DCPI 650/2005

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

#### PERSONAL INJURIES ACTION NO. 650 OF 2005

# BETWEEN

## WONG SIU LING (黄小玲) Plaintiff

## and

GEM GROUP ASIA LIMITED Defendant

(山姆亞洲有限公司)

# Coram: Deputy District Judge Anthony Chow in Court

Dates of Hearing: 14th and 15th August 2006

Date of Handing Down Judgment: 30th August 2006

--------------------------

### JUDGMENT

--------------------------

1. This is a personal injury claim by an employee against her employer.

Background:

2. The defendant was the Hong Kong representative office of a United States company, which contracts with various manufacturers of bags for export to the United States.

3. Commencing from April 2001, the plaintiff was employed by the defendant as a receptionist. In addition to her duty as a receptionist, the plaintiff was assigned other duties from time to time. One of these duties was packing and wrapping sample bags into boxes for shipment.

4. On or about July 2002, the defendant was moving its operation to Shenzhen, China and started to lay-off it’s staffs in Hong Kong.

5. On or about August 2002 the plaintiff suffered minor injury to her back while packing sample bags into UPS boxes for shipment to the defendant’s Shenzhen office.

6. The plaintiff has received the sum of HK$148,429.23 in her Employees’ Compensation claim.

The plaintiff’s case:

7. The plaintiff alleged on 9/8/2002, she was assigned to pack and wrap sample bags into medium and large size UPS delivery boxes. The sample bags were placed on the floor and after packing, the plaintiff had to lift the filled boxes, which weight between 5 to 10 kilograms each, on to a table for binding and writing of address. While lifting one of these boxes, the plaintiff sprained her back. Irrespective of her sprained back, the plaintiff managed to complete her work for the day.

8. On 13/8/2002, the plaintiff alleged she sprang her back again while doing the same duty. The plaintiff alleged that both incidents were reported to the defendant’s accounting officer Ms. Lam Lai Kwan on the same day of the incidents.

9. The plaintiff alleged she was formally informed of her dismissal on the closing of work on 13/8/2002.

10. After office hour on 13/8/2002, the plaintiff attended the A&E Department of United Christian Hospital. She was treated with analgesic after x-ray examination did not discover any abnormality and she was sent home with 5 days sick leave.

11. The plaintiff alleged she developed left buttock, left posterior thigh and left leg pain and numbness as a result of her injuries. Between August 2002 and September 2002, the plaintiff attended her family physician Dr Lam Kwok Wing for treatment on 8 occasions.

12. On 27/9/2002, the plaintiff fell while walking on the street and injured her left shoulder and the coccyx region, but the injury was minor in nature.

13. In November 2002, the plaintiff’s lower back pain got worst and she was admitted into St. Teresa Hospital for 5 days. A MRI of the plaintiff’s lumbar spine showed normal findings. The pain continued and the plaintiff received 6 months of physiotherapy at the United Christian Hospital.

14. The plaintiff alleged the work related injuries caused psychological problems and since 24/9/2003, she has been receiving treatment for depression from East Kowloon Psychiatric Centre.

The defendant’s case:

15. The defendant denied any negligence and in the alternative, the plaintiff’s injury was caused materially or contributed by the plaintiff’s own negligence.

16. The defendant alleged that the packing and lifting of boxes of between 5 to 10 kilograms was well within the ability of the plaintiff, who was a healthy 28 years old.

17. The plaintiff suffered a relatively minor injury, which did not require any hospital stay. Although there may be some residual pain from the work related incident, Dr. Lau Hoi Kuen opined that the plaintiff’s symptom was not as serious as she complained.

18. The work related injury was not the sole or significant cause of the plaintiff’s psychological problem. Dr. Benjamin Lau opined that the aetiological factors of the plaintiff’s depression included back pain, unemployment, childcare and the plaintiff’s internal family conflicts. Dr. Chan Chee Hung opined that the plaintiff’s pre-morbid personality made it difficult for her to face the various stresses in her life.

