Allianz Insurance Co (Singapore) Pte Ltd and others *v* Ma Shoudong and another [2011] SGHC 106

Case Number : Originating Summons No 1158 of 2010/Z

Decision Date : 29 April 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Niru Pillai (Global Law Alliance LLC) for the appellants; Shanker Kumar (Hoh Law Corporation) for the respondents.

Parties : Allianz Insurance Co (Singapore) Pte Ltd and others — Ma Shoudong and another

Employment Law – Work Injury Compensation Act – section 3(6) – section 29(2A)

29 April 2011 Judgment reserved.

Lai Siu Chiu J:

1 It has been two years since Wang Zeng Ming ("the deceased") at 21 years of age passed away on 18 April 2009. The deceased, a national of the People's Republic of China, was the son of Ma Shoudong and Wang Jijin ("the respondents"). The respondents did not have the closure they probably expected when the Assistant Commissioner for Labour ("the Commissioner") awarded them $140,000 ("the Award") on 28 October 2010 under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("the Act") for their son's untimely demise. That was because the deceased's employer Singapore Airport Terminal Services Limited ("SATS") and its co-insurers Allianz Insurance Co (Singapore) Pte Ltd and Singapore Aviation and General Insurance Co Pte Ltd (who are the first and second appellants respectively), chose to appeal against the Award, thereby prolonging the respondents' grief. Given China's one child policy, it was highly unlikely that the deceased had any siblings. No amount of compensation let alone the Award, would have consoled the respondents in their irreplaceable loss if the deceased had been their only child.

2 Since about July 2007, the deceased had worked as a cabin service assistant for SATS (which is the third appellant in this action). His job was to deliver food and beverages from the SATS catering building to aeroplanes. On the day of his death, the deceased was working with a colleague Lee Keok Chuan ("Lee"). The pair made deliveries to two aeroplanes. For the third delivery which was to a bigger aeroplane than to the first two aeroplanes, the pair loaded about 3 – 4 containers and 8 – 10 oven racks onto trolleys. Each container and oven rack weighed up to 25 kilograms. The trolleys were then wheeled to, and loaded onto a nearby delivery truck. The pair subsequently accompanied the delivery truck to the aeroplane and assisted in the unloading of the trolleys. The entire delivery took around 1½ hours. After completing the delivery, the deceased went to the designated resting area for a short break. At around 7.45pm he vomited and collapsed. An ambulance promptly arrived to take him to the hospital but he was pronounced dead at 8.50pm.

3 The issue before the Commissioner was whether the death had been caused by an accident that arose out of and in the course of the deceased's employment pursuant to s 3(1) of the Act; the Commissioner held that it was and accordingly made the Award.

4 It was common ground between the parties that the deceased had the congenital condition of

Myocardial Bridging, where the coronary arteries tunnel into the muscle of the heart instead of resting on top of it at the endocardium. The respondents' expert witness was Associate Professor Gilbert Lau ("Professor Lau"), a senior consultant forensic pathologist at the Health Sciences Authority. He gave evidence that it was likely that the physical strain of the deceased's work exacerbated his heart condition which then caused him to suffer cardiac arrest or a lethal episode of cardiac arrhythmia. The appellants disputed Professor Lau's evidence. Their own expert witness Dr Baldev Singh ("Dr Singh"), a cardiologist in private practice, testified that the deceased's heart condition was generally benign. Given the amount of time the deceased had to rest after the third delivery and the non-strenuous nature of the job, Dr Singh opined that it was more likely than not that the deceased had suffered from an unpredictable and random attack of "sudden death syndrome".

5 The Commissioner preferred Professor Lau's evidence. Accordingly, he found that the *appellants* had failed to discharge their burden of proof to show that the death had *not* arisen out of the deceased's employment.

The appeal

6 The appellants filed Originating Summons No 1158 of 2010 ("the OS") on 11 November 2010 appealing against the Award and prayed for it to be set aside and for the Commissioner's decision to be reversed. Two grounds for the appeal were set out in the OS. First, it was said that the Commissioner was wrong to have reversed the burden of proof. This ground required an analysis of s 3 of the Act. Second, it was alleged that the Commissioner reached the wrong finding of fact. This ground concerned the application of s 29(2A) of the Act.

