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EO 3/2000

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

EQUAL OPPORTUNITIES ACTION NO 3 OF 2000

BETWEEN

RAY CHEN Plaintiff

AND

IBM CHINA/HONG KONG LIMITED Defendant

Coram: HH Judge Saunders

Date of Judgment: 11 - 15 December 2000

JUDGEMENT

Introduction:

The circumstances giving rise to Ray Chen's claim may be shortly stated. On 18 August 1998 Ray Chen began employment with IBM China/Hong Kong Limited (IBM) as a 'Senior IT Specialist'. His salary was $50,000 per month. It was a term of his employment that during the first six months of that employment he was on probation. During the probationary period he was subject to a specific provision in the contract of employment that termination of the employment may be effected by IBM upon 'reasonable notice' being given; that notice being defined by the contract as seven days notice.

On 18 December 1998, in an 'exit interview', Ray Chen was given notice of termination of his employment. At that time his wages were paid up to 31 December 1998. The termination was effected by Ray Chen's immediate superior, Michael Shevloff. Michael Shevloff first offered Ray Chen the opportunity to resign voluntarily rather than be dismissed. Ray Chen rejected that option, and Michael Shevloff signed a formal termination letter, terminating Ray Chen's employment. The reasons given to Ray Chen for his termination were that IBM was not satisfied with his performance and that the expansion of the team in which he had been working meant that a more experienced person was required in his place. Michael Shevloff told Ray Chen that he would receive one months wages in lieu of notice of termination of the employment, together with the Chinese Lunar New Year bonus on a pro rata basis, and payment for accrued annual leave. After the termination letter was signed Ray Chen made a complaint to Michael Shevloff that he had been sexually harassed by a superior, Ms. Tamara Rus.

On the next day, 19 December 1998, Ray Chen made a complaint to the Equal Opportunities Commission of sexual harassment against Tamara Rus and IBM.

It is Ray Chen's contention that during the exit interview Michael Shevloff asked if Ray Chen had kept an IBM ThinkPad computer Michael Shevloff's evidence was that he did not recall raising the matter during the interview. Nothing turns on the difference however, for it is not in dispute that on about 24 December 1998 Ray Chen's wife received a phone call from Michael Shevloff in which Michael Shevloff asked that the ThinkPad computer be returned to IBM. On Ray Chen's instruction she telephoned Michael Shevloff to tell him that he had not kept that or any other property of IBM.

On 29 December 1998 IBM wrote, and dispatched to Ray Chen by registered post, a letter, in which details of the computer they alleged was retained by him were set out, and he was told that his final payment of wages have been prepared and would be released to him when the equipment was located.

It is not in dispute that that letter was not opened by Ray Chen and was returned to IBM. The final payment of wages, a sum of $67,214.64, was not paid to him but remained with IBM. Ray Chen subsequently brought proceedings in the District Court (EO 2/99) against both Tamara Rus and IBM, alleging sexual harassment under the provisions of the Sex Discrimination Ordinance (SDO). In those proceedings he sought, inter alia, reinstatement to his former post and promotion.

The proceedings in EO 2/99 duly went to trial and were dismissed in a reserved judgment handed down by Judge Poon on 6 April 2000. In early May 2000 Cannie Ng, of the IBM Human Resources Department, took steps to pay to Ray Chen the final payment of wages. Initially an attempt was made to pay the sum into his bank account but that had been closed. Subsequently, on 23 May 2000 an IBM employee, Felix Tseng from the IBM Accounting Department, was sent to Ray Chen's home with a cheque for $67,214.64. Ray Chen declined to accept it, contending first that he should have been paid interest on the sum, second that he should be compensated for the delay and paid an undefined further bonus, and third that he should have had what he described as "a sounding apology" for the delay in payment.

It was established, in the particulars of the defence, that all other IBM employees, terminated on notice in circumstances similar to that of Ray Chen, received their final pay within days of their last day at IBM.

Having rejected the cheque on 23 May 2000 Ray Chen issued these proceedings against IBM, six days later, on 29 May 2000, claiming that the failure to make payment of the wages to him constituted an unlawful victimisation contrary to the provisions of s 9 SDO. He seeks first, a declaration that he has been unlawfully victimised, second, payment of the wages he says are due to him, third, damages for injury to feelings, exemplary damages in the sum of $2,000,000.00, (that having been reduced from $20,000,000.00 prior to trial), and interest and costs. A claim for a further $1,000,000.00 punitive damages was abandoned prior to trial.

The relevant Hong Kong law:

The SDO, in s 9 describes discrimination by way of victimisation as follows, (I have omitted provisions irrelevant to these proceedings):

"(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Ordinance if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised or any other person has -

(a) brought proceedings against the discriminator or any other person against this Ordinance,

(c) otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance,

(2) Subsection (1) shall not apply to the treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

(3) For the purposes of subsection (1), a provision of Part III or IV framed with reference to discrimination against, or sexual harassment of, women shall be treated as applying equally to the treatment of men and for that purpose shall have effect with such modifications as are necessary."

By s 11 the SDO makes certain acts of discrimination, including victimisation, unlawful in the following terms, (again irrelevant provisions are omitted):

"(2) It is unlawful for a person, in relation to employment by him at an establishment in Hong Kong to discriminate against a woman-

(c) by dismissing her, or subjecting her to any other detriment"

The effect of s 9(3) is to render this provision equally applicable, in the case of a man, where the issue is victimisation. Accordingly, either a man or a woman has an action for victimisation if the subject of behaviour described in s 9 SDO.

The contention of Ray Chen, relying upon these provisions, is that the act of delaying payment of the final payment to him until the conclusion of the proceedings in EO 2/99, a period of some 17 months, was an act of victimisation as defined by s 9(1) of the Ordinance because all other comparable employees received their payment within but a few days. This he says was subjecting him to a detriment contrary to s 11(2)(c) of the Ordinance.

The relevance of the equivalent English Law in Hong Kong:

The SDO was enacted by the legislature on 20 May 1996 and came fully into force on 20 December 1996. It has therefore been in force for only a short time. It is clear that it is modelled upon the equivalent English legislation, which is contained in the Sex Discrimination Act 1975 (SDA). In England there is also in force the Race Relations Act 1976 (RRA), which in turn is closely modelled on the Sex Discrimination Act.

The similarity in the three pieces of legislation may be seen as follows:

s 5 SDO is identical to s 1 SDA; s 1 RRA closely follows them, substituting race for sex;

s 6 SDO is identical to s 2 SDA; the RRA contains no relevant provision as it does not distinguish between men and women;

s 9 SDO is identical to s 4 SDA, except that s 4 adds references to legislation not in existence in Hong Kong; s 2 RRA is also identical (except that ss 3 is omitted).

s 11 SDO is identical to s 6 SDA, except for references to the countries and legislation not in force in Hong Kong; s 4 RRA is similarly identical.

