# DCPI 2006/2019

[2020] HKDC 105

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2006 OF 2019

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BETWEEN

SUN XIAN Plaintiff

and

PIZZA HUT HONG KONG

MANAGEMENT LIMITED Defendant

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##### Before: Her Honour Judge Levy in Chambers (Open to Public)

Date of Hearing: 7 January 2020

Date of Decision: 7 January 2020

Date of Reasons for Decision: 24 January 2020

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REASONS FOR DECISION

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1. *INTRODUCTION*
2. On 10 October 2018, Mdm Sun (the plaintiff) commenced these personal injuries proceedings in the High Court against her employer, Pizza Hut Hong Kong Management Limited (the defendant) based upon an alleged accident on 23 May 2015 arising out of and in the course of the employment.
3. On 27 May 2019, a Master of the High Court ordered the transfer of this action to the District Court. By the same order, leave was also granted for the setting down of this action for trial (in the District Court).
4. On 9 August 2019, the plaintiff filed a “Notice to Set the Case Down for Trial” in the running list with 2 days reserved for trial.
5. On 15 August 2019, the defendant issued a summons (“**Summons**”) for leave to serve a signed witness statement (“**Cheung’s Statement**”) of Cheung Kam Wah (“**Cheung**”) containing a statement of truth.
6. The Summons was opposed.
7. At the hearing of the Summons, after hearing arguments from counsel, Miss Lau for the plaintiff and Mr Ho for the defendant, this court, other than the documents in the form of attachments nos 2, 3 and 6 to Cheung’s Statement, granted leave to the defendant to serve Cheung’s Statement with amendments by excluding all references to the said attachments in respect of which leave was refused.
8. These are the reasons for my decision.
9. *RELEVANT BACKGROUND FACTS*
10. When this case was set down for trial, the plaintiff and the defendant had exchanged the plaintiff’s own witness statement and a statement of Miss Chan Yin Ling (“**Manager**”), the regional compensation and benefits manager of the defendant.
11. According to these witness statements, at the time of the alleged accident, the plaintiff was employed as the defendant’s senior kitchen staff and worked in the defendant’s Tsim Sha Tsui branch (“**TST Branch**”). The plaintiff averred that she sustained a serious injury to her lower back when she stretched her body and forearm to remove a large container of salad sauce weighing over 10 kgs from a multi-layered rack inside a very small frozen store room (“**Frozen Room**”).
12. In the Statement of Claim, the plaintiff asserts negligence, breach of the implied terms of the contract of employment, breach of occupiers’ liability and breach of the statutory duties provided in the Occupational Safety and Health Ordinance (Cap 509).
13. The plaintiff pleaded a host of particulars in respect of each of the causes of action. The allegations are, in the main, that the defendant had failed to provide (i) a safe working environment; (ii) sufficient manpower and safe system of work; and (iii) necessary instructions and training to ensure the plaintiff was able to carry out her duty safely.
14. The defendant denies the allegations. The defendant’s only witness, the Manager, did not witness the alleged accident. Since there were discrepancies in the plaintiff’s Incident Report provided to the defendant 5 days after the alleged accident, the defendant takes issue with the plaintiff’s account of the alleged accident. The Manager states that the salad containers were usually 70% full, and the shelf where the sauce containers were placed was at a level slightly below the plaintiff’s waist. The Manager also avers that the plaintiff was an experienced worker, and the defendant had deployed sufficient manpower and provided the plaintiff with sufficient training and supervision.
15. *CONTENTS OF CHEUNG’S STATEMENT*
16. Cheung was the manager of the TST Branch at the material time of the alleged accident. Attached to Cheung’s Statement are 6 documents as follows: -
17. Attachment 1 - the Employment Contract ([僱用員工協議書 (全職)]);
18. Attachment 2 - Time Card Data Report;
19. Attachment 3 - Staff Duty Schedule;
20. Attachment 4 - a photo taken in 2019 of the shelf for the salad dressing containers;
21. Attachment 5 - 4 photos taken in 2019 of the salad dressing containers of various sizes showing their measurements;
22. Attachment 6 - a copy of the Employees’ Work Safety Guides Handbook (3rd edition, January 2014) ([僱員工作安全手冊]).
23. Cheung alleged that by the date of the alleged accident, the plaintiff had worked for the defendant for about 2 years. Referring to Attachments 2 and 3, Cheung believes that there was sufficient manpower on the date of the alleged accident.
24. Cheung also avers that the weight of the containers would not have been more than 10 kgs. He further refers to one of the guidelines in Attachment 6, that prescribes a maximum weight limit of 11 kgs to be carried by a female worker.
25. *LEGAL PRINCIPLES*
26. The parties have little dispute as to the legal principles governing late discovery and the application for the serving of the witness statement.
27. The established principles state that when an indulgence is sought from the court, a party is required to provide a satisfactory explanation to justify the grant of the indulgence: *Chan Wing Cheung v Ho Shu Yee* [[1]](#footnote-1). After the implementation of the Civil Justice Reform, the court “expects a full account for the lateness of the application and full justification” for the reason for the delay : *DBS Bank (Hong Kong) Ltd v Sit Pan Jit*[[2]](#footnote-2).
28. In addition to the requirement of showing cause, a party seeking a court’s leave for late discovery of documents should also provide the court and his opponent with full and accurate information as to the following: -
29. the provenance and the makers of such documents;
30. the relevance of such documents to the issues before the court;
31. the availability or non-availability of the makers to attend trial for cross-examination in case the opponent objected to the hearsay evidence: *Kinetics Medical Health Group Co Ltd v Dr Tse Ivan Cheong Yau*[[3]](#footnote-3)and *Hong Lok School Ltd & Others v Chow Sai Yiu & Others[[4]](#footnote-4)*.
32. As to the court’s discretion in the granting of leave for a late application, Bharwaney J in *Parsad v Great Wealthy Engineering Co Ltd[[5]](#footnote-5)*, a case concerning a late application for the serving of additional witness, instructively stated,