First ground of appeal: reversal of the burden of proof

7 An employer's liability for compensation is imposed by s 3(1) of the Act which reads:

> **Employer's liability for compensation**
>
> **3**. – (1) If in any employment personal injury by accident arising out of *and* in the course of employment is caused to an employee, his employer shall be liable to pay compensation in accordance with the provisions of this Act.
>
> [emphasis added]

Section 3(1) must be read with s 3(6) which states:

> (6) For the purposes of this Act, an *accident* arising *in the course* of an employee's employment shall be deemed, in the absence of evidence to the contrary, to have arisen *out of* that employment.
>
> [emphasis added]

8 Section 3(6) is very much a local innovation. It was not present in the Act's predecessor the Workmen's Compensation Ordinance (9 of 1932) and was added only in the Workmen's Compensation Ordinance (31 of 1954) as s 4(5). The presumption was described by the Acting Commissioner for Labour (*Proceedings of the Second Legislative Council of the Colony of Singapore*, 4th Session 1954/1955, (15 June 1954) at B142) as:

> Perhaps the most important change proposed is in the law itself. Under the existing legislation a

> workman, to obtain compensation, has to prove that the accident arose both out of and in the course of his employment. Under the present proposals the workman must still prove that the accident arose in the course of his employment, but the onus of proving that it did not arise out of his employment will rest on the employer if he holds that the claimant is not entitled to benefit.

9 Section 4(5) (as it was) did more than simply create a rebuttable presumption for the employee's benefit. It also unintentionally clarified the local position on two issues of interpretation arising from what is now s 3(1). First, it was now clear that "arising out of" and "arising in the course of" are two separate and distinct concepts. This pertinent distinction stands in contrast to a line of cases which suggested that "arising out of and in the course of" could be regarded as a *single* term of art. In *McLauchlan v Anderson* [1911] SC 529, a man stumbled and fell as he climbed down from his wagon to retrieve a pipe which he had dropped. The wagon ran over and killed him. The Lord President conceded the theoretical distinction between "arising out of" and "arising in the course of" but said (at 532) that:

> In a great many cases, however, the two phrases do not admit of separate consideration; and the present is one of those cases. If this accident took place in the course of the workman's employment, it also indubitably arose out of that employment; if not, not.

10 Second, it was also clear from the wording of s 4(5) (as it was) that it is the *accident* alone that has to arise out of and in the course of the employment. This is in contrast to the House of Lords decision in *Fenton v J Thorley & Co., Limited* [1903] AC 443 where Lord Macnaghten held that (in relation to the Workmen's Compensation Act 1897) the phrase "injury by accident" was intended to be a compound phrase (at 448):

> Then comes the question, Do the words "arising out of and in the course of the employment" qualify the word "accident" or the word "injury" or the compound expression "injury by accident"? I rather think the latter view is the correct one.

11 The consequence of s 3(6) is that, as the judge in *NTUC Income Insurance Co-operative Ltd and another v Next of kin of Narayasamy s/o Ramasamy, deceased* [2006] SGHC 162 (at [20]) ("the *NTUC Income* case") observed, s 3(1) requires the employee to prove three conditions:

(a) he has suffered a personal injury;

(b) the injury was caused by an accident; and

(c) the *accident* arose out of *and* in the course of his employment.

12 The first condition was not disputed by the appellants: the personal injury suffered by the deceased was his death. The second condition was also *not* in dispute. The appellants conceded that the cardiac arrest/lethal arrhythmia which caused the death was an "accident" within the meaning of s 3(1). In other words, the parties were in agreement that the respondents had shown that the personal injury (death) was caused by an accident (cardiac arrest/lethal arrhythmia). The only point of contention was whether the third condition had been satisfied – the appellants argued that the respondents had not proven that the cardiac arrest/lethal arrhythmia arose out of *and* in the course of the deceased's employment. This is where s 3(6) of the Act comes into play. Once it is proven that the accident arose *in the course* of employment, it will be presumed that the accident also arose *out of* his employment. The operation of s 3(6) effects a limited shift of the burden of proof from the respondents to the appellants by requiring the employer to show that although the accident arose *in the course* of employment, it nonetheless did not arise *out of* the employment.

13 It was the appellants' case that since the respondents had not proven that the accident arose *in the course* of employment, the Commissioner was wrong to *apply* the presumption under s 3(6) and, if the presumption did not apply, the Commissioner should not have shifted the burden of proof onto the appellants. The success of this appeal hinged entirely on the question of law: what does "arising in the course of employment" mean?