Where there are differences those differences are not relevant to the matters of interpretation that arise in this case.

I should note that ss 5 and 6 SDO relate to discrimination between the sexes and are not directly applicable in this case.

A large body of case law in relation to both the SDA and RRA has arisen in England in the 15 years or so that those acts have been in force. As the terms of the legislation are so close it is plain that the courts in Hong Kong may look to the English cases for guidance on the interpretation of the Hong Kong law. They will be persuasive authorities but the courts in Hong Kong should not blindly follow the English approach which may on occasions not be appropriate for Hong Kong conditions.

That this is so is seen in the consideration of the first point taken by Mr. Burns.

The Adekeve point:

It is beyond argument that Ray Chen was dismissed on 18 December 1998. On his own case, the acts about which he complains took place after that date. It is the argument for IBM that the expression 'in relation to

employment' in s 11 SDO applies only to a person whose employment continues at the time of the act of victimisation.

The submission was, in my immediate view a startling one, for it leads to obvious injustices. If correct it would mean that a person subjected to wrongful acts, constituting victimisation during employment could seek relief, but someone subjected to the same acts, for the same reasons, after the employment was terminated would not be able to claim. By way of example a person who was wrongfully refused a reference letter while in employment would be entitled to make a claim for discrimination, whereas someone who made the request after the termination of employment, and was equally wrongfully refused, would not be able to claim. Mr. Burns' answer to those propositions was that that was a matter for the legislature and that his submission was supported by English authority.

In Adekeye v The Post Office (No 2) [1997] IRLR 105 the facts were as follows. Miss Adekeye was summarily dismissed on grounds of misconduct with effect from 8 June 1991. She was found to have evaded postage and to be in unauthorised possession of official envelopes. Following the dismissal she exercised her right of internal appeal, but on 17 August 1991 she was notified that her appeal was unsuccessful. She submitted an industrial tribunal application on 25 September 1991, complaining of unlawful race discrimination, both in the circumstances of her dismissal, and in the conduct of her appeal. The claim of discrimination in relation to her dismissal was time-barred, however, the industrial tribunal allowed her appeal in relation to the conduct of the appeal. Her argument was that, in relation to the appeal, she had been treated differently than other employees who had committed the same offence. The Post Office appealed to the Court of Appeal.

In the Court of Appeal it was held, supporting a decision of the Employment Appeal Tribunal, (EAT) that she was not entitled to bring a complaint under s 4 RRA in relation to the conduct of the appeal to the industrial tribunal, a process which was undertaken after her dismissal, because she was not 'a person employed' or an 'employee' at the time of her appeal hearing, and those expression could not properly be construed to include a former or ex-employee.

The Court of Appeal described the argument for the appellant in these terms:

"On his first argument Mr. Alan submitted that there were two possible constructions of the phrase 'in the case of a person employed by him'. One was that it only applied to circumstances occurring prior to dismissal (which he called the narrow construction). The other was that because aspects of the contract of employment subsist even after dismissal, the phrase could be construed to include circumstances arising out of the contract of employment that concern the case of a person who is or has been employed by the respondent (which he called the wide construction)."

The Court held that on a true interpretation of the expression "in the case of a person employed by him", giving the words their ordinary and natural meaning, the words meant "in the case of a person who is employed by him". In so doing the court accepted the view of the EAT in Nagarajan v Agnew [1994] IRLR 61 per Knox J at 65 reaching the same result.

That this produced an unsatisfactory result was recognised by Peter Gibson LJ who said at 109:

"However I recognise that this (result) does not cover the case where the complaint by an ex-employee is of racial discrimination at the internal appeal hearing and in the decision on that appeal. I agree with Smith J that it is unsatisfactory that the 1976 (Race Relations) Act does not extend to give a remedy to an ex-employee pursuing an appeal against dismissal."

A second argument was advanced for Ms. Adekeye based upon Equal Treatment Directive 76/207/EEC in European law (ETD). Application of the relevant directive would, it was argued, require an interpretation that would extend the expression to give the Appellant protection. Although the court was not persuaded by the argument it was recognised by Peter Gibson and Hirst LLJ that it was open to argument that the ETD was applicable and the view of Pill LJ that it was strongly arguable that the directive was applicable.

The matter did not end there, for the existence of the ETD brought the issue, not only back to the English Courts but also to the European Court of Justice (ECJ). In Coote v Granada Hospitality Ltd [1999] ICR 942

the EAT faced a ruling by the ECJ that the ETD required member states to introduce into their national legal systems such measures as are necessary to enable a complainant to pursue a claim by judicial process when the employer refused, after the end of the complainant's employment, to provide a reference by reason of the fact that she had made a previous complaint of unlawful discrimination against him. The form and method by which this was to be achieved was left to the member states.

The EAT reviewed the decision in Adekeye to determine whether it was possible to construe the Sex Discrimination Act 1975, in the light of the ETD and the ruling of the ECJ, so as to enable a claimant to make a victimisation complaint in relation to events that occurred after the employment relationship terminated. For the employer it was said the Adekeye effectively concluded the point. The EAT was not however, technically, bound by Adekeye as the decision in that matter was in relation to the RRA, whereas the decision in Coote was on the SDA. In Adekeye the Court of Appeal had refused to take account of the ETD, but the EAT was now faced with a specific decision from the ECJ. Consequently, it was argued for the Appellant, the EAT was bound to give effect to the decision of the ECJ.

In its decision the EAT noted that the Court of Appeal in Adekeye accepted that the words "a person employed by him" were grammatically capable of meaning "who is employed" or "who has been employed" and went on to comment that that, presumably meant the words could mean both. Thus, the legislation could be interpreted in a way which was in conformity to the ETD. The EAT was critical of the reasoning in Adekeye in the following terms:

"As we understand it the Court placed reliance on the fact that section 4 [in this case section 6] is drafted in the present tense. But with great respect it seems to us that the present tense would have been quite apt had the section been intended to apply to former employees, since what is made unlawful is a present act of discrimination.

Secondly, the Court was of view that there was no room for the application of the 'access to benefits' to ex-employees, since access would 'seem to me likely to occur during employment'. During the course of argument, quite apart from the important matter of references, to which the Court made no reference, a number of matters were raised, and the court itself, in its deliberations has considered others: for example, the continued use of sports facilities to retirees, the payment of bonuses to present and former staff and the provision of concessionary travel facilities. All of these matters might be decided or altered after the employment had ceased..... It is the experience of this Court that for many purposes the contact between employer and former employee may continue after the employment relationship has ceased."

The EAT went onto say:

"We have not been persuaded that it could be said that the Court of Appeal's decision was so mistaken [per incuriam] that it need not be followed. We quite see the force of the criticisms made of it. Indeed, we would go further and respectfully say that we disagree with it. But the doctrine of precedent requires us to follow it and had it been applicable to this case we would have done so."