The Issue:

19. The parties have agreed that the plaintiff suffered injuries due to the 9/8/2002 and 13/8/2002 incidents and the 27/9/2002 slip and fall only caused minor and transitory injuries, the issues are therefore:

(1) Was the defendant negligent?

1. If the defendant was negligent, was the plaintiff contributory negligent?
2. Is there a causal relationship between the plaintiff’s depression and her back injuries?

Issue (1) deals with liability and the other two issues deals with quantum.

**“Was the defendant negligent?”**

20. Paragraph 5 of the Statement of Claim alleged the defendant’s negligence as follows:

* 1. Requiring the Plaintiff to lift heavy objects which was beyond her physical capacity;
  2. Failing to provide any instructions or safety guidelines for lifting heavy objects in a safe and proper way;
  3. Failing to provide supervision when the Plaintiff was required to lift heavy objects;
  4. Failing to provide assistance at all to the Plaintiff when the Plaintiff was required to lift heavy objects; and
  5. Failing to provide a safe system of work.

21. The allegations can be roughly divided into 3 categories: (1) Requiring the plaintiff to lift heavy objects beyond her physical capacity; (2) Failing to provide safe system of work and supervision; and (3) Failing to provide assistance to the plaintiff.

22. I will deal with each of these allegations separately.

***Requiring the plaintiff to lift heavy objects beyond her physical capacity.***

23. Mr. Mui, for the plaintiff, referred to the case of *Lam Mui v. Kalex Circuit Board (Hong Kong) Ltd*. HCPI 1155/1997, where the plaintiff therein suffered injury to her back while lifting circuit boards and putting them into trays. Deputy High Court Judge Longley held:

*“ Bearing in mind that the weight of each individual circuit board was only about 1 ½ pounds and it was left to the Plaintiff to decide how many boards to lift at any one time it might be thought the Plaintiff would have considerable difficulty in establishing any liability on the part of her employer. Employers cannot be expected to exercise constant supervision over everything their employees do. As Lord Kilbrandon said in Brown v. Allied Iron Founders [1974] 1 WLR 527:*

*‘Employers are not required or expected to be on a constant watch to see that no one moves a weight which is too heavy for him, nor will such solicitude be well received, however, kindly intention.... Often it must be left to the employee to make up the load he is to move; if the work* ***does not necessarily involve the moving of injuriously heavy weights****, but it is quite compatible with the selection by the employee of a safe load for individual movement, the employer cannot be said to have employed him to move a weight which was not safe.’” (Emphasis added.)*

24. The nature of the plaintiff’s work, or more precisely, the work that caused her injuries was packing sample bags into boxes and lifting these boxes that weighted, by the plaintiff’s own testimony, between 5 to 10 kilograms.

25. The plaintiff’s statement confirmed that for sometime before the incidents in August 2002, packing and lifting parcels of sample bags that were of similar weight has been part of her duties.

26. The plaintiff also admitted prior to her injury, she often lifted her then 2 years old daughter. Although there was no evidence of the weight of the plaintiff’s daughter at that time, I think she must have weighted more then 10 kilograms.

27. At the time of the injury, the plaintiff was a healthy 28 years old female, lifting between 5 to 10 kilograms was well within her ability. 5 to 10 kilograms can hardly be called “*injuriously heavy weights”.*

***Failing to provide safe system of work and supervision.***

28. The relevant legal principle is succinctly stated by Lord Reid in *General Cleaning Contractors Ltd. v Christmas* [1953] AC 180, approved by Mr. Justice Cheung (as he then was) in *Lai Chi Pon v Toto Steel & Iron Works Ltd.* HCPI 1149A/1995, as follows:

*“It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do and supply any implements that may be required… No doubt he cannot be certain that his men will do as they are told when they are working alone. But if he does all that is reasonable to ensure that his safety is operated he will have done what is bound to do.”*

29. However, the employer’s duty to lay down a system of work does not extend to task that does not involve any serious risk of injury, is simple and non-complicated. In *Cheung Suk Wai v. AG* [1996]4 HKC 288, Mr. Justice Leung (as he then was) quoted and adopted Lord Oaksey’s statement in *Winter v. Cardiff Rurl District Council* [1950] 1 All ER 819:

*“ In my opinion, the common law duty of an employer of labour is to act reasonably in all circumstances. One of those circumstances is of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that an employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs…* ***where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is naturally and reasonably that it should be left to the foremen or workmen on the spot****.” (Emphasis added)*

30. It is agreed that no training or system of work or mode of operation was provided by the defendant, the question is therefore: Was the plaintiff’s work “*complicated or highly dangerous or prolonged or involves a number of men performing different functions*” and therefore required a system of work or was it “*simple and the decision how it shall be done has to be taken frequently*” and how to complete the task should be left to the employee?