14 Courts have, over the decades, grappled with the meaning of the phrase "arising out of and in the course of employment". The relationship between the two arms of the phrase was well described by Lord Finlay LC in the House of Lords' case of *Charles R Davidson and Company v M'Robb or Officer* [1918] AC 304 where he said (at 314 – 315):

> "Arising out of the employment" obviously means arising out of the work which the man is employed to do and what is incident to it – in other words, out of his service. "In the course of employment" must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it – in other words, in the course of his service...
>
> The words "and in the course of" were probably added for this reason. If the nerve or agility of a workman were impaired by the conditions of his work and in consequence he met with an accident in the street which he would have avoided but for the impairment of his health occasioned by his work, the accident might be said to arise "out of the employment". The same thing might be said in the case of an accident which he would have escaped but for fatigue induced by working overtime. The introduction of such claims is prevented by the words "in the course of the employment." Such an accident as above suggested, though it may arise out of the work, would not be in the course of the work.

15 On the authorities, it is clear that an accident arising *out of* the employment requires a causal connection between (i) the employment (and its incidents) and (ii) the accident. A direct or physical causation is not necessary: *Smith v The Australian Woollen Mills Limited* (1933) 50 CLR 504 per Starke J at 517-518. But the causative standard is higher than the "but for" test. The accident must have arisen because of some intrinsic risk in the nature of the employment. As Lord Sumner put it in *Lancashire and Yorkshire Railway v Highley* [1917] AC 352 (at 372):

> Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?

16 In contrast, an accident arises in the course of the employment if it bears a temporal relationship with the employment. A simple test would be whether the accident occurs, as a matter of common sense, while the employee is at work. An elaboration of this test was provided by Lord Wright in *Weaver v Tredegar Iron and Coal Company, Limited* [1940] AC 955 (at 973):

> It has long been held that the course of the employment is not determined by the time at which a man is actually occupied on his work. There may be intermissions during the working hours when he is not actually working as, for instance, times for meals or refreshments, or absences for personal necessities. And the course of the employment may begin or end some little time before or after he has downed tools or ceased actual work.

17 Keeping in mind the reasoning of the abovementioned authorities, the appellants' contention that an accident only arises *in the course* of employment if there is a causative link between the two is clearly misconceived. Further, the two authorities relied upon by the appellants did not assist them. The first was *Ormond v C D Holmes & Co Ltd* [1937] 2 All ER 795. The case was irrelevant as it turned *solely* on whether the second attack was an "accident" under the Workmen's Compensation

Act 1925 (at 800 and 807). The second was an English Court of Appeal decision in *Hawkins v Powells Tillery Steam Coal Company, Limited* [1911] 1 KB 988 ("*Hawkins*"). The critical issue there was whether the heart attack that killed the employee had been *caused* by his employment *or* other factors. The Court of Appeal held it was not caused by the employee's work in a colliery but by his own diseased heart condition. Consequently, *Hawkins* does not support the appellants' contention. If it does, it should be taken to have been overruled by the subsequent two House of Lords cases cited above at [14] and [16].

18 In the present case, it was undisputed that the cardiac arrest/lethal arrhythmia that killed the deceased occurred while he was at work. It follows that the accident arose *in the course* of his employment. Hence the Commissioner was entitled to find that pursuant to s 3(6) of the Act, the burden of proof shifted to the appellants to prove that the accident had *not* arisen *out of* the deceased's employment. Consequently, I dismiss the first ground of appeal.

Second ground of appeal: the Commissioner's finding of fact

19 The Commissioner, after weighing the competing evidence had concluded as a fact that the appellants had failed to rebut the presumption under s 3(6) of the Act. The appellants contended that the Commissioner's finding of fact was wrong. The appellants are faced with s 29(2A) of the Act which reads:

> **Appeal from decision of Commissioner**
>
> ...
>
> (2A) No appeal shall lie against any order unless a substantial question of law is involved in the appeal and the amount in dispute is not less than $1,000.

20 As Kan Ting Chiu J observed in *Karuppiah Ravichandran v GDS Engineering Pte Ltd and another* [2009] 3 SLR(R) 1028, s 29(2A) reflects the policy that decisions of the Commissioner are not to be examined as though they are decisions of a court of law. The purpose of the Act must be kept in mind. As the Minister said (*Singapore Parliamentary Debates*, *Official Report* (22 January 2008) volume 84 at column 259):

> Workmen's Compensation Act or WCA provides a simpler and quicker way to settle compensation claims by avoiding protracted legal proceedings.

21 Kan Ting Chiu J was therefore correct in emphasising (at [16]) that findings of fact fall within s 29(2) only if they are findings that *no* person would have come to if he had applied the law properly. The standard is higher than a manifestly wrong finding of fact. So the question that arises is whether the Commissioner's finding that the presumption under s 3(6) was not rebutted was one that *no* person would have come to if he had properly applied the relevant law.

