Summary of Judgment

Commissioner of Inland Revenue ("CIR") v Dr. The Honourable Leung Ka-lau ("Respondent")
FACV 5/2023; [2023] HKCFA 36

Decision	**:**	**The CIR's appeal allowed**
Date of Hearing	**:**	**6 October 2023**
Date of Judgment/Decision	**:**	**10 November 2023**

Background

1. The Respondent was a doctor formerly employed by the Hospital Authority ("**HA**"). He was deprived of certain rest days and statutory / public holidays (collectively "**holidays**") due to HA's on-call system which required doctors to be on stand-by for work on their rest days and holidays.

2. In *Leung Ka Lau v Hospital Authority* (2009) 12 HKCFAR 924, the Court of Final Appeal ("**CFA**") held that the Respondent was entitled to damages payable by the HA for loss of rest days and holidays to be assessed as a result of the on call system (the "**Sum**").

3. The CIR decided that the Sum was in return for having acted as an employee on rest days and holidays and was therefore "income from employment" chargeable to salaries tax under section 8 of the Inland Revenue Ordinance (Cap.112) (the "**IRO**").

4. The Board of Review upheld the CIR's determination.

5. The Court of First Instance allowed the Respondent's appeal and held that the Sum was compensation for HA's breach of contract which is not chargeable to salaries tax. Subjecting the Sum to tax would also result in double taxation as the Respondent had already paid tax on his remuneration package which included his day-off entitlement.

6. The CIR's appeal was dismissed by a majority in the Court of Appeal with the minority agreeing with the CIR's characterization of the Sum. Leave to appeal to the CFA was granted to the CIR by the Court of Appeal on the ground that a question of great general or public importance was involved.

Key issue

7. The key issue is whether the Sum is, as a matter of substance rather than form, income from employment. The question for determination by the CFA is:- "Whether a

payment made to an employee to compensate for the loss of his contractual entitlements to rest days and holidays as a result of being required by his employer to work on those days, is "income from employment", under section 8 of the IRO?

Department of Justice's Summary of the CFA's ruling

(full text of the Court's judgment at)
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=156143&QS=%2B%7C%28FACV%2C5%2F2023%29&TP=JU

8. The CFA answered the question in the affirmative unanimously.

9. The appeal is allowed primarily on the ground that the Sum falls squarely within the test for taxation from employment as set out in *Fuchs v Commissioner of Inland Revenue* (2011) 14 HKCFAR 74: -

(1) The purpose for which the Sum was paid arose from the Respondent acting as or being an employee. The Respondent was required to be on stand-by for work at the request of the HA. This was what the Sum was aimed at compensating. The Respondent stood by on his holidays and rest days because he was an employee of the HA. In doing so, the Respondent was "acting as or being an employee": §23.

(2) The Sum may be viewed as a payment for past services. The Respondent provided the HA a service by being on stand-by, even if he was not called on to go to the hospital. The HA had a responsibility to properly staff its hospitals on holidays and statutory rest days. It fulfilled that obligation, in part, by requiring the Respondent to stand by on call on those days. That was a past service to the HA: §24.

(3) The terms of the contract that provided for holidays and rest days, of which the Respondent was deprived, might be viewed as an inducement to prospective employees to enter into a contract for services with the HA. Hence it was related to employment under the *Fuchs* test: §25.

10. In CFA's view, the majority of the Court of Appeal wrongly applied "abrogation of contractual rights" as a test of chargeability. The test is not whether the employer had acted in breach in terminating the contract. The test remains that of the purpose of the payment at the relevant time. In any event, this is not a case of abrogation of contractual rights but a demand that they be fulfilled: §§28-33.

11. The CFA rejected the distinction relied on by the majority of the Court of Appeal, in favour of the Respondent, that the Sum was damages for the HA's breach of the Employment Ordinance (Cap.57) and so arose from the infraction of that ordinance rather than arising from the employment contract. While the HA might arguably have violated the EO, the principal reason the payment was ordered was the entitlement for the Respondent standing by on holidays and rest days: §§34-35.

12. The CFA further observed that taxing the Sum would not result in double taxation. The Respondent's basic monthly salary (on which he had paid tax) did not include compensation for denial of rest days and holidays by HA. The Sum was a compensation for the Respondent's loss of rest days and holidays, which was paid over and above the basic monthly salary of the Respondent, and therefore not previously subject to tax: §§37-38.

13. The CIR's appeal was allowed unanimously.

Civil Division
Department of Justice
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