The EAT accordingly held that the complaint, although as to conduct following dismissal, was, in the light of the European Equal Treatment Directive, covered by the SDA. The decision in Coote was followed by a differently constituted EAT in Bull v Harrods Ltd (Unreported EAT 1426/98 6 July 1999).

The European Equal Treatment Directive does not, of course apply in Hong Kong, neither is its status such that any regard may be had to it in the interpretation of Hong Kong legislation. Mr. Law, recognising that, submitted that the court in Hong Kong was required to interpret Hong Kong law so as to give effect to the Convention on the Elimination of all Forms of Discrimination against Women (<<CEDAW). CEDAW>> was extended to Hong Kong, at the consent of the Peoples Republic of China and the United Kingdom on 14 October 1996. Certain reservations were made to the application of the Convention by the Peoples Republic of China, but none are applicable to this case.

<<CEDAW>> is a general convention on the issue of discrimination against women. It was Mr. Law's argument that the SDO must be interpreted to give effect to <<CEDAW>> and that such an interpretation would result in the Court being required to hold that a woman should be protected against discrimination by a former employer in the same way as found in Coote and Bull. It was right, he said that in this case Ray

Chen was a man, but that was irrelevant to the proper interpretation of the SDO, and if a man received an advantage from the proper interpretation of the Ordinance then so be it.

Mr. Law relied upon Article 11 1 of <<CEDAW>>, and although he did not specifically state so, it appears that Articles 11 1(b) and (d) are most appropriate:

"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, the same rights, in particular:

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, a swell as equality of treatment in the evaluation of the quality of work."

It may be argued too, that the general words of Article 13 are relevant as follows:

"States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on the basis of equality of men and women, the same rights...."

The European Equal Treatment directive is in similar terms, and includes in particular Articles 5 and 7 which provide:

"5 1. Application of the principal of equal treatment with regard to working conditions, including conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on the grounds of sex.

7 Member States shall take the necessary measures to protect employees against dismissal by he employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principal of equal treatment."

Finally, Mr. Law relied also upon the provisions of s 19 of The Interpretation and General Clauses Ordinance which provides that:

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

I am conscious of the fact that the Equal Treatment Directive may be argued to be more specifically directed at the precise issue with which the Court is concerned and that <<CEDAW>> is in much more general terms. However, having regard to the general terms of <<CEDAW>>, and it purpose and intent, I am satisfied that its effect on the interpretation of the SDO is such that the SDO should be interpreted in such a way as to protect a woman from discrimination by an employer, in relation to that employment and the consequences of dismissal from the employment, even after the employment has terminated. To interpret the SDO in that way will be to give it a fair large and liberal interpretation and to remedy what otherwise would be a plain injustice.

If it is necessary to interpret the ordinance in that way then it must equally be interpreted for a man. I am well aware that I am taking an unusual course in not following an interpretation by the English Court of Appeal, which would normally be a very persuasive authority. But to follow that interpretation, both in the light of <<CEDAW>> and the clear injustices that follow from that interpretation would in my view be wrong.

I accordingly hold that on a true construction of s 11(2) SDO an act of discrimination occurring after the dismissal of an employee may be the subject of remedy under the SDO.

If I am wrong in my interpretation of s 11 SDO then the fact that the treatment about which Ray Chen complains took place after his dismissal would mean that he has no rights under the SDO and the action must be dismissed.

The s 9(2) point: A false and bad faith allegation:

The SDO provides in s 9(2) as follows:

"(2) Subsection (1) shall not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith."

Mr. Law sensibly conceded that the effect of the judgment of Judge Poon in EO 2/99 was to find that Ray Chen's allegation of sexual harassment was made falsely and not in good faith. That that was so is abundantly plain from the passages of Judge Poon's judgement to which I was referred by Mr. Burns. It is particularly plain from Judge Poon's finding at p 56 of the Judgement that the proceedings in EO 2/99 were brought against both defendants "maliciously and frivolously".

Mr. Law's argument was that the bar in s 9(2) applied only to an "allegation" made under s 9(1)(d) and not to the protected acts set out in ss 9(1) (a),(b) and (c). This was so he said, because s 9(2) referred only to a false "allegation".

I reject the argument. To suggest that an employer is to be protected from a false allegation not made in good faith but not from proceedings based on such an allegation is absurd. The bringing of proceedings confers no special status on an allegation and that proceedings are brought should not be sufficient to save an employee from the consequences of a false allegation not made in good faith.

It is right that a person who makes an allegation should be protected once the allegation is made. But just as s 9(1) operates as a warning to an employer as to the type of conduct he may manifest towards an employee, so does s 9(2) operate as a warning to an employee as to the allegations he may make and the subsequent proceedings he undertakes on such an allegation.

I accordingly hold that if the conduct of IBM in not making payment of funds to Ray Chen until May 2000 does constitute a relevant act of discrimination, it may not, by reason of his false allegation, which was not made in good faith, be a basis for remedy.

In case I am wrong in that finding I shall proceed to consider the other arguments made.

The "ex gratia" payment point:

Mr. Burns contended that Ray Chen was only entitled to seven days notice upon termination, that he had been paid beyond those seven days, and that accordingly the payment which Ray Chen seeks was an ex gratia payment only and thus not a legal entitlement. The result, he said, was that as IBM was under no legal duty to make the payment, there could be no available act of discrimination.

The terms of Ray Chen's employment were set out in a letter to him dated 12 August 1998 (Ex pp 55-6). Originally he had received a letter dated 9 July 1998, as may be seen from Ex p 56. That letter provided for a commencement date of 16 September 1998. But Ray Chen and IBM agreed to advance his commencement date to 18 August 1998 and on 12 August 1998 IBM substituted, in their records, a new first page to the letter of employment with the new commencement date. They should have given Ray Chen a copy of that page but it appears they did not. Mr. Law sought to argue that the circumstance was suspicious but that is plainly not so. At worst it is a clumsy oversight by the Human Resources department in IBM in not ensuring that the employee's records matched theirs. Nothing turns on the point whatsoever.

To be read with the letter is a document signed by Ray Chen, on his commencement day, 18 August 1998, (Ex p 62) the effect of which is that during his probationary period of six months he was subject to seven days notice if his employment was to be terminated. IBM employees were paid in the middle of the month, for the whole of the month. Ray Chen's bank account passbook (Ex p 128) shows that on 15 December 1998 he was paid the sum of $50,000, being his pay for the month of December. The date of his termination was 18 December 1998 and, it is argued, he was entitled only to be paid to 25 December 1998. Notwithstanding that that was the limit of the legal obligation, Mr. Burns said that the agreement to pay first, a pro rata Chinese Lunar New Year bonus, second 5 days vacation leave and third, one additional months salary in lieu of notice, a total of $67,214.64 was an ex gratia payment to be made by IBM.

