first facet of this approach is that a PO may be issued as long as there is a "chance or risk" of family violence being committed against a family member, even if no actual violence has taken place before or at the time of the application (see *UMI v UMK and UMJ and another* [2018] SGFC 53 at [39]). In *UTH v UTI (on behalf of child)* [2019] SGFC 27, DJ Azmin Jailani explained (at [29]) that such an approach was necessary in the context of the WC because:

> [I]t would be untenable, both as a matter of logic and principle, for the court to only issue protection orders *only* when actual family violence has been committed. This ensures the utility of protection orders as a tool to anticipate a problem before it reaches an irreversible state. [emphasis in original]

39 Another facet of the "pre-emptive" approach is that an applicant generally will not be required to positively prove that an order is 'necessary' once family violence or the threat of it has been proven on the balance of probabilities (see *TCK v TCL* [2014] SGDC 460 at [44], citing Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2nd ed, 2013) at p 133). In other words, "once the first limb [of s 65(1) WC] has been proved, the second limb is likely to operate unless the protection is thought to be unnecessary" (*VCJ v VCK* [2019] SGFC 121 at [10]).

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Applicability of the "pre-emptive" approach to the POHA PO regime

40 It was a central tenet of the appellant's case that a liberal "pre-emptive" approach, similar to that which has been applied under s 65 of the WC, should be adopted in the application of s 12(2) of the POHA. According to the appellant's proposed approach, once s 12(2)(a) is satisfied by proof of past acts of harassment, the presumptive starting position is that a PO should be granted on the basis that such harassment will continue.[17]

41 In support of this interpretation of s 12(2), the appellant relied heavily on the 2014 Parliamentary debates which took place during the second reading of the Protection from Harassment Bill (*Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91 ("the 2014 Parliamentary debates")), as well as the 2019 Parliamentary debates which took place during the second reading of the Protection from Harassment (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (7 July 2019), vol 94 ("the 2019 Parliamentary debates")).

42 During the 2014 Parliamentary debates, the Minister for Law, Mr K Shanmugam, explained that Parliament had introduced the PO regime as part of a slew of "tougher measures to deal with harassment, both online and offline". When explaining the mechanism of the PO regime, Minister Shanmugam also stressed that "*if you can prove harassment* – that is, illegal conduct, then *you will get a set of remedies* to try and deal with the illegal conduct" (emphasis added). These remarks collectively suggest that the main function of the PO regime was to afford expeditious and effective relief to victims of both online and offline harassment.

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[17] ASS at para 48

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43 The 2014 and 2019 Parliamentary debates also make clear that there are some parallels between the WC PO regime and the POHA PO regime. For example, in the 2014 Parliamentary debates, Minister Shanmugam stated that the POHA PO regime was drafted based on the recommendations of the Singapore Academy of Law ("SAL") Law Reform Committee's report on proposed legislation to curb stalking (Singapore, Law Reform Committee of the Singapore Academy of Law, *Report on Proposed Legislation to Curb Stalking* ("the SAL Report")). The PO and EPO provisions proposed in the SAL Report are partly modelled after the family violence provisions in the WC (see the SAL Report at para 5.3.10).

44 The similarities between the WC PO regime and the POHA PO regime were further emphasised during the 2019 Parliamentary debates. While addressing Parliament on the 2019 amendments to the POHA, the Senior Minister of State for Law, Mr Edwin Tong Chun Fai, made numerous comparisons between the two regimes and indicated that the proposed amendments to the POHA were intended to bring it more "in line with" the regime under the WC.

45 I acknowledge that the WC and POHA PO regimes are aligned to a certain degree. I also recognise that there are policy considerations which may seemingly favour a more liberal approach towards the issuance of POs where online communications are concerned. Online publications tend to gain traction very quickly due to their borderless and viral nature, and a PO may be the only viable remedy for victims who wish to quickly and effectively stem their deleterious effects.

46 However, I disagree with the appellant's submission that "victims of harassment under the [POHA] ought to be treated and afforded the same kind

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of protection which victims of the [WC] are afforded”.[18] In my judgment, it would not be appropriate to assume that both protection regimes are completely identical in the way that they operate.

47 First, there is nothing in the 2014 and 2019 Parliamentary debates that goes so far as to suggest that the POHA regime simply replicates the WC regime. As Minister Shanmugam clarified in 2014, the POHA regime took reference from the recommendations in the SAL Report, which was only *partly* modelled after the family violence provisions. Even though the POHA amendments in 2019 may have been intended to bring them more “in line” with each other, this is still quite far removed from equating the two regimes or suggesting that they are indistinguishable.

