

Progress Software Corp (S) Pte Ltd v Central Provident Board
[2002] SGHC 174

Case Number : OS 601579/2001

Decision Date : 08 August 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Sarjit Singh Gill SC, Dylan Lee and Chua Beng Chye (Shook Lin & Bok) for the plaintiffs; Edmond Pereira and LR Penna (Edmond Pereira & Partners) for the defendants

Parties : Progress Software Corp (S) Pte Ltd — Central Provident Board

Civil Procedure – Appeals – 'Back door' appeal – Plaintiffs not having statutory right of appeal to courts – Whether plaintiffs' application a 'back door' appeal

Civil Procedure – Originating processes – Mode of commencement of proceedings – Plaintiffs' application by way of originating summons – Application by defendants to strike out on basis of incorrect mode of commencement – Dismissal of defendants' application – No appeal against dismissal – Whether plaintiffs ought to commence application under O 53 of Rules of Court – Whether issue res judicata – O 53 Rules of Court

Provident Fund – Contributions – Whether variable component in plaintiffs' salary package constitutes 'additional wages' or 'ordinary wages' – Sch 1 paras 5(d) & 5(e) Central Provident Fund Act (Cap 36, 2001 Ed) – reg 2(1) Central Provident Fund Regulations (Cap 36, Rg 15, 1998 Ed)

Words and Phrases – 'Additional wages' – 'Ordinary wages' – Sch 1 paras 5(d) & 5(e) Central Provident Fund Act (Cap 36, 2001 Ed)

Judgment

GROUND OF DECISION

Cur Adv Vult

1. The plaintiff is a private company incorporated in Singapore and is a subsidiary of Progress Software Corporation, a NASDAQ listed company in the United States Of America. This is an application brought by the plaintiff in respect of the Central Provident Fund ("CPF") payments of four of its employees. Under their employment contracts, the remuneration of these employees is structured as having two component parts described in the affidavit of Christopher Yeo, the plaintiff's managing director, as a fixed component (comprising about 60% of the total remuneration) and a variable component (comprising the balance 40%). The fixed component was expressed as an annual package and contributions to the CPF were paid on a monthly basis. The variable component was determined monthly but paid at various intervals. At this point it will be useful to mention that remuneration for the purposes of calculating contributions under the Central Provident Fund Act, Ch 36 fall into two broad categories. First, there is the "ordinary wages", and secondly, there is "additional wages". These are defined in 5 (d) and (e) of the First Schedule to the Act as follows:

"(d) "additional wages" means any wages other than ordinary wages;

(e) "ordinary wages for the month" means the amount of remuneration due or granted wholly or exclusively in respect of employment during that month and payable before the due date for the payment of contribution for that month."

All CPF contributions must be paid "not later than 14 days after the end of the month in respect of which the contributions are payable" as required under reg 2 of the CPF Regulations (1987).

2. The employees concerned in this case were paid a fixed monthly salary in respect of which no dispute arises. They were also paid commissions depending on whether they met the sales target set for them by the company. The plaintiff says that the commissions do not depend on collections but on invoices generated by the employee. Therefore, it takes the view that any commission due is easily computable at the end of each month and should therefore form part of the ordinary wages of the employee. If that is right, then the total contributions to the CPF, including the variable component (the commissions), is subject to the maximum of 36% from the employee (up to a maximum of \$2,160) and 20% (up to a maximum of \$1,200) from the employer - these amounts are those payable at the material time. The figures and percentages may vary from time to time. On the other hand, if the variable component is regarded as "additional wages", which, in the opinion of the Board, it is, then additional contributions are required to be made from the "additional wages". The additional contributions are not subject to the maximum prescribed for contributions from the "ordinary wages".

3. According to Christopher Yeo, as at 1 July 1996 the Board accepted that the variable component is part of "ordinary wages". On 4 August 2000 the plaintiff's records from 1997 to 2000 were called for as part of the Board's "periodic checks". The plaintiff's then Finance Manager was summoned to produce various documents and answer queries by the Board. Eventually, the Board wrote by letter dated 15 November 2000 to the plaintiff stating that the "commission payments should be treated as "Ordinary Wages". However, on 22 January 2001, the Board wrote to the plaintiff stating that the plaintiff had not made correct contributions to the CPF for their employees for the period between October 1998 and July 2000 and re-assessed the commission payments to be "additional wages". A sum of \$13,728 was demanded by the Board as additional payment. This amount was subsequently revised to \$12,048 after an exchange of correspondence between the board and the plaintiff's solicitors. The plaintiff disputes the view taken by the Board and so it paid the amount under protest. It also paid certain sums being interest for late payment (also under protest). These payments were demanded and paid in respect of a single employee (Anne Seow). On 28 June 2001 the Board demanded payment of additional sums for similar reason in respect of three more employees of the plaintiff. A sum of \$98,530 was demanded and paid under protest. On 15 October 2001 the Board revised the amount to \$100,221 and the plaintiff paid the balance of \$1,691, again under protest. Fearing that the Board may reject the payment and commence criminal prosecution the plaintiff made this application on 19 October 2001.