Mr. Burns said that Ray Chen had failed to prove that he was legally entitled to the three additional payments. The letter of 12 August 1998, which Ray Chen accepted accurately set out his terms of employment set out his commencement date and salary and further provided as follows:

"As from the Effective Date of employment, you will become our regular employee and will enjoy the same benefits as all our regular employees do under the current IBM Benefits Plan set out in the on-line Hong Kong HR Homepage under Indirect Support of GCG Intranet Site (http//w3.gcg.IBM.com). The Company may from time to time and in its discretion amend, change or modify any or any part of the plans under the IBM Employee Benefits Plan. Your compensation may also be subject to any incentive/quota/bonus/variable pay scheme of the Company as may be applicable to employees of your position from time to time."

The contents of the relevant web pages were not discovered and as a result of that, I was not able to determine just what the full terms of the employment were. When asked about them Mr. Burns said that they had been amended and no longer existed in the form they were in, in August 1998. It seems to me that it cannot lie at the mouth of a Defendant to say, you must prove the terms of your employment and that if those terms are contained on a page on the World Wide Web which have been amended by us and can no longer be produced, a circumstance entirely beyond the control of the employee, then the claim must fail.

If IBM choose to place the terms of their employee's contract on a web page then they have a clear responsibility to maintain appropriate copies whenever changes are made. If they choose to despatch the information into the electronic ether, never to be seen again, they must not be surprised if inferences are drawn against them.

As part of the discovered documents the terms of payment to four other IBM employees, also terminated in their probationary period, were produced (Ex pp 14,15, 17 & 18). All received pro rata Chinese Lunar New Year Bonus and accrued vacation pay. On the basis of that evidence alone I find it to be sufficiently proved by Ray Chen that his terms of employment entitled him to those payments on termination.

One of the other employees received one months additional pay in lieu of notice. Two received what is described as 'variable pay' an expression not dealt with in the evidence, but no extra payment in lieu of notice. One received overtime pay and again no extra payment in lieu of notice. There is not a sufficient pattern of the payments to say, even on the balance of probabilities, that it was a term of employment that a person terminated was entitled to an additional one months pay in lieu of notice. This is particularly so when such a term would be in direct contradiction to Ex p 62 which makes it abundantly plain that seven days notice was all that was required. The clear implication is that there is no obligation on the employer to pay a sum in lieu of notice, beyond those seven days. I am accordingly not able to say that it was a term of the contract of employment that IBM should pay to Ray Chen an additional one months pay in lieu of notice on termination, in addition to the seven days required by Ex p 62.

Neither am I able to say, on the evidence, that IBM had established a practice of making an additional payment to an employee of a further one month's pay on termination, if that termination was in the probationary period. Had such a practice been established I would hold that the fact that it was made ex gratia is not a bar to a failure to pay that sum constituting an act of discrimination. It seems to me that a legal liability should not be a prerequisite to the failure to take a step being an available act of discrimination. If an employer establishes a practice, such that his employees may reasonably expect the practice to be applied to them, even if it falls below a legal obligation, then the employer should apply the practice fairly and uniformly and not withhold the step in a discriminatory manner.

That this should be so may be seen by the example of a letter of reference. As far as I am aware there is no legal obligation on an employer to give an employee a letter of reference. In West Yorkshire Police v Khan [2000] ICR 1169 CA, which concerned letters of reference, there was no suggestion that the Chief Constable had a legal duty to provide a reference. He simply accepted that he would "ordinarily comply with requests to provide references". Thus, it seems to be the case that once a practice is established by an employer he must apply that practice fairly and uniformly to his employees, irrespective of any overriding legal obligation or the lack thereof.

The salary overpaid was stated in Ex p 16 as $20,967.74 (i.e. 13 days from 19/12/98 to 31/12/98). On my finding that Ray Chen was entitled to seven days notice the correct calculation of overpaid salary is $9,677.41 (i.e. 6 days from 26/12/98 to 31/12/98). After adjusting for that sum, the amount due for Chinese Lunar New Year bonus and accrued vacation pay due, the amount to which Ray Chen is entitled in terms of his contract is $28,504.97. That is a sum which is lawfully due to Ray Chen. It matters not that the amount of the claim is less than that sum.

I accordingly hold that there were funds, lawfully due to Ray Chen, and that the ex gratia point fails.

The merits:

I have found that the Adekeye point fails and that the alleged act of discrimination, although after the termination of Ray Chen's employment, may constitute a basis for a claim under the SDO. I have found that the ex gratia point fails and that there were monies lawfully due to Ray Chen following his termination. Finally I have found that the s 9(2) point succeeds and that is a complete bar to Ray Chen's claim.

In case I am wrong on these preliminary points I shall proceed to consider the claim on its merits.

Rav Chen's credibility:

It was a central plank of IBM's case that Ray Chen was not a credible witness. A number of matters were relied upon and must be dealt with.

(i) The findings against him in EO 2/99:

Judge Poon found that Ray Chen had been "on a number of instances...less than frank and truthful" (Judgement p 27). He admitted lying, and failing to disclose a criminal conviction in his application for employment with IBM. Judge Poon rejected his evidence in its entirety (p 38). She found that not only was he not dismissed because of his allegation of sexual harassment, but that he could not have been dismissed for that reason. Judge Poon found that he had made material non-disclosure in an application for a Prohibition Order (p 56), and that the proceedings had been brought by Ray Chen "maliciously and frivolously"(p.56).

These are not findings that bind me in any way, but they are matters which weigh heavily against Ray Chen when his credibility is considered. That such findings have been made in a court of record will always be a matter that another court will give weight to in assessing the credibility of a witness.

(ii) His denial of receipt of the letter of 29 December 1998:

On 29 December 1998 IBM wrote to Ray Chen a letter (Ex p 91) in which the details of the ThinkPad were set out and a statement was made that "IBM has prepared your final payment of wages and will release it to you when the equipment has been located." That letter was sent to Ray Chen by registered post but was returned with a handwritten notation "Return to Sender" and with the Post Office chop ticked at the box marked "Unknown". Mr. Burns submits, and I accept, that those notations would not have occurred unless the Post Office had received information to the effect that Ray Chen was unknown at the address on the envelope.

Ray Chen acknowledged in evidence that throughout the whole of the relevant period his residential address was that endorsed on the envelope, namely 28E Han Kung Mansion, Taikoo Shing, Hong Kong. He agreed that the residence had been owned by his father since 1988 and that he himself had resided there since 1994. His evidence was that with some short periods of absence, (which did not include December 1998/ January 1999), he still resided there.