“[6] Whilst the primary aim is to secure the just resolution of the dispute in accordance with the substantive rights of the parties, and which must include the right of a party to rely on admissible, relevant and probative factual evidence, the court must also have regard to other relevant circumstances, such as the potential disruption to the trial, the prejudice to the other parties, and the explanation offered by the applicant for the late application. These matters have to be considered and weighed in the light of and against the underlying objectives of the civil justice reform to ensure cost effectiveness and economy, expedition, proportionality, and fairness between the parties.

[7] It is not possible to lay down guidelines to cover and cater for every possible situation that may give rise to a late application for leave to rely on a witness statement; however, the court would have to carefully weigh, in each case, the relevance and probative value of such a witness statement against the potential disruption to trial, prejudice to other parties, and the objectives of civil justice reform. …”

1. These considerations, in my view, should also apply*, mutatis mutandis*, to the late discovery of documents.
2. *EXPLANATION GIVEN FOR THE DELAY AND THE RELEVANCE OF THE PROPOSED EVIDENCE*
3. In support of the Summons, the defendant filed the affirmation of Trevor Wong, the handling solicitor of Messrs. Mayer Brown (“**Mayer Brown**”) to explain the delay in the preparation and application for leave for the serving of Cheung’s Statement. Mr Wong stated that after a conference with counsel in around April 2019, the defendant wanted to adduce Cheung’s evidence to respond to the plaintiff’s allegations in her witness statement. The defendant did not immediately start the preparation of Cheung’s Statement because it wanted to save costs by waiting for the outcome of the then pending mediation scheduled to take place on 27 May 2019. The preparation of Cheung’s Statement only started after the mediation failed. On 8 July 2019, Mayor Brown sent a copy of Cheung’s Statement to the plaintiff’s solicitors, Messrs. Raymond Luk & Co (“**Raymond Luk**”), seeking the latter’s consent to the service of Cheung’s Statement.
4. On 12 August, after the plaintiff filed a Notice of Setting down for trial on 9 August, Raymond Luk replied to Mayer Brown that the plaintiff opposed the adducing of Cheung’s Statement.
5. In the supporting affirmation, Mr Wong also states that Cheung’s Statement is highly relevant to the issues in dispute as it responds to the allegations in the plaintiff’s witness statement. In any event, it is averred that its admission will have no impact on the trial.
6. At the hearing, Mr Ho, the defendant’s counsel, made 4 points in support of the application. First, Cheung’s evidence is relevant and probative and will assist the court in resolving factual disputes on liability. Second, there is no disruption to the trial date as the plaintiff alleged as no trial date has been fixed notwithstanding that the case has been set down. Third, there is no prejudice. Any delay would have been substantially brought about by the plaintiff’s own inaction in preparing her own response to Cheung’s Statement and her own delay in the commencement of the action. Fourth, the defendant was reasonable to wait until after the outcome of the mediation before preparing Cheung’s Statement.
7. *THE OBJECTIONS*