31. Mr. Sakhrani, for the defendant, referred to *Wong Tai Wai David v. Hong Kong Cable Television Limited*, HCPI 541/2001, where the plaintiff, a technician employed by the defendant company to install cable television service for subscribers, suffered an injury to his wrist while moving a 14-inch TV set. Deputy High Court Judge Fung held:

*“ I find that moving or lifting a 14 inch TV set is* ***a simple and non-complicated operation****. It is a one person job and does not require the assistance of either the colleague or householder. There is no evidence to show what inherent risk is involved or what training is required in relation to that operation by one person.* ***I find that it is reasonable to leave the execution of the operation to the plaintiff on the spot****.” Emphasis added.*

32. Packing sample bags into boxes and lifting them is clearly not a “*complicated or highly dangerous or prolonged or involves a number of men performing different functions*”. Similar to lifting a 14-inch TV set, packing and lifting boxes that weight between 5 to 10 kilograms was clearly a “*simple non-complicated operation*” and how to complete this task could reasonably be left to the employees. I therefore find no system of work or supervision was required.

***Failing to provide assistance to the plaintiff.***

33. The plaintiff has admitted that in the past, she had never asked for assistance in packing these boxes, even though a colleague was available to help. Accordingly, the plaintiff considered packing and lifting these boxes a one-person job and assistant was not required.

34. Furthermore, the plaintiff also testified after the first injury on 9/8/2002, her colleagues, including Ms. Lam Lai Kwan, enquired about her injuries everyday, including the next workday (Monday 12/8/2002) and the morning of the plaintiff’s second injury (Tuesday 13/8/2002). It was the plaintiff who decided that she could manage and decided to continue to pack and lift the boxes. Under the circumstances, I cannot see what kind of assistance the defendant had failed to provide to the plaintiff.

***Other special circumstances.***

35. In *Lam Mui,* irrespective of finding that each individual circuit board was only about 1½ pounds and it was left to the Plaintiff to decide how many boards to lift at any one time, Deputy High Court Judge Longley nevertheless held the employer negligent. One of the reasons cited was at the time of the accident the employee was faced with unusual urgency to complete her task. Deputy high Court Judge Longley held:

*“I consider that the fact there were insufficient trolleys in the immediate vicinity to deal with a situation* ***when the worker was required urgently to deal with a second batch of boards****, coupled with a lax culture within the section which was condoned by the line supervisor whereby boards were carried by hand in urgent situations led to the accident in the present case. Faced with the pressure to deliver the goods to the Quality Control Department as quickly as possible, she carried more boards than it was safe for her to carry.”(Emphasis added).*

36. Here, the plaintiff was not faced with any time pressure. The plaintiff testified that she did not know 13/8/2002 was her last day of work. Although the defendant was closing its operation in Hong Kong, there was no evidence that the plaintiff was urged to complete the packing on any particular date. In fact, Mr. Yau Ting Hon, the defendant’s managing director, testified that the defendant’s Hong Kong office did not formally close until sometime in October.

37. Accordingly, I found the defendant was not negligent and there is no need for me to consider the second and third issues.

Orders:

38. (a) Claim is dismissed.

(b) Costs is to the defendant, with Certificate for Counsel, to be taxed if not agreed.

(Anthony Chow)

Deputy District Judge

Mr. Louie Mui, instructed by M/s Lam, Lee & Lai for the Plaintiff.

Mr. Ashok K. Sakhrani, instructed by M/s Winnie Leung & Co. for the Defendant.