He denied that he had ever received the letter. When asked to compare the capital letter "R" on the notation on the envelope with other samples of that letter which he agreed were his, he denied that he had written

the notation. I did not find his denial to be persuasive and it must be said that the hand writing is remarkably similar. But in the absence of expert hand writing evidence, and having regard to the seriousness of the charge made, I cannot say, even on the balance of probabilities, that, despite what are plainly suspicious circumstances, the notation was made by Ray Chen.

(iii) His role in the Jenott trial:

In December 1996 a man named Jenott, a Fort Bragg North Carolina paratrooper, was prosecuted by way of Court Martial in the United States in relation to computer hacking of US Army computer systems. Ray Chen was a witness in that trial. His version of events was that he was retained as a security consultant by the United States and gave his evidence in that role.

Mr. Lane, solicitor for IBM, had prior to the hearing of this matter conducted various searches on the world wide web and gave evidence as to those searches. Mr. Law opposed the evidence being adduced as he said that he was unable to cross-examine the makers of the information produced. I allowed the evidence to be given having regard to the provisions of s 73B(5) District Court Ordinance Cap 336 in which the following provision is made:

"(5) The Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance (Cap 480) shall not be bound by the rules of evidence and may inform itself on any matter in such manner as it sees fit, with due regard to the rights of the parties to proceedings therein to a fair hearing, the need to determine the substantial merits of the case and the need to achieve a prompt hearing of the matters at issue between the parties."

In my view the real issue in relation to this evidence is the weight to be attributed to it, and the fact that the makers of the information cannot be cross-examined is a significant factor in assessing that weight.

Mr Lane's searches took him to information published on the World Wide Web concerning the Jenott case, particularly in a newsletter called "The Crypt Newsletter" on a web server hosted by the Northern Illinois University Department of Sociology1. There the author of the newsletter describes the role of Ray Chen in a quite different light. He is there described as a convicted thief who gave evidence under an immunity.

There was no evidence before me that lent any credibility to the assertions made on the web page, other than that Ray Chen acknowledged in evidence that he gave evidence under an immunity. He denied however that had that immunity not been given and he had not given evidence in the Court Martial he himself would have been prosecuted. However it is difficult to see what other inference can be drawn from the granting of an immunity. Ray Chen could not suggest any other reason for the granting of an immunity. When pressed as to the truth of evidence he had given in relation to this matter in EO 2/99 Ray Chen declined to answer on the grounds that his answer might incriminate him.

While I am not able to conclude that Ray Chen has lied about his involvement in the Jenott trial I am satisfied that he has been less than frank in his evidence concerning that involvement. That lack of frankness is a matter I must have regard to when assessing his credibility.

(iv) His alleged conviction in Washington State USA:

The information in the Crypt Newsletter asserts that Ray Chen had been convicted of breaking into the University of Washington in 1991 and stealing a computer. It asserts that he was sentenced to 60 days in jail and 30 days community service. Ray Chen acknowledged that he was at the University of Washington at that time. In his Resume (Ex p 4) he says that he has a Bachelor of Science in Computer Technology (1990) and that he attended the School of Law from October 1990 to June 1993. He however denied that he had such a conviction or that he had spent time in jail.

Armed with the information he had obtained from the Crypt Newsletter, Mr. Lane undertook further internet searches and by email made contact with the King County Superior Court in the State of Washington. He ultimately received an email, purporting to come from an official of that Court (Ex p 196-7) in the following terms:

"RE: Criminal Record of Conviction - Ray Chen - Burglary circa December 1992

The charges he was found guilty of are Burglary 2nd degree and Possession of Stolen Property 1st degree. King County Superior Court cause No 92-1-04432-0 SEA. The sentence information is 90 days KC jail of which 30 was converted to community service and 11 months community supervision, costs."

The email invited Mr. Lane to telephone for written certified information but Mr. Lane's evidence was that there was insufficient time to obtain the certification.

In assessing this evidence I have regard to the very serious allegation made against Ray Chen. It is not a matter to be approached lightly. A search undertaken of the University of Washington Degree Validation web site (to which I will refer in detail shortly) reveals that one Raymond Juei-Yao Chen, first enrolled fall 1983, holds the degree of Bachelor of Science in Electrical Engineering. That person is plainly not Ray Chen the Plaintiff. On the evidence as it is before me I am unable to say that the "Ray Chen" referred to in the email Ex p 196-7 is not the same as the Raymond J Y Chen discovered in the degree search. In that circumstance I disregard entirely the assertion that Ray Chen has the criminal conviction referred to and that he has lied on oath about that conviction.

(v) His claim to hold degrees from the University of Washington:

Mr. Lane's evidence was that the University of Washington provided a service for employers to enable them to verify claims made by prospective employees to degrees conferred by the university2. This is provided by way of a database that may be searched by the public through the degree validation service provided on the university's web pages. A search will not always reveal whether a named person has a degree as the University permits degree holders to opt to restrict the information so that it may not be accessed by the public. A search of the database was undertaken by Mr. Lane and his evidence was that it revealed no holder of the degrees claimed by Ray Chen.

Mr. Law's only challenge to that evidence was to have Mr. Lane acknowledge that in EO 2/99 Ray Chen had said that he did not recall if he had restricted the release of his information by the University. However that evidence must be viewed in the light of his evidence before me. First he denied that there even was a degree validation service saying that as a result of a murder the University had imposed very strict guidelines on the release of such information (Transcript pp 84 1. 18 - 85 1. 5). It was only when faced with the plain documentary evidence of the existence of the web site that he acknowledged its existence and sought refuge in the provision entitling students to restrict their information. Significantly he did not assert that he had restricted his information. To do so, of course, would have been quite contradictory to his assertion that he did not know the web site existed.

At the conclusion of his re-examination the following exchange occurred:

"Mr. Law: I have no further questions. I think his father will come to court to bring the certificates but now he is not here.

Court: Do you wish to put some certificates in through him in response to the cross-examination.

Mr. Law: Yes.

Court: Why don't we deal with that tomorrow."

The certificates referred to were of course the relevant degree certificates. When the hearing resumed the next day Ray Chen gave no further evidence and produced no documents to the court. It is clear that Ray Chen had every opportunity to put before the court the best evidence to establish that he holds the degrees he claims but simply failed to do so, it having been made absolutely plain to him in cross-examination that his assertion of the degrees was under direct challenge.

If the evidence produced by Mr. Lane were to be accepted then it would establish that he does not hold the qualifications he claims and has lied on oath. The question is what weight should I place on the evidence obtained from an internet search.

A web site purportedly conducted by a University and being as comprehensive as that of the University of Washington falls into quite a different category from that of the Crypt Letter. It has substantial inherent credibility and, in my view, may be accepted at face value. There is no suggestion that the University of Washington is not a recognised university, nor is any suggestion made that it is a mere "degree mill" producing degrees based on so-called "life experience" for those who are prepared to pay for a degree without any study.

