DCPI 1471/2008

**IN THE DISTRICT COURT OF THE**

HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES ACTION NO. 1471 OF 2008**

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

LEE SAU FAT Plaintiff

and

F. H. SECURITY SERVICES

COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

DCEC 120/2007

**IN THE DISTRICT COURT OF THE**

HONG KONG SPECIAL ADMINISTRATIVE REGION

**EMPLOYEES’ COMPENSATION CASE NO. 120 OF 2007**

\_\_\_\_\_\_\_\_\_\_\_\_

IN THE MATTER OF

AN APPLICATION BETWEEN

LEE SAU FAT Applicant

and

F. H. SECURITY SERVICES

COMPANY LIMITED Respondent

\_\_\_\_\_\_\_\_\_\_\_\_

Coram : Her Honour Judge Anthea Pang

Date of Decision : 21 December 2010

**D E C I S I O N**

***Background***

1. The above two cases were consolidated and heard together before me. I gave judgment in favour of the Defendant/Respondent in both actions and I dismissed the Plaintiff/Applicant’s claims for damages for personal injuries and for employees’ compensation.
2. At the time when I handed down my judgment, I made an order nisi that costs be paid by the Plaintiff/Applicant to the Defendant/Respondent, to be taxed if not agreed, with certificate for counsel. Subsequently, the Defendant/Respondent took out two summonses dated 5 July 2010 to have the costs order nisi varied and to have the costs taxed on an indemnity, instead of party to party, basis. In respect of the employees’ compensation action, application is also made for enhanced interest under O.22, r.23 of the Rules of the District Court.
3. By consent, the summonses were dealt with by way of written submissions, the last of which reached this court on 20 September 2010.
4. This is my decision on the applications.

***Findings At Trial***

1. The central issue at trial was whether, as alleged by Madam Lee (the Plaintiff/Applicant), an accident happened to her while she was on duty on 17 March 2006 (referred to as the “3rd accident” at trial). When dismissing the claims of Madam Lee, I found that, at the most, a “near-fall” incident might have happened on that day. However, this “near-fall” incident, if it had happened, did not cause Madam Lee to sustain any injuries and did not aggravate any of her then existing injuries. Insofar as the 3rd accident is concerned, I am of the view that it did not happen as alleged.
2. When arriving at the above conclusions, I found that :
   * 1. it is inconceivable that Madam Lee would continue to perform her patrolling work and not to seek assistance straight away if she had the alleged accident on that day;
     2. if Madam Lee had the alleged accident and if, as she claimed, she had mentioned that to her attending doctors on 18 March 2006 immediately after it had happened and, thereafter, on each and every occasion when she sought medical treatment, there should not have been a complete absence, for a period of almost one year, of any reference to the accident in the medical notes whereas the injuries she sustained during an earlier accident (referred to as the “2nd accident” at trial) were repeatedly recorded;
     3. if the accident had indeed happened, such should have been reported to the Labour Department in June 2006 when Madam Lee made reports about the other accidents, including the 2nd accident, which she claimed happened at work. However, Madam Lee did not do so and she only reported the 3rd accident in October 2006; and
     4. the written report about the 3rd accident which Madam Lee said she had provided to her employer with a copy to the Legal Aid Department was nowhere to be found.
3. Clearly, all the above pointed to the fact that the 3rd accident did not happen at all and Madam Lee should know very well what the truth was. However, she came to court to test her luck and hope that she would succeed in making out her claims. When giving evidence, Madam Lee did not only exaggerate matters, she indeed fabricated new injuries which she had never mentioned in any of her previous statements.
4. As I have indicated in my judgment, the reason for Madam Lee to lie about this 3rd accident might well be that, as suggested by Mr. Lim for the Defendant/Respondent, in July 2006, she got worried as she had learned that she would not be entitled to any employees’ compensation in relation to the 2nd accident. Thereafter, Madam Lee started making reports about the 3rd accident and it would appear that, in doing so, she was hoping that she could get herself covered in terms of compensation by way of this alleged 3rd accident. In other words, on the evidence before me, it would be the case here that Madam Lee simply made up the story about this 3rd accident and started making complaints about the injuries in an attempt to pave the way for making claims in these proceedings.

***The Applications to Vary the Costs Order***

1. It is clear from the above that Madam Lee’s claims were unmeritorious and misconceived at the outset. It was oppressive for Madam Lee to have instituted these two sets of proceedings against her employer FH when no accident had happened as alleged.
2. Counsel for the Plaintiff/Applicant urged this court not to award costs on an indemnity basis in this case as Madam Lee is on legal aid and the bulk of the costs will be paid out of the public funds. However, as the Defendant/Respondent has been unnecessarily dragged into these litigations and has incurred costs in defending these proceedings which were instituted by Madam Lee for the only purpose of claiming damages and compensation which she knew at the outset that she was not entitled to get, I consider it just that the Defendant/Respondent be compensated more fully by way of indemnity costs.
3. The power to grant costs on an indemnity basis is discretionary (O.62, r.28(3)) but having read the submissions of the parties and having considered the matter, I am of the view that it is appropriate, in this case, to exercise my discretion to award costs to the Defendant/Respondent in these proceedings (including this application), to be taxed on an indemnity basis, with certificate for counsel.
4. However, in my judgment, it is inappropriate to consider granting the Defendant/Respondent’s application to have enhanced interest pursuant to O.22, r.23.
5. This application for enhanced interest was made based on a sanctioned payment made on 8 April 2010 in DCEC 120/2007.
6. O.22, r.23(4) provides that the court may order that the defendant is entitled to *“(a) his costs on the indemnity basis* ***after the latest date on which the plaintiff could have accepted the payment or offer without requiring the leave of the Court****; and (b) interest on the costs … at a rate not exceeding 10% above judgment rate.”* (emphasis added)
7. O.22, r.15(1) stipulates that a plaintiff may accept a sanctioned payment without the leave of the court not less than 28 days before the commencement of the trial. In this case, the trial commenced on 26 April 2010 whereas the sanctioned payment was made on 8 April 2010. In other words, the Plaintiff/Applicant here might only accept the sanctioned payment without the leave of the court if the parties agreed upon the liability for costs (O.22, r.15(2)(i)). However, as pointed out by counsel for the Plaintiff/Applicant, there was never any agreement between the parties as to the liability for costs. That being the case, I do not see O.22, r.23(4) to be applicable here and I am not prepared to grant the application for enhanced interest.

***Conclusion***

1. The costs order nisi is to be varied as follows : the costs of the action for personal injuries and the application for employees’ compensation (including this application) are to be paid by the Plaintiff/Applicant to the Defendant/Respondent, to be taxed on an indemnity basis, with certificate for counsel. The Plaintiff/Applicant’s own costs are to be taxed in accordance with the Legal Aid Regulations.

(Anthea Pang)

District Judge

Ms. Christina Lee, instructed by Messrs. Yeong & Co., on the assignment of the Director of Legal Aid, for the Plaintiff/Applicant

Messrs. Leung & Lau, for the Defendant/Respondent