4. The application was made by way of an Originating Summons in which the plaintiff seeks a determination by this court as to whether the variable component of the four employee's remuneration ought to be classified as "ordinary wages" and not "additional wages", and at the same time, prayed for a declaration that the plaintiff and its four employees are entitled to a refund of the payment made under protest. The Board applied through its solicitors to strike out this Originating Summons on the ground that it was misconceived because the application ought to be made as an O 53 proceedings. The application to strike out was dismissed by the Deputy Registrar and the Board appealed. The appeal before a judge-in-chambers was dismissed on 15 April 2002. The Board declined to appeal further but its counsel Mr. Pereira maintained that the procedure is wrong and took it as a preliminary objection before me at the hearing of the Originating Summons. Mr. Dylan for the plaintiff, not surprisingly, responded by claiming that this objection is *res judicata* and that the issue had been raised and disposed.

5. Counsel for the Board, Mr. Pereira, made a strong submission on the Or. 53 point as follows. The Board was established as a statutory body under the CPF Act. The different rates of contributions as well as the different types of wages are prescribed in the First Schedule which may be amended from time to time by the Minister. The contributions are paid into a fund administered by the Board. The fund and contributions to it are administered by the Board; and in this regard, any objection or

challenge to the Board's decisions relating to the administration of the fund or the contributions must be made to the Board. In the event that the person objecting is still dissatisfied with the Board's decision, he may appeal where statutory provision is made for appeals. In this case, there is no provision for appeal under the CPF Act. Hence, in his view, a dissatisfied person is left with only one alternative, namely, to apply under O 53 for leave to issue an order for certiorari to quash the decision of the Board, or a mandamus order to compel the Board to perform a specific act (such as reimbursing money paid). By s 58(d) and (e) of the Act, non compliance with the regulations or rules under the Act, or the failure to make payment, is an offence under the Act.

6. Mr. Pereira submitted that the functions of the Board are determined by the Minister under the power conferred upon him by the Act and as such the court will not ordinarily interfere with those functions, and will, in any case, do so only by way of judicial review. Hence, the proper procedure is to commence an O 53 proceeding. The courts, he submitted, do not oversee the administrative functions of a public body in any other way. An action of this nature in respect of a private organization would be directed at the organization's servant or agent and the liability of the organization is vicarious in nature. In the case of a public body, the act of any agent of the public body is an act of the public body directly, and, in the words of the Court of Appeal in *Seah Hong Say (trading as Seah Heng Construction Co) v Housing Development Board* [1993] 1 SLR 222, 225, "... in so doing [the court] reviews not the substantive decision in any case, but the decision-making process". The specific nature of the claim in *Seah's* case is entirely different, but the basic principle is no different. In this case, the Board had made a determination as to the payment of CPF contributions in respect of the salaries of four of the plaintiff's employees. Mr. Pereira takes the view that the conduct of the Board in this case was "quasi-judicial" in character. This term has been defined in *Judicial Review of Administrative Action*, 5th ed, de Smith, Woolf & Jowell, page 1008 as follows:

"In administrative law this term may have any one of three meanings. It may describe a function that is partly judicial and partly administrative - e.g. the making of a compulsory purchase order (a discretionary or administrative act) preceded by the holding of a judicial-type local inquiry and the consideration of objections. It may, alternatively, describe the "judicial" element in a composite function; holding an inquiry and considering objections in respect of a compulsory purchase order are thus 'quasi-judicial' acts. Or it may describe the nature of a discretionary act itself where the actor's discretion is not fettered."

Counsel takes the view that even if this court were to decide that the demand for payment was wrong and issues a declaration as prayed for by the plaintiff, the court cannot overrule the action of the Minister under a private proceeding.

7. Mr. Dylan, counsel for the plaintiff, referred me to *Chin Hong Oon Ronny v Tanah Merah Country Club* [2002] 3 SLR 226 for the proposition that the Originating Summons is an acceptable mode of proceedings because in that case, the objection that it was not was overruled by the court. I have absolutely no disagreement with the court's ultimate decision on the merits of that case, but I am not certain that the O 53 point made there is relevant in the present case. That was a private law dispute between a private individual and his club, and presumably contractual rules apply. In that case, the issue hinged on the correctness of the club's decision in suspending the club's privileges to the plaintiff. Although the court there held that it was not an O 53 case, it nevertheless applied administrative law principles, see page 238:

"I turn next to the plaintiff's complaint that there had been non-compliance with the rules of natural justice. The position at law is, the function of the court in

relation to the proceedings of clubs is a supervisory one and confined to the examination of the decision-making process, i.e. whether the rules of natural justice had been observed and whether the decision was honestly reached. Its function is *not* to review the evidence and the correctness of the decision itself (see the Court of Appeal's decision in *Singapore Amateur Athletics Association v Haron bin Mundir* [1994] 1 SLR 47)."