In deciding that I shall have regard to the information published on the internet by the University of Washington I have taken into account the provisions of s 73B(5) of the District Court Ordinance.

Weighing the fact that the degree validation service did not reveal that Ray Chen held either a B Sc (Computer Science) or the Juris Doctorate claimed by him, together with his failure to produce to the court any degree certificates whatsoever, I am satisfied, on the balance of probabilities, that Ray Chen has lied about the qualifications he holds. This clearly is a matter I must take into account when assessing his credibility.

(vi) His claim to hold a licence to practise law in California:

Just as the University of Washington makes a degree validation service available to the public, the State Bar of California makes available a similar service for members of the public to check to see whether a person is in fact a member of the California Bar and licensed to practise law in that state3. Again Mr. Lane has conducted a search on the "Members Records Online"4 page for Ray Chen. The search produced two persons whose details were set out in Ex pp 202-7. One is named "Raymond T. Chen", now of Arlington Virginia, who was admitted in California in December 1994, an undergraduate of the University of California at Los Angeles, and who attended New York University School of Law. The other is "Ray Y. Chen", who was admitted in California in December 1995, now of Santa Ana, Orange County, California, an undergraduate of the University of California Irvine and who attended Whittier College School of Law. Plainly neither are Ray Chen the Plaintiff. Significantly, the record also shows that Raymond T. Chen is an inactive member, whereas Ray Y. Chen is an active member.

In cross-examination Mr. Law put to Mr. Lane that in EO 2/99 Ray Chen had said that he had not prepared the resume at Ex p 1 - 4. Mr. Lane acknowledged that that was correct. Mr. Burns did not, in terms, put it to Ray. Chen in cross-examination that he was not in fact licensed to practice at the California Bar, but it was plain from the attack made on the Juris Doctorate qualification and the evidence of Mr. Lane that that fact was challenged. At the conclusion of Mr. Lane's cross-examination Mr. Law sought permission to recall Ray Chen to deal with the issue of an application for a licence to practise law in California. Mr. Burns had no objection to that application. However after receiving advice from his counsel, Ray Chen gave no further evidence.

It may well be that Ray Chen did not prepare the resume in which the assertion is made that he has "Passed the ABA, licensed to practice law in the State of California". But he has not in any way resiled from that statement in his evidence in this trial. When the matter has been put directly in issue he has not taken the witness stand, when given the opportunity, to assert the qualification. Further, I note, in passing, that the acronym "ABA" is that for the American Bar Association, a quite different matter from the exam required to be taken by a lawyer who wishes to practise in California and which is colloquially known as "the California Bar".

Just as I am satisfied that he does not hold the degree of Juris Doctorate from the University of Washington I am satisfied that he is not admitted to practise law in the State of California. This too is a serious matter which must reflect on his credibility.

(vii) His claim to an honourable discharge from the United States Marines:

Mr. Burns submission that he does not have an honourable discharge from the United States Marines is dependant upon his submission that Ray Chen has a criminal conviction in Washington State. As I have found the evidence is insufficient to establish that conviction. While I would have thought that it would

have been a simple, and indeed a sensible matter for Ray Chen to prove to the Court by producing the appropriate documents as to his discharge, which he chose not to do, in the whole of the circumstances I am not satisfied that Ray Chen has lied about his discharge from the US Marines.

(viii) His conviction in Hong Kong:

In either 1994 or 1995 Ray Chen was convicted of three counts under s 27(a) Telecommunications Ordinance Cap 106. These offences involved the unauthorised access to a computer by telecommunications. He was fined $10,000.00 on each count. The convictions are ones which involve an element of dishonesty. In any terms obtaining access to a computer when unauthorised is a dishonest act. Were the matter to stop there it may be thought to be minor and to have but little effect on the assessment of his credibility in this trial.

But it does not stop there. Although he frankly admitted those convictions he was obliged to admit also that following that trial he published an assertion in an Internet Relay Chat line that the convictions came about as a result of a conspiracy to frame him by the worldwide gay community. He said in evidence that those were views he still held. That is an attitude which is so completely at variance with the views of right thinking persons that I am obliged to have regard to both those views and the convictions when assessing Ray Chen's credibility. Both point to a man who is not worthy of credit on oath.

Having regard to all of the foregoing matters I find Ray Chen to be a person who is not believable. He has lied to me on oath. Where there are differences in the evidence between Ray Chen and the witnesses called by IBM and I have accepted the evidence of the IBM witnesses and rejected that of Ray Chen as well as any other matters relied upon, I have taken into account my findings as to his credit.

The issue of the retention of the ThinkPad computer:

It was the case for Ray Chen that the allegation that he had retained the ThinkPad was a deliberately false allegation. The evidence of Ray Chen was that it was so made to enable IBM to withhold from him monies it knew were due to him. Mr. Law, in his submissions did not accept that the allegation in relation to the ThinkPad may be characterised as a genuine but wrong belief held by those at IBM. This issue must therefore be resolved.

Ray Chen was terminated at an exit interview conducted by Michael Shevloff on 18 December 1998. It was the first time that Michael Shevloff had had to conduct an exit interview with an employee at IBM and before doing so he sought advice from the Human Resources Department as to the steps he must take. Amongst other matters he was required to complete a document entitled "Manager's Report of Transfer/Separation/Leave". This he did, quite properly, shortly after the interview. It is Ex p 85. In the check list he has marked off certain items but has left blank the box marked "IBM owned equipment, computer hardware and software returned". It was his evidence hat he did not recall whether he asked Ray Chen if he had returned the IBM ThinkPad computer. Ray Chen said that he did.

There is no documentary record of the allocation of a ThinkPad computer to Ray Chen personally or even to the team with which he worked. But Ray Chen did not dispute the fact that there was such a computer available to his team. His only dispute was as to whether he had retained it. The first documentary evidence relating to the ThinkPad is in an email from Cannie Ng of the Human Resources Department to Carrie Chung, copied to Michael Shevloff and Janet Chow on 21 December 1998 (Ex p 48). In it she asks that the final payment to Ray Chen be withheld until the computer is returned and that Ray Chen be contacted to recover it.

The issue is next raised in an email on 22 December 1998 by Kenneth Choy to Michael Shevloff in which he sets out the details of the computer and asks for its return (Ex p 49). Further emails, Ex p 50, pursue the matter internally at IBM. In all the relevant emails are exchanged between 8 people at IBM in Hong Kong. Finally the registered letter Ex p 91 was sent to Ray Chen.

Ray Chen made no allegation of mala fides against anyone at IBM other than Michael Shevloff. Indeed, Mr. Law accepted in his submissions that Cannie Ng, the only other witness involved in the series of emails, was a witness of truth. Ray Chen accepted that Tony Yeung and Kenneth Choy, also both involved in the emails were "good men" and he made no allegation against them.