48 Secondly, there are salient differences in the manner in which the two pieces of legislation are worded in respect of how applicants might apply for the respective remedies. The most obvious difference is that s 65(1) of the WC envisages a lower threshold. Indeed, under s 65(1) of the WC, it is not even necessary to establish that family violence *has been committed* in order for a PO to be granted. Rather, for a PO application to succeed, the applicant need only prove that (a) family violence “is likely to be committed” against a family member, and that (b) the PO is necessary for the protection of that family member. It is thus the literal wording of s 65(1) which provides the basis for the first facet of the “pre-emptive” approach alluded to at [38] above. In contrast, s 12(2)(a) POHA expressly requires proof of *actual* harassment; the applicant cannot merely show that there is a chance or risk that harassment will occur.

[18] ASS at para 43

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The appellant's argument has glossed over this crucial difference in the wording of the respective pieces of legislation.

49 The appellant's proposed "starting position" that a PO should be granted once s 12(2)(a) is satisfied is likewise wholly inconsistent with the plain wording of the POHA. Under s 12 of the POHA, it is abundantly clear that *all three* threshold requirements (*ie,* ss 12(2)(a), (b) and (c)) must be cumulatively satisfied before a PO can be issued. However, the expansiveness of the appellant's suggested approach would effectively shift the burden to the respondent to prove that harassment is not likely to continue, thereby rendering s 12(2)(b) virtually otiose. This outcome cannot be what was intended by Parliament, given the well-entrenched rule that Parliament does not legislate in vain (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38]).

50 Thirdly, there are fundamental differences between the functions of the two PO regimes, as well as the contexts in which they operate. The WC is geared towards ensuring adequate and prompt protection for those who are victims of family violence, or who are in danger of being exposed to the same. Viewed in this light, the lower threshold is necessary as such individuals are likely to be living (and may well have to continue living) within the same household as the person against whom protection is sought. "Family violence" is defined fairly narrowly under s 64 of the WC and includes, *inter alia*, "wilfully or knowingly placing, or attempting to place, a family member *in fear of hurt*", and "causing continual harassment with intent to cause or knowing that it is *likely to cause anguish* to a family member" (emphasis added).

51 In contrast, the POHA addresses a far wider range of conduct across various societal settings (*eg* at home, in school, in the workplace, online *etc*). It also potentially extends protection to a much wider range of individuals, some

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of whom may not even be known to the potential respondents, whether in a face-to-face or online setting. The requirements under s 12(2) of the POHA were undoubtedly drafted with this broader context in mind. They were intended to be flexible enough to strike an appropriate balance between the victim's and the perpetrator's interests in a wide range of circumstances.

52 Given the clear differences between the WC and POHA regimes, I reject the "pre-emptive" approach propounded by the appellant. Such an approach would not be consistent with the plain wording of s 12 of the POHA or the legislative policy underlying the provision.

The respondent's conduct subsequent to the filing of the PO application and the grant of the EPO

53 I now turn to the second subsidiary issue concerning s 12(2)(b) of the POHA. This relates to the question of whether the DJ had acted correctly in law by giving weight to the respondent's conduct subsequent to the filing of the application for a PO and the grant of the EPO.

Relevance of respondent's conduct during the pendency of proceedings

54 The appellant contended that any acts which take place during the pendency of proceedings and/or while an EPO is in force must necessarily be disregarded for the purposes of assessing whether the respondent's conduct is likely to continue. Otherwise, irresponsible online users would be permitted to "game the system" by swiftly taking down their harassing posts once they are alerted to the possibility of court interference. This is despite the fact that such posts are often viral in nature and can potentially cause incommensurable harm

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within a very short period of time.[19] Furthermore, there is nothing to prevent such perpetrators from posting more harassing publications online once the applicant's PO application has been dismissed or withdrawn.[20]

55 In support of his position, the appellant referred me to the case of *Teng Cheng Sin v Law Fay Yuen* [2003] 3 SLR(R) 365 ("*Teng Cheng Sin*"). *Teng Cheng Sin* was a case involving a wife's application for a PO against her husband under s 65 of the WC. In his grounds of decision, Kan Ting Chiu J held that evidence of a disputed incident which had taken place two-and-a-half-months after the date of the wife's application should not have been allowed (see *Teng Cheng Sim* at [20]).

56 I am unable to agree with the appellant's submissions. I endorse the DJ's reasoning as set out in the brief oral grounds of her decision granting the appellant leave to appeal. Essentially, there is nothing in the language of s 12 of the POHA which lends support to the restrictive interpretation that the appellant is seeking.[21] Section 12(2)(b) of the POHA simply requires the court to consider whether the respondent's contravention is "likely to continue", or whether the respondent is likely to commit a contravention of the relevant POHA provisions. There is hence no statutory basis for limiting the court's consideration of the contravening acts to those which have taken place before the filing of the PO application.