8. In the affirmation in opposition prepared on behalf of the plaintiff, Mr Luk of Raymond Luk stated that the late adducing of the evidence would disturb the trial dates, and that the defendant provided no good reason to explain the late preparation of Cheung’s Statement. Were Cheung’s Statement admitted, Mr Luk stated that the plaintiff would suffer prejudice as a result of the delaying of the trial especially with the time the plaintiff would need to prepare a reply statement and the prolonging of the length of the trial with an additional witness. The plaintiff would also suffer financial hardship if there was any delay in the proceedings.
9. At the hearing, the plaintiff’s counsel, Miss Lau, additionally contended that the defendant had failed to provide any reason for the late discovery of the documents that were all along in its possession. It was submitted that the defendant’s attribution of the delay for the preparation of Cheung’s Statement to its alleged desire to save costs should not constitute a valid reason for the delay.
10. Miss Lau also took issue with the alleged relevance of Cheung’s evidence. It was suggested that Attachment 6 to Cheung’s Statement (the 2014 version of Employees’ Work Safety Guides Handbook) was not relevant as it was not the version at the material time of the accident. In urging for the dismissal of the Summons, Miss Lau contended that most of the evidence Cheung purports to deal with in Cheung’s Statement is either already set out in the Manager’s statement or hearsay evidence.
11. *DISCUSSION*
12. *Ex facie*, this Summons was only seeking the late adducing of the witness statement. It is clear however that the defendant also sought through the documents attached to Cheung’s Statement discovery of documents, as the 6 attached documents (Attachments 1-6) were not among the 4 documents that the defendant had discovered in its List of Documents filed on 13 September 2018. It is thus necessary to also consider whether leave should be given for the late discovery of these documents. I will firstly discuss the late discovery of documents.

*G.1 Late discovery of documents*

1. Admittedly all the attached documents to Cheung’s Statement, other than Attachments 4 and 5 (which were recent documents), were already in the defendant’s possession when these proceedings were commenced. As the plaintiff had already disclosed the Employment Contract (Attachment 1) earlier in her List of Documents (at item 16) filed on 6 July 2018, the defendant might be excused for not disclosing it in its List of Documents. Nonetheless, the defendant would be required to explain why it had not disclosed documents Attachments 2, 3 and 6, and only sought leave at such a late stage.
2. Mr Ho had rightly accepted that the defendant had only provided explanation (in the supporting affirmation) for the late preparation and late application for leave for Cheung’s Statement, but not for the late discovery of documents. Thus, the defendant was completely silent as to why it failed to disclose these 3 documents. It was obvious to me that the defendant had no intention to provide any explanation as its counsel had neither proffered any explanation at the hearing nor requested an adjournment to allow the defendant an opportunity to provide an explanation.
3. It has been firmly established (see Section D above) that a party seeking late discovery of documents is required to show cause with full justification: *Chan Wing Cheung* case *(supra); DBS Bank (Hong Kong) Ltd* case *(supra)*. The defendant’s complete lack of explanation, in my view, is fatal to its application for the late discovery of documents, and I decline to grant leave for the admission of Attachments 2, 3 and 6.