But neither Ray Chen nor Mr. Law were able to explain to me why Michael Shevloff should embark on a quite remarkable exercise to create a deliberately false allegation in relation to the computer and then involve so many other innocent people in putting the exercise into effect. There was simply no evidence at all to suggest why Michael Shevloff should have such an improper motive. The emails demonstrate that Michael Shevloff asked Kenneth Choy to "double check" the position relating to the computer (Ex p 49) a step he would be unlikely to take if setting up a quite false allegation. Such a double check could well produce the answer that Ray Chen did not have the computer.

Ray Chen believed that the false allegation was made to justify the deprivation of payment to him because he had made a complaint to the Equal Opportunities Commission. In EO 2/99 Judge Poon found that the first occasion on which Ray Chen made an allegation of sexual harassment was in his exit interview. Both Ray Chen and Michael Shevloff agreed that at the termination of the interview Ray Chen said words to the effect "I will see you in Court". It was Ray Chen's evidence that this referred to the claim for sexual harassment. Michael Shevloff believed that it referred to a potential claim for unfair dismissal. In either event it seems quite beyond belief that Michael Shevloff, on hearing that would immediately set about manufacturing a false allegation of the retention of the computer to justify withholding the final payment due to Ray Chen. It is, in my view, more likely than not that Michael Shevloff believed that expression "see you in Court" related to an claim for unfair dismissal as Ray Chen had declined to accept the offer of resignation and was plainly upset at his dismissal. The suggestion of sexual harassment had not previously been made, and Michael Shevloff's mind would undoubtedly have been primarily directed to the issue of the dismissal. To suggest that on hearing the statement "see you in Court" Michael Shevloff realised that a claim was to be made under sex discrimination legislation and immediately set about putting in place a malicious and false claim that the computer had been retained in order to enable wages to be withheld is quite fanciful and beyond any belief.

Further, if Ray Chen's version were accepted as to the request for the return of he ThinkPad being made during the interview it would mean that Michael Shevloff must has anticipated both the claim for sexual harassment and the "see you in Court" statement in order to be setting up the false claim of retention. Plainly that is simply impossible.

I am satisfied that Michael Shevloff and other employees at IBM genuinely believed that Ray Chen had retained a ThinkPad computer belonging to the company. I am not required, nor am I able to determine whether in fact the computer was retained. That was not an issue in the proceedings before me and the appropriate witnesses were not called and examined on the facts relevant to that issue. It is sufficient for the purposes of these proceedings that I make the finding that has been made.

Mr. Law submitted that an employer had no right whatsoever of setoff against an employee's wages and that the only proper course for IBM to have followed would have been to pay the wages due and then deal with the issue of the computer. That was all the more so, he said, where the employee had made a complaint under the SDO. He said further that the effect of the SDO was to take away completely any right of setoff an employer might otherwise have when a complaint was made.

I reject those submissions. Under s 32(2) Employment Ordinance Cap 57 an employer has a limited right of setoff. The section is in the following terms:

"(2) The following deductions may be made by an employer from wages of his employee-

(b) Deductions for damage to or loss of goods, equipment or property belonging to or in the possession or control of the employer or expressly entrusted to an employee for custody, awful loss of money for which an employee is required to account where such damage or loss is directly attributable to his neglect or default:

Provided that-

(i) The total amount recoverable by deductions in any one case shall not exceed the equivalent in value of the damage or loss suffered by the employer or $300 which ever is the less; and

(ii) The total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period;"

The amount retained by IBM by way of setoff against the return of the ThinkPad far exceeds the sum they were lawfully entitled to retain, but that gives rise only to liability under the Employment Ordinance and is not relevant to a claim under the SDO unless it can be shown that the retention is for any of the reasons set out in s 9(1) SDO. There is nothing in the SDO to lead me to conclude that where the employer's reason for retaining money due by way of setoff, is otherwise lawful unders 32(2) of the Employment Ordinance, he may not continue to maintain that setoff. If his reason, even if in part only, is one of the proscribed acts in s 9(1) SDO, then of course he may not lawfully make the setoff.

The steps taken between December 1998 and 10 May 2000:

Michael Shevloff's involvement with the return of the ThinkPad and the retention of the funds ended on 29 December 1998. Ray Chen himself simply took no steps whatsoever to recover the monies he claims were being withheld. He says that he did not want to have direct contact with IBM, and to an extent that is understandable. But for a time at least he was represented by solicitors in EO 2/99 and had he been concerned about the matter he could have raised it with his solicitors who could have taken it up with IBM's solicitors. Even while he represented himself Ray Chen could have raised the matter in a letter to IBM's solicitors. While he may, understandably, not want to have direct contact with IBM, he was required to have contact with their solicitors in relation to interlocutory matters in EO 2/99 and could easily have raised the matter himself then. From time to time he had to come to court on interlocutory matters in EO 2/99 and had he been concerned about the issue he could have raised it with the judge. There is no suggestion that he ever did so.

In fact the resolution of the issue of the outstanding monies was quite contradictory to the claim he was making. In EO 2/99 he sought not only reinstatement in his position but promotion. To accept the final payment of wages would have implied to him an acceptance of his termination, an act he could not countenance.

As for IBM, they believed they were entitled to hold the monies against the return of the ThinkPad, they had sent a registered letter which had been returned and no further demand was made of them. Both parties became enmeshed in the build up to the hearing of EO 2/99 and it is not surprising if, in the complete absence of any action by Ray Chen on this issue, it simply fell into abeyance.

Ray Chen's apparent complete lack of interest in the issue of the monies continued right through the trial of EO 2/99. I was directed to passages 192 & 193 of the transcript of the evidence of that trial which Mr. Law contended demonstrated Ray Chen's continued concern and complaint about the non payment of the monies. Those pages are part of the evidence in chief of Ray Chen in which he is dealing with the issue of a prohibition order he had obtained against Tamara Russ, the first defendant in EO 2/99. There is nothing in those pages that in anyway indicates he was concerned or complaining about the monies he claims as due to him.

That he made no complaint at all of this matter during the hearing of EO 2/99, by which time he was certainly aware of the contents of the registered letter Ex p 9, is further clear evidence that he was, simply, not seeking payment of the sum.

I am accordingly satisfied that in December 1998 and right through to the delivery of judgement in EO 2/99 by Judge Poon, Ray Chen was not concerned about the payment of funds to him neither did he in any way seek those funds. I am satisfied that IBM were, at all material times during that period, willing to pay the monies due to Ray Chen if the ThinkPad issue was resolved and that the fact that the funds were not paid was not in any way dependent upon any of the matters in s 9(2) of the SDO.