57 In fact, as the respondent has correctly pointed out, the appellant's suggested approach may potentially lead to absurd outcomes where the

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19 ASS at paras 28 to 29

20 ASS at para 30

21 ABD at p 727, para 8

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respondent's conduct is *escalating*, rather than *de-escalating* in nature.[22] A respondent's unabashed decision to blatantly persist with his/her harassing behaviour, despite being fully apprised of the legal consequences which may follow, must surely provide a *very strong impetus* for the issuance of a PO. I take the view that it would be wholly undesirable to circumscribe a court's powers to take such aggravating conduct into consideration when assessing the requirement under s 12(2)(b) of the POHA. Such an approach would certainly run contrary to Parliament's intention to swiftly curb harassing behaviour and protect victims of harassment through the introduction of the PO regime.

58 When this argument was put to the appellant, he responded that his suggested approach of disregarding acts which take place during the pendency of PO proceedings would not short-change potential applicants. He argued that any escalating or aggravating conduct that occurs subsequent to the date of the original PO application could potentially form the basis of a fresh PO application. I decline to endorse this approach. In my view, it is likely to clog up and unnecessarily complicate the existing legal process for PO applications under s 12(2) of the POHA. It would be far more practical and effective for courts to adopt a holistic view of the respondent's conduct, and to take into consideration all the circumstances up to (and including) the date of the hearing for the application, pending the determination of the application for the PO. This would preserve the flexibility inherent in the POHA, and facilitate the achievement of a just outcome based on the unique factual circumstances of each case.

[22] RSS at para 51

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59 Finally, I am of the view that the appellant's reliance on *Teng Cheng Sin* is misplaced. As explained at [46] to [50] above, the WC and the POHA PO regimes do not operate in an identical fashion. Cases decided under the WC are therefore of limited utility in the present context. Moreover, *Teng Cheng Sin* does not stand for the wider general proposition that a court must necessarily exclude *all* post-application conduct when ascertaining whether a PO ought to be issued under s 65 of the WC. In that case, the incident which the DJ had erroneously taken into consideration had been of a *disputed* nature, and had taken place two-and-a-half months after the application for a PO had been made. It is not clear if these distinguishing features had a determinative impact on Kan J's eventual decision to disregard evidence of the alleged incident.

Weight to be placed on acts taking place during the pendency of proceedings

60 Consonant with what I have set out above, the respondent's post-application conduct may be taken into account regardless of whether it is escalating or de-escalating in nature.

61 As to how much weight ought to be attached to conduct subsequent to the filing of a PO, this necessarily depends on the facts and circumstances of each case. In the context of de-escalating acts, the court should place greater weight on de-escalating acts which appear to have been motivated by genuine contrition. However, de-escalating acts should generally be given less weight if there is evidence to suggest that the respondent did not have a genuine desire to discontinue his harassing acts, and only wanted to "game the system". Likewise, the court should generally place less weight on de-escalating acts which take place while an EPO is in force, if it is clear from all the circumstances that the respondent did not harbour any sincere wish to mend his ways.

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The DJ's determination that the respondent's contravention of the relevant POHA provisions was not likely to continue

62 I now come to the third subsidiary issue, which relates to the correctness of the DJ's factual determination that the respondent's contravention of ss 3 and 4 of the POHA was not likely to continue. Flowing from my conclusion on the previous issue at [56] above, I will approach this inquiry on the basis that the DJ was entitled to take the respondent's post-application conduct into consideration.

63 Before me, the appellant argued that a PO should have been granted even if the respondent's conduct during the pendency of the proceedings was relevant to the s 12(2)(b) inquiry. The appellant submitted that the respondent's mitigating acts were of limited weight as his carefully premeditated acts of harassment revealed his calculative and conniving disposition.[23] Further, the respondent was unremorseful and continued to insist that his actions were justified even during the trial.[24] There was thus no indication that the respondent would have discontinued his harassing acts if the EPO had not been in place to prevent him from doing so.

64 I disagree with the appellant's characterisation of the respondent as a person who had "meditated each and every step he was going to take in order to harass the appellant".[25] In my view, the respondent had acted on the spur of the moment because of his indignance at WeR1's refusal to address his claims regarding his unpaid salary. His actions were driven by emotion rather than

23 ASS at para 63

24 ASS at para 62

25 ASS at para 63

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rational logic. This is apparent from the tone and style of the respondent's e-mails and publications, which were written in a free-flowing, stream-of-consciousness manner. It is also telling that the respondent voluntarily took steps to remove his online reviews a mere *one to two days* after their publication, and eventually sent the 9 June 2018 e-mail to the appellant requesting that they "settle [their dispute] asap". In my view, these acts indicated that the respondent had recognised the irrationality of his prior conduct once he had been given some time to cool down and reflect on the situation at hand.

