Whether an Injured Worker is an Employee or an Independent Contractor?

Introduction

Where in any employment, personal injury by accident arising out of and in the course of the employment is caused to an employee, section 5(1) of the Employees’ Compensation Ordinance, Cap. 282 (“ECO”) makes the employer liable to pay compensation. Therefore, if the injured worker is engaged as an independent contractor, he is not entitled to compensation under ECO even if he had a work-related accident.

This article aims to discuss how the Court would determine whether an employer-employee relationship existed, in particular, when the contract entered into by the parties was not named as an employment contract, but a sub-contract describing the injured worker as an independent contractor or self-employed person.

Indicia of Employment

The question of whether the injured worker was an employee is a question of fact to be determined by the Court. In the earlier case-law, whether the employer controlled the manner of doing the work was regarded as the single test for identifying an employer-employee relationship. This single “control” test was later considered as too narrow and inadequate. In Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 at 382, the Court laid down a number of tests:

1. whether the worker was carrying on business on his own account or carrying on the business of the employer;
2. the degree of control exercised by the employer;
3. whether the worker provides his own equipment;
4. whether the worker hires his own helpers;
5. what degree of financial risk the worker takes;
6. what degree of responsibility for investment and management the worker has; and
7. whether and how far the worker has an opportunity of profiting from sound management in the performance of his task.

In Poon Chau Nam v Yim Siu Cheung trading as Yat Cheung Airconditioning & Electric Co. FACV 14 of 2006, Mr. Justice Ribeiro PJ opines that the modern approach to the question whether one person is another’s employee is to examine all the features of their relationship.
against the background of the indicia developed in the case laws with a view to deciding whether, as a matter of overall impression, the relationship is one of employment.

In *Poon Chau Nam*, the air-conditioning business belonged to Yim. Yim decided which jobs should be assigned to Poon and paid him to do them at the daily rate of $550, plus any overtime allowance. All the profits and losses of the business were for Yim’s account. Poon bore no financial risks and reaped no financial rewards beyond his daily-rated remuneration. Yim managed the business and hired several other workers, some of whom would sometimes work alongside Poon on a job. Poon personally did the work assigned to him. He did not hire anyone to help. Travel expenses incurred in the course of the work were borne by Yim who sometimes drove Poon to the work site in his van, particularly where heavy equipment had to be transported there. Such equipment was owned by Yim. Whenever items had to be purchased by Poon for work purposes, he was reimbursed by Yim, even where the amounts were very small. Poon was a skilled air-conditioning worker and, like the others who were undoubtedly Yim’s employees, did not require supervision or control over the manner of carrying out the work. So the control test is, in the circumstances, of little relevance. The other indicia all point clearly to an employer-employee relationship entered into for each specific engagement.

The main difference between Poon and the other workers was that his employment was of a casual nature whereas theirs was permanent and paid on a monthly basis. The Court considered sections 2(1), 11(2) and 11(7) of the ECO and has no hesitation to hold that ECO recognizes an employee whose employment is of a casual nature and who may work for more than one employer.

In regard to the fact that Poon had made his own Mandatory Provident Fund ("MPF") arrangement as a self-employed person, Mr. Justice Ribeiro PJ held that the objective facts strongly supported the conclusion that Poon was an employee at the time of accident and the fact that he labelled himself as a self-employed person for MPF purpose did not change the picture concerning Yim’s liability under the ECO.

**Contracting out of the ECO**

Section 31(1) of the ECO stipulates that “any contract or agreement whether made before or after the commencement of this Ordinance, whereby an employee relinquishes any right to compensation from an employer for personal injury by accident arising out of and in the course of his employment, shall, subject to subsection (2), be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under the provisions of this Ordinance.”
Therefore, if the injured person should be properly regarded as an employee on the objective facts and upon application of the indicia of employment as discussed above, any agreement made by the parties describing the injured person as an independent contractor or a self-employed person will not affect the employer’s liability under ECO.

**Conclusion**

The Court will determine whether an employer-employee relationship existed by investigating and evaluating all the factual circumstances in which the work was performed by the injured worker. Even if the parties had made a written contract describing the injured worker as an independent contractor or self-employed person, such written contract would be disregarded or be treated as not being conclusive if the objective facts support an employer-employee relationship.

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**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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