8. The present case has reached me in the unusual circumstances that I have set out above. Although I can see some merits in the submission of Mr. Pereira, counsel for the Board, that this ought to be an O 53 proceedings, the fact of the matter is that Mr. Pereira had not exhausted his avenue of appeal (to the Court of Appeal) and the issue having been ventilated before another High Court judge, must be considered *res judicata*. I do not think that I am now at liberty to say that this application ought to be dismissed on the ground that it came to me by the wrong path, and so it will not be necessary for me to address the question whether this ought to be commenced by way of an Or. 53 proceeding.

9. Mr. Pereira then raised his second objection, namely that this application is an appeal through the backdoor when the Act makes no provision for an appeal to the courts. It has long been recognised that a right of appeal is a statutory right. See *Healey v Minister of Health* [1955] 1 QB 221, 232. The present proceedings were instituted because the plaintiff disputes the Board's decision that certain commissions paid by the plaintiff to its employees were "additional wages". It is accepted that the basis for the dispute lies in the different interpretation of the same words in the CPF Act. The question is, whether the commencement of these proceedings constitutes an appeal? A plaintiff is entitled to assert its right by disputing an alleged legal obligation. In such cases the court shall be the arbiter as to whether there is or is not such an obligation. In this regard, I do not agree that this application is in fact an appeal by the "back-door". Drawing a line between such cases and cases in which a party is in fact making an attempt to launch an appeal where no such right exists, is a fine one; but in this case I would lean in favour of holding that the application for a determination as to whether the Board had acted within the legal limits is not an appeal.

10. I shall now express my view as to whether the variable commissions in this case come under the definition of "additional wages" or "ordinary wages", that is, on the merits of this case. Mr. Pereira's argument for the Board runs as follows. The definition in the First Schedule (reproduced above) says that additional wages "means any wages other than ordinary wages". "Ordinary wages", in turn, is defined to mean remuneration due and payable before the due date for the payment of contribution for that month". Regulation 2(1) spells out that the time for such payment shall not be later than 14 days from the end of the month. Hence, Mr. Pereira argued, the variable commission, though computable at the end of each month but not payable within the 14 days period, must be "additional wages".

11. Mr. Dylan for the plaintiff replied. It will be useful to first note the relevant term of the employment contract which provided as follows:

"Our sales manager has an annual compensation plan of S\$150,000 of which 55% is paid as retainer and the remaining 45% is paid based on the value of his sales performance as follow

(a) Fixed base-salary = S\$82,500 per annum. Which is equivalent to S\$6,875 per month. We understand that this is to be treated as ORDINARY WAGES, hence, the total CPF contribution from both employer & employee would be capped at the ceiling payment of S\$2,400 (40% x S\$6,000)

(b) Variable target income = S\$67,500 (which is 45% @ S\$150K)

The variable portion is given in the form of commission payment and is payable on a monthly basis. The percentage payment is based on the value of total billing for the month, hence, if the total billing (sales) for the month is S\$200,000, the sales manager will earn a total commission of S\$5,750."

However, it was not disputed that the commissions though calculable monthly, were not paid as computed but adjusted according to the actual payments received by the plaintiff from its customers. Mr. Dylan disagrees with the Board's view that such payments were in fact apportioned retrospectively. It may be noted in passing, that one of the plaintiff's employees, Mr. Wong Jak, deposed that they do not know how much commission they (the employees) were entitled to at the end of each month. They were informed only after they receive the plaintiff's "Compensation Plan Financial" statement.

12. The issue before me was whether the variable component of the plaintiff's salary package for its employees should be considered "additional wages" or "ordinary wages". Ordinary wages are remuneration that are due or granted wholly or exclusively in respect of employment during that month and *payable before the due date for the payment of contributions for that month*. In the context of the CPF Act, I do not see the emphasized words as meaning payable at any other time. The word payable means what it must mean in ordinary usage in the context of the above passage. Confusion may arise when the word "payable" in the context of the Act begins to assume an ambiguous meaning which it must do if I accept Mr. Dylan's submission – that "payable" includes deferred payments. I am, therefore, inclined towards the Board's view. I am also inclined to concur with the decision in *Trevor Griffiths v Oceanroutes (SEA) Pte Ltd* S.952 of 1995 (unreported) in which the definition of "additional wages" in *CCH/SNEF Singapore Employers' Handbook* was accepted. In that handbook, "additional wages" is understood to mean "any wages other than ordinary wages. For example, annual bonus, incentive payments and other payments made at intervals of more than one month."

13. Finally, I should comment on Mr. Dylan's submission that the variable commission was "payable" within the meaning of "ordinary wages" because the deferment clause in the employment contracts in question is a "condition defeasant/subsequent since the duty/liability to pay the variable commission component has already arisen when the sales revenue has been billed, but this duty/liability is deferred or discharged when the plaintiff exercises [its] rights under the deferment clause". He argued that since the plaintiff had not exercised its discretion to defer payment, the variable commission component remains "payable" monthly. But, I think that this is precisely what takes it outside the definition of "ordinary wages". The term "payable" in the Act must signify that payment due *will* be paid within that period.

14. For the above reasons, I dismiss the plaintiff's applications under this Originating Summons with costs to be taxed if not agreed.

Sgd:

Choo Han Teck

Judicial Commissioner

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