65 Based on the relevant trial transcripts, I agree with the appellant that the respondent believed that his actions towards the appellant were justifiable. During cross-examination, the respondent stated that he felt that the appellant's reaction to his conduct had been "unreasonable",[26] and that the appellant did not have any basis to make the present complaint.[27] Nevertheless, I agree with the respondent that this fact is not dispositive of the s 12(2)(b) inquiry. As the respondent correctly observed, it is not inconsistent for the respondent to aver that he has done nothing wrong, and to simultaneously maintain that he seeks to resolve the dispute and no longer wishes to have anything to do with the appellant. The two positions may reflect a degree of cognitive dissonance but it is not patently unreasonable for the respondent to subscribe to both ideas notwithstanding that they seem to be contradictory. In any case, the respondent's continued belief in the legitimacy of his past conduct does not *ipso facto* indicate that he is likely to continue with any harassing conduct, and there has certainly been none thus far since June 2018.

[26] Notes of Evidence ("NE"), 7 May 2019, 27/24-25

[27] NE, 7 May 2019, 28/1-7

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66 Having carefully considered the circumstances in their totality, I find that the DJ did not err in her assessment of the evidence and her eventual determination that the respondent's contravention was not likely to continue. I see no reason to depart from her findings of fact.

67 In arriving at this decision, I place substantial weight on the fact that the respondent had shown himself to be capable of exercising self-control and restraint after 9 June 2018. No further communication to the appellant or WeR1, let alone anything in the nature of harassment, has emanated from the respondent since then. It seems that the respondent eventually came to his senses, albeit only after publishing the offending reviews and the blog post, such that he was prepared to adopt a more conciliatory stance by 9 June 2018. That stance has not shifted, even if the respondent continues to hold the view that he has done no wrong. It is also pertinent that the PO application was commenced (and the EPO was granted) only on *18 June 2018*, more than a week *after* the respondent had terminated all correspondence with the appellant and WeR1. Hence, it cannot be fairly said that the respondent was only putting up a show of conciliation in an attempt to "game the system" and avoid a PO being issued against him.

68 Moreover, I concur with the DJ's conclusion that the respondent's post-application conduct was indicative of his attempts to contain rather than to perpetuate the conflict between himself and the appellant. Specifically, the respondent immediately took down his blog after he was informed during the PTC on 13 August 2018 that his blog post remained live. He also took steps to remove the cached link to his blog by contacting Google and blogger.com even though he was under no obligation to do so. In my view, the DJ did not place undue weight on these acts in her analysis of the requirement under s 12(2)(b) of the POHA. As she explained in the oral grounds of her decision granting the

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appellant leave to appeal, the respondent's conduct prior to the commencement of the suit had "featured prominently" in her assessment of whether the respondent's harassment was likely to continue.[28]

69 Finally, it bears noting that the parties do not presently share any professional or personal relationship, and it does not appear that their paths will ever need to cross again in the future. This considerably reduces the likelihood of further contact and possible discord between the parties which could potentially trigger future acts of harassment.

70 Even if I have erred in accepting that the DJ was entitled to take the respondent's post-application conduct into consideration, I would nevertheless still conclude – for the reasons highlighted at [67] above – that the respondent's harassing conduct was not likely to continue. In my view, there is sufficient evidence to demonstrate that the respondent had intended to discontinue his harassing behaviour *even before* the filing of the PO application.

71 Accordingly, I uphold the DJ's conclusion that the requirement under s 12(2)(b) of the POHA was not satisfied in the instant case. It follows that the DJ correctly declined to grant a PO.

Section 12(2)(c) of the POHA: Whether it was just and equitable to grant a PO

72 Given my findings above, it is strictly unnecessary for me to ascertain whether the requirement under s 12(2)(c) of the POHA was satisfied.

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28 ABD at p 727, para 9

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Nevertheless, and in any event, I am satisfied that it would not have been just and equitable to grant a PO in the present case.

73 As I previously held in *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316 (at [54]), the key considerations which are pertinent to the issue of whether it just and equitable to grant an order under s 12 of the POHA are as follows:

(a) the nature and seriousness of the harassing conduct;

(b) the purpose and motive behind the conduct in question;

(c) the impact of the conduct on the victim and the degree of adverse emotional or psychological harm suffered;

(d) the degree to which the harassing conduct had been made known to the public;

(e) whether the victim had the means to mitigate or avoid the harassing conduct;

(f) whether the person behind the conduct had made genuine efforts to ensure that the conduct would not be misconstrued or misunderstood; and

(g) the ordinary instances of daily living that may be expected to be tolerated by reasonable persons.