The steps taken from 10 Mav 2000 to 24 Mav 2000:

It is common ground that following the delivery of judgment in EO 2/99, Cannie Ng first tried to simply deposit the sum in Ray Chen's bank account. This she was unable to do as the account had been closed. It is further common ground that in the week commencing 15 May 2000 Cannie Ng telephoned Ray Chen to advise him of that fact. According to Ray Chen the conversation ended inconclusively and it was agreed that it would be continued at some time in the future when Cannie Ng chose to call Ray Chen again.

Cannie Ng's evidence however, was that in that telephone call Ray Chen asked that the payment be sent to him by post, to which she agreed. I accept Cannie Ng's evidence and reject that of Ray Chen. Ms. Ng's evidence is corroborated by the fact that on 16 May 2000 a cheque for the required sum was drawn (Ex p 120). The drawing of that cheque is explicable only on Cannie Ng's version of the conversation. Had the arrangement she asserts not been made there would simply be no need to have drawn the cheque. Equally there is no reason for the matter to have been left open as Ray Chen asserts, and further no need to draw the cheque. He himself was quite unable to explain why the conversation should have ended in such an incomplete way or why the cheque should have been drawn on the day after the conversation.

Further I reject Ray Chen's assertion that during that or any other conversation Ms. Ng said that the delay had been occasioned "by the lawsuit", and that he asked for interest and compensation for the delay Had that been sought, again there would be no need to prepare the cheque in the sum of $67,214.64.

It is not disputed that by oversight the cheque was not posted. I accept that on 23 May 2000 Ray Chen telephoned Cannie Ng and inquired as to the cheque. Ray Chen accepts that in that telephone conversation he agreed that the cheque would be delivered to him that day. I reject his assertion that he sought and extra, undefined "bonus", interest, compensation and a "sounding" apology. Had he done so the amounts would have had to have been settled and there would have been simply no need to send a staff member to Ray Chen with a cheque for the original sum.

I accept the evidence of Felix Tseng as to what took place when he arrived at Ray Chen's home to deliver the cheque. He made a note (Ex p 136) immediately he returned to his office, only 10 minutes after the event. I am satisfied that that was the first occasion on which Ray Chen made any claim for interest or other compensation of any sort. That that is so is demonstrated equally by Ray Chen's acceptance that Cannie Ng might well have been surprised at the refusal to accept the cheque. Had the demands for interest and compensation been made before Felix Tseng's visit she would have no reason to be surprised at its rejection. She sent a cheque which she had every reason to believe would be accepted as Ray Chen had asked for nothing more.

Ray Chen asserts that both Cannie Ng and Felix Tseng told him that the delay in making the payment "was due to the lawsuit". I do not accept that either said that, but even if they did it is not a sufficient basis to found the claim. In the first place the expression is too vague when used by employees who have not themselves been involved in the sexual harassment litigation to have the meaning Ray Chen seeks to ascribe to it. Secondly, for the reasons I have set out I am satisfied that IBM's reason for withholding the payment was solely that of the issue of the return of the ThinkPad. Finally, the pursuit of the action in EO 2/99 was in fact Ray Chen's own reason for not doing anything himself to facilitate payment. The acceptance of the sum at any earlier time was in direct contradiction to the relief he sought in those proceedings.

Findings:

I accordingly find that Ray Chen's claim fails. I am satisfied that the sum of $67,214.64 was not retained by IBM for any of the reasons in s 9(2) SDO. In retaining that sum IBM have not committed an act of unlawful victimisation against Ray Chen.

There will accordingly be judgement for the Defendant.

The consequence of the findings as to Ray Chen's credibility:

Like Judge Poon I have found Ray Chen to be less than frank and truthful. Like Judge Poon I have found Ray Chen to be a liar on oath. That is so in his repeated assertion of degrees from the University of Washington and in relation to his claim to be a lawyer qualified and enrolled to practise at the California Bar.

There are not sufficient grounds to say, on the balance of probabilities, that he does have the criminal conviction asserted by IBM, and in assessing his credibility I have entirely disregarded that evidence. However there are good grounds to suspect that that assertion is true. there are good grounds to suspect that he has lied as to the handwriting on the letter Ex p 91 and also as to the reasons for the immunity that was given to him in the Jenott trial.

This is the second time he has come to a court of law in Hong Kong as a plaintiff and found to be both less than frank and truthful and a liar. This is a situation which should not be allowed to continue. I have accordingly directed the Registrar of the District Court to forward the transcript of the evidence, the exhibits, and a copy of this judgement to the Director of Public Prosecutions for his consideration and to take such steps as he thinks appropriate.

Should the Ordinance be amended in the light of Adekeve?

If I am wrong in my interpretation of the SDO as providing protection to an employee for acts of the employer after termination of the employment then I am firmly of the view that the SDO should be amended to give appropriate protection. The examples cited in Adekeye, Coote and Bull dramatically demonstrate the injustice that would follow if the protection is not given. It simply cannot be morally right that an employee may be given a remedy if his employer refuses, wrongly, to supply a letter of reference, if that letter is sought prior to dismissal, but the employee who makes the request after dismissal has no remedy.

It equally cannot be morally right that the acts of an employer towards an employee may constitute an actionable discrimination if they occurred prior to the termination of employment, but not if they occur when an employee makes an entirely justifiable claim under ss 5 Or 6 SDO after termination of the employment.

In Coote the Court considered the potential "knock-on" effect of the decision and foresaw a frustrated employee who has lost a claim of unfair dismissal, after a lengthy hearing, trying again some years later on the pretext that no reference or a bad reference prevented him from obtaining a new job. The Court said (at p 950):

"It seems to us, on the one hand, that if an employer has been guilty of giving a discriminatory reference (that is one influenced by sex or race, or because of a previous claim) or of not giving a reference at all for reasons which are discriminatory, then as a matter of policy it is right that the former employee should have a remedy. On the other hand, tribunals must be reasonably alert to the possible misuse of this type of complaint. There must be some basis for the assertion that the way the reference was dealt with was because of race or sex or because of the doing of a protected act. We are quite content to believe this issue to the good sense of the industrial jury."

With that I agree. The courts which are required to apply the legislation are well capable of rejecting an unjustified complaint made for a wrong purpose and the sanction of costs will be adequate to protect employers from the rare occasions when such claims might be made.

Should I be wrong in the finding that I have made therefore there is in my view a clear and urgent case for the amendment of the legislation.

Costs:

Having regard to the findings I have made issues as to costs, and the appropriate level at which they might be imposed arise. I will hear counsel on costs on a date to be fixed on the application of either party, 14 days notice to be given to the other party.

John Saunders
Judge of the District Court
3 January 2001

Representation:

Solicitors for Plaintiff: Ford Kwan & Co

Solicitors for Defendant: Wilkinson & Grist