Introduction

The scope of employees’ compensation claims under the Employees’ Compensation Ordinance (Cap.282) (“ECO”) is not limited to injuries occurred when an employee is working within Hong Kong. ECO provides for two circumstances, namely, ss.30B(2) and (5) ECO, under which the Hong Kong Courts could award employees’ compensation to injuries occurred outside Hong Kong. These subsections are respectively discussed in the cases of Ahmed Ishtiaq v Tin Wo Engineering Company Limited [2010] HKCU 1036 and Chan Sze Yuen v Tin Wo Engineering Company Limited and Ors [2012] HKCU 1538.

Both cases involved one common defendant, injuries occurred at the same construction site outside Hong Kong, but yielding different results.

ss.30B(2) and (5) ECO

ss.30B(2) and (5) ECO states that:

“(2) [The ECO] also applies where personal injury by accident arising out of and in the course of employment is caused to an employee outside Hong Kong where the employee's contract of employment is entered into in Hong Kong with an employer who is a person carrying on business in Hong Kong.

(5) If an employer who is a person carrying on business outside Hong Kong submits or has agreed to submit to the jurisdiction of the Court, then, notwithstanding that the accident causing the personal injury occurred outside Hong Kong, [the ECO] shall apply to employees within the meaning of [the ECO] who have been recruited or engaged in Hong Kong.” (emphasis added)

Ahmed Ishtiaq v Tin Wo Engineering Company Limited

Background

The Applicant is a Pakistani who started working as a steel fixer around the middle of December 2006 through the introduction of another Pakistani friend of him. As far as the Applicant knew, his Pakistani friend was working for the Defendant Tin Wo Engineering Company Limited (“Tin Wo HK”), and hence he also believed that he was working for Tin Wo HK. It was only upon commencement of the proceedings that the Applicant found out that his...
pay cheques and all relevant attendance sheets that he has signed bore the Chinese name of World Faith Engineering Limited ("World Faith"), which he had no knowledge of due his inability to read Chinese. World Faith is a related company with Tin Wo HK and Tin Wo (Macao) Engineering Company Limited, a company incorporated in Macau SAR ("Tin Wo Macau") (the relevance of Tin Wo Macau will be explained in later part), in a sense that these companies have common shareholders and common directors.

In about April 2007, the Applicant was informed of a job opportunity in Macau and he volunteered to join. He was then asked by Tin Wo HK, as a prerequisite to join the Macau project, to attend a safety course organized by Gammon Building Construction (Macau) Limited ("Gammon Macau"), the main contractor of the Macau project, which would be held in Hong Kong. When attending the safety course, the Applicant was given a form which was prepared by a staff of Tin Wo HK (the "Form"), which contained references to Tin Wo HK, Gammon Macau’s address and other remarks, including a clause saying that if the Applicant fails to attend the safety course as scheduled, Gammon Macau will charge $500 as penalty and this sum will be deducted from the Applicant’s salary.

The Applicant having attended the safety course went to Macau and worked as instructed until he was injured. The Applicant commenced the present action against Tin Wo HK for employees' compensation.

Who was the Applicant’s employer?

It was not disputed that the Applicant was injured at the site in Macau, nor was it disputed that the Respondents submitted to the jurisdiction of the Hong Kong Court. However, the key question is whether the Applicant was an employee of Tin Wo HK at the time of the injury. If the answer to this question is in the affirmative, then the Applicant may be able to sue Tin Wo HK for compensation pursuant to s.30B(2) ECO, because Tin Wo HK is carrying its business in Hong Kong and its employment relationship with the Applicant started in Hong Kong.

The Applicant relied on the fact that the Form was prepared by a staff of Tin Wo HK, which would mean that the Applicant was first employed by Tin Wo HK and then sent/lent to work in Macau. The Applicant also relied on the salary penalty clause of the Form which the Applicant submitted indicated that Tin Wo HK was recruiting workers to work in Macau.

Tin Wo HK on the other hand submitted that in the Macau project, Gammon Macau was the main contractor and Tin Wo Macau was the sub-contractor. Although Tin Wo Macau is related to Tin Wo HK and/or World Faith, they are separate legal entities and should not be confused with one another. Tin Wo HK contended that as the Applicant’s employer Tin Wo
Macau is a company incorporated in Macau SAR, and the injury occurred in Macau, the employees’ compensation claim should accordingly be commenced in the Courts of Macau.