74 In his written submissions, the appellant emphasised that:

(a) the respondent had deliberately chosen to tarnish the appellant's reputation on multiple online platforms within the public domain;

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(b) the appellant's reputation and emotional well-being had been severely affected by the respondent's conduct; and

(c) the respondent's motive was clearly retributive in nature.[29]

75 In my view, these factors do not sufficiently point towards granting a PO in the instant case. First, the respondent's online publications were very quickly hidden from public view through the efforts of the appellant and the respondent. Secondly, the appellant has not led sufficient evidence to show that the harassing communications and publications were so damaging that his business reputation and/or psychological health were affected. Thirdly, although the respondent had acted with malicious intent, his actions were impulsive rather than premeditated, and he had subsequently displayed a genuine desire to reach an amicable settlement with the appellant. This is evidenced by his 9 June 2018 e-mail to the appellant and his voluntary deletion of his Google review on the same day, as well as his conduct at the PTC on 13 August 2018.

76 Consequently, I uphold the DJ's finding that the threshold under s 12(2)(c) of the POHA has not been crossed. The appellant's application thus fails on this basis as well.

"Without prejudice" correspondence

77 For completeness, I shall address the respondent's arguments on the parties' "without prejudice" correspondence.

29 ASS at para 66

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78 The legal principles pertaining to the admissibility of "without prejudice" communications are well-established. At common law, "without prejudice" privilege attaches to admissions which are made for the purpose of settling a dispute (see *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 423 ("*Sin Lian Heng*") at [13]). As the Court of Appeal explained in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") at [24], this rule is given statutory expression under s 23(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), which provides as follows:

> **Admissions in civil cases when relevant**
>
> **23.**—(1) In civil cases, no admission is relevant if it is made —
>
> (a) upon an express condition that evidence of it is not to be given; or
>
> (b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

79 Section 23 applies to, *inter alia*, all communications which are expressly made on a "without prejudice" basis (see *Mariwu* at [24]). While attaching the words "without prejudice" to a communication does not automatically render it privileged, the presence of such words would place the burden of persuasion on the party who contends that they ought to be ignored (see *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 at [22], citing *Sin Lian Heng* at [60]).

80 For present purposes, it is also salient to note the definition of an "admission" under s 17 of the EA:

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> **Admission and confession defined**
>
> **17.**—(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

81 Since the existence of a dispute and the parties' attempt to compromise it lie at the heart of the "without prejudice" privilege (see *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [17]), the privilege cannot attach to communications wherein a party has admitted liability such that a dispute no longer exists (see *Mariwu* at [30]; *Sin Lian Heng* at [45]). An admission of *liability*, however, must be distinguished from a *mere admission*: while the former relates to a situation where one party clearly acknowledges his liability, the latter merely refers to statements or actions which appear on their face to go against the interest of the maker (see *Sin Lian Heng* at [43] to [44]).

82 In the present case, the letter containing the offer to settle which was sent from the respondents' then-solicitors, Breakpoint LLC, to the appellant's solicitors, Gabriel Law Corporation, was clearly marked "without prejudice", and was expressly made on a "without admission of liability" basis.[30] I therefore consider that the "without prejudice" privilege *prima facie* attaches to both the respondent's offer as well as to the appellant's letter of reply to that offer.

83 Furthermore, it was not open to the respondent to unilaterally waive the privilege that attached to both letters. It is trite that waiver of the "without prejudice" privilege requires the consent of both parties (*Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 at [22]). In

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[30] RSS at para 134

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the present case, there is nothing to suggest that the appellant had expressly or impliedly consented to waiving the privilege.

84 As such, it was not permissible for the respondent to rely on the "without prejudice" communications between the parties. Consequently, I do not accept the respondent's submission that the appellant's rejection of his global settlement offer amounted to an abuse of process. Nevertheless, this point is moot since I have found in favour of the respondent in any event, without having to rely on the parties' "without prejudice" correspondence.

Conclusion

85 In conclusion, I agree with the DJ's reasoning that the requirements under ss 12(2)(b) and (c) of the POHA were not fulfilled. I therefore dismiss the appeal.

86 I further order that costs shall follow the event. In the event the parties are unable to agree on costs, they are at liberty to tender brief written submissions on costs within two weeks of the date of this judgment for my consideration.

See Kee Oon
Judge

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