*G.2 Late serving of witness statement*

1. Cheung’s Statement, as a result of the exclusion of Attachments 2, 3 and 6, would have to be examined in its amended form without any references to these attached documents.
2. I allowed the adducing of Cheung’s Statement in its amended form as the evidence deals with a number of factual issues on the manpower arrangement of the TST Branch, the general layout and the condition of the Frozen Room where the alleged accident occurred, as well as the plaintiff’s credibility regarding whether she suffered any injury on the alleged date of the accident. The existing evidence of the Manager has obviously not covered these issues in sufficient detail. Cheung’s evidence will assist the trial judge in resolving disputed facts, and is relevant.
3. In excising my discretion to grant leave to the defendant to adduce Cheung’s evidence, I had taken into account the plaintiff’s objections but found then unsubstantiated.
4. First, I do not accept that an additional witness will cause prejudice to the plaintiff. It is noted that after Raymond Luk set the case down for trial on 9 August 2019, the case has not been warned for trial even up until the date of the hearing. There has been no attempt by Raymond Luk to inquire the status of trial after Mayor Brown’s letter dated 13 August 2019 to the Registry requesting the withholding of the running of the case for trial. Hence, no trial dates have been disrupted.
5. Second, it is not in dispute that Raymond Luk, before the Summons was issued, had already been provided with a copy of Cheung’s Statement on 7 July 2019. Hence, the plaintiff has had ample time to deal with Cheung’s evidence and draft her reply if she needed. However, despite a period of 6 months, the plaintiff’s counsel at the substantive hearing on 7 January 2020, was still unable to confirm whether the plaintiff would be serving any witness statement in reply. In the circumstances, I consider the plaintiff’s complaint of the defendant’s delaying of the trial is not valid. Any delay would have been self-inflicted by the plaintiff’s seeking of time for the preparation of her reply statement.
6. Thirdly, I also do not accept that the plaintiff’s financial situation would be adversely affected by allowing Cheung as an additional witness. As Mr Ho has rightly highlighted, the plaintiff only filed her Statement of Claim almost 3 years after the alleged accident. More importantly, I note from the tabling questionnaire Raymond Luk filed on 12 September 2018 that the related employees’ compensation claim was already settled for a sum of $140,000 (net of the advance payments of $88,500). It is plain that the plaintiff had already received quick financial relief by the compensation that she received in the employees’ compensation proceedings.
7. Lastly, should there be any prejudice (which I do not find the plaintiff has suffered) caused by the delay as a result of the adducing of Cheung’s evidence, I believe that it can be compensated by costs.
8. For the reasons stated above, I allowed the admission of Cheung’s Statement in its amended form.

(Katina Levy)

District Judge

Ms Lorinda Lau, instructed by Raymond Luk & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Leon Ho, instructed by Mayer Brown, for the defendant

1. [2005] HKEC 41 (CFA) at [8] citing *Cable & Wireless HKT Telephone Ltd & Ors v City Telecom Ltd*, CACV 197/1999, CA. [↑](#footnote-ref-1)
2. [2014] HKEC 207 at [19]. [↑](#footnote-ref-2)
3. [2013] HKEC 986 at [36]. [↑](#footnote-ref-3)
4. [2003] 2 HKLRD 782 at 789D-E. [↑](#footnote-ref-4)
5. [2012] 3 HKLRD 705 at [6]- [7]. [↑](#footnote-ref-5)