In relation to the preparation of the Form by its staff for the Applicant, Tin Wo HK submitted that such was done only with a view to assist employees in applying for working visa in Macau, and has nothing to do with employment.

The Court agreed with the Respondent, and accepted that it was improbable that the Applicant was employed by Tin Wo HK and then immediately sent/lent to work for Tin Wo Macau. The Court accepted the evidence of the shareholder of both Tin Wo HK and Tin Wo Macau that it was Tin Wo Macau who paid the periodical payments to the Applicant after the accident. The Applicant’s case was dismissed.

**Chan Sze Yuen v Tin Wo Engineering Company Limited**

**Background**

The Applicant is a steel binder from Hong Kong, who was injured in the same construction site as in the above case of Ahmed Ishtiaq. He commenced action in the Courts of Hong Kong against Tin Wo HK, Tin Wo Macau and Gammon Macau.

The claim against Tin Wo HK was soon dismissed by the trial judge on the basis that the Applicant was not employed by Tin Wo HK when he worked at the Macau site. However, the Applicant was successful to rely on s.30B(5) ECO and convince the trial judge that he was actually recruited or engaged by Tin Wo Macau in Hong Kong to go to work in Macau, and therefore compensation was awarded against these Macau entities. It was against these findings that Tin Wo Macau and Gammon Macau sought to appeal.

**Where was the Applicant engaged or recruited?**

The Applicant’s case was that one day he heard from a staff of Tin Wo HK that a foreman of Tin Wo Macau directed him and three other workers to go to Macau on the following day to work on some urgent matter. On the following day, the Applicant and three other workers went to Macau as instructed, and were met by a foreman of Tin Wo Macau, who gave them the key to the workers’ quarter and told them to start work the following day. The Applicant alleged that as his employment with Tin Wo Macau was “confirmed” verbally in Hong Kong, he should have been engaged and/or recruited in Hong Kong as per s.30B(5) ECO, and thus could claim in the Courts of Hong Kong against these Macau entities.

The Respondents disagreed with this view and contended that what the Applicant was given in Hong Kong was merely information of a job opportunity, which should not constitute recruitment. The Respondents also alleged that the formalities of employment were not fulfilled until the Applicant arrived in Macau.
The Court of Appeal did not accept the Respondents' interpretation of the words “recruit” and “engage” as in s.30B(5) ECO. The Court of Appeal opined that s.30B(2) and (5) ECO clearly draw a distinction between employers who carry on business in Hong Kong and those who carry on business outside Hong Kong. The former is covered by s.30B(2) ECO, which requires the employment contract to be entered into in Hong Kong i.e. employed; and the latter is covered by s.30B(5) ECO, intentionally using different wordings of “recruit” and “engage” instead of “employment”, and therefore such words must bear different meanings.

While the Court of Appeal accepted that mere provision of information of job opportunity will not be sufficient to amount to “recruitment”, different trades and profession will have different practice and modes of recruiting. In this regard, it would be difficult to have an exact and universal definition of “recruitment”, and whether an Applicant is “recruited” is a matter of evidence.

Judging on the evidence of the case, particularly in light of the fact that the Applicant was immediately given a key to the workers’ quarter when he arrived Macau, the Court of Appeal was satisfied that the Applicant must have been recruited in Hong Kong or else he would not went to Macau just for a potential job offer. The appeal was dismissed.

**Lesson to Learn**

It is not impossible to claim for employees’ compensation for injuries occurred outside Hong Kong. However, there are at least two things to note from the above cases. First, it is important to ascertain who the proper employer is before commencing any proceedings. Second, choose the appropriate forum to commence the proceedings. If the employer at the time of the accident was a non-Hong Kong entity, one should consider if there is sufficient evidence to support the allegation that the Applicant was in fact recruited or engaged in Hong Kong.

With the benefit of hindsight, if the Applicant in Ahmed Ishtiaq had joined Tin Wo Macau and Gammon Macau as Respondents in his claim, and sought to rely on s.30B(5) ECO suggesting that the he was actually recruited in Hong Kong when he attended the safety course and fulfilled the prerequisite for joining the work in Macau, he might have had a successful claim in Hong Kong!
For enquiries, please contact our Insurance & Personal Injury Department:

E: insurance_pi@onc.hk  T: (852) 2810 1212
W: www.onc.hk        F: (852) 2804 6311
19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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