22 The evidence before the Commissioner may be summarised as follows: There was some dispute over how strenuous the deceased's work was. On one side was the evidence of Lee that the work he and the deceased were engaged in was strenuous. It was Professor Lau's opinion that strenuous work coupled with the deceased's heart condition was the reason for the cardiac arrest/lethal arrhythmia. That was so even though the deceased collapsed only some time after he had begun his break. On the other side was the arm-chair evidence of the deceased's supervisors and managers that the work the deceased did was not strenuous. It was Dr Singh's opinion that the deceased's heart condition was generally benign, and that his collapse was best explained by an inexplicable and random

occurrence of "sudden death syndrome". The Commissioner preferred the evidence of Lee and Professor Lau because Lee being a co-worker had personal experience of the nature of the deceased's duties and because Professor Lau appeared to be the more reliable witness. This was clearly not a decision which no person would have come to had he properly applied the relevant law.

23 The appellants in their closing submissions before the Commissioner (at [59]) had argued that "a litigation lawyer's work entails far greater challenges physically (not to mention mentally) given their need to carry heavy voluminous documents to court". This flippant and insensitive submission should never have been made; it was a mockery of the sanctity of life and would have greatly upset the respondents had they come to know of it.

24 In light of the observations in [22], it follows that the appellants' second ground of appeal was outside the ambit of s 29(2A) of the Act and must also be dismissed.

25 Before I conclude this judgment, I should address one final issue. Counsel for the appellants had raised a preliminary issue at the commencement of the hearing. He submitted that the Commissioner had written his grounds of decision (dated 21 February 2011) with one eye on the grounds of appeal as was evident where he said (at [35]):

> In the preparation of my Grounds of Decision, I have had the opportunity to peruse OS 1158/2010 by filed the Respondents containing the grounds of their appeal. In summary, the Respondents assert that the decision in favour of the claimants is wrong for the following broad reasons:
>
> a I had failed to appreciate that the burden in proving each and every ingredient of this claim under Section 3(1) of the Work Injury Compensation Act lies with the Claimants and not the Respondents;
>
> b I had erred in law and in fact by preferring the evidence of Dr Lau over Dr Singh and thereby finding that the death arose out of and in the course of employment.

The Commissioner then proceeded to deal with the issues listed at (a) and (b). Counsel for the appellants complained that the Commissioner's grounds of decision had wrongly embarked on an *ex post facto* analysis to refute the appellants' grounds of appeal. He submitted that the right course of action should have been for the grounds of decision to simply expand on the Commissioner's brief oral grounds. Consequently, he requested the court to disregard the Commissioner's "irregular" grounds of decision in its entirety as it amounted to a justification of the Commissioner's decision – the court should only refer to the notes of evidence and submissions.

26 Whilst it was indeed unfortunate that the Commissioner referred to the OS in his grounds of decision, that by itself was no reason for the court to disregard the document altogether. All that was required was for the court to ignore the offending paragraph. Without that, the decision could still stand on its own. In this regard, the old case of *Loh Kwang Seang v Public Prosecutor* [1960] MLJ 271cited by the appellants has no relevance. This can be seen from holding no. 4 in that case which reads:

> It is not permissible for a trial court having signed and delivered its grounds of decision to the appellants to supplement the grounds of decision or amplifying them in any way. The conduct of the learned President in amplifying his grounds by adding a further 27 lines of typewritten material to it was both irregular and improper but it was not such conduct as can be said to have occasioned a miscarriage of justice or such as could be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed.

In our case, the Commissioner did not issue his grounds of decision before 21 February 2011. By definition, he could not be accused of supplementing any *previous* grounds of decision. More importantly, the issues in the grounds of decision substantively reflected his oral grounds. The Commissioner only said (see N/E 99):

> I rule in favour of the [respondents]. Brief oral grounds. The burden of proof was mainly on the [appellants] as the deceased passed away in the course of employment.
>
> Ultimately, the physical efforts of the deceased too proximate to the time of death. On the issue of medical evidence, I prefer to the evidence of Dr Lau. His position takes into account the fact that physical condition differ from person to person. This is as opposed to Dr Singh who categorically insists on this 10 minute timeframe. Even on this 10 minute timeframe, he departs and cannot hold the position.
>
> Ultimately, the level of proof required is on a balance of probabilities and not beyond a reasonable doubt and I find that the [respondents] have proved their case so.

Contrary to the appellants' submission, the Commissioner's grounds of decision did amplify his brief oral grounds. He did not as they complained, make "a *de facto* Respondents' Case in answer to the Grounds of Appeal".

Conclusion

27 Consequently, I dismiss the OS with costs to the respondents to be taxed unless otherwise agreed.