## DCPI 685/2004

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES ACTION NO. 685 OF 2004**

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BETWEEN

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| --- | --- |
| ARZADON EDEN SARCEDA | Plaintiff |
| and | |
| WONG KIT YI KITTY | Defendant |

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

Coram: Deputy District Judge M. Chow

Date of Hearing: 1st, 2nd & 9th November, 2006

Date of Handing Down Judgment: 16th November, 2006

JUDGMENT

1. This is a claim by the Plaintiff that she suffered a fall from a stool and sustained injury during the course of her employment with the Defendant.
2. The Plaintiff was employed by the Defendant as a domestic helper since July 1998. Her main duty was to look after the Defendant’s late father ( Mr. Wong ) who suffered from depression and heart problem at the material time.
3. The Defendant’s family did not live with Mr. Wong, they relied on the support and services of the Plaintiff.
4. The Plaintiff’s employment contract stated that Saturday was her weekly day off.
5. The alleged accident occurred on 21st July, 2001 which was a Saturday. It should be a day off for the Plaintiff.
6. The Defendant disputed liability. The Defendant came to know the accident through her sister-in-law, Miss Lam who called her in Japan to inform her about the accident on 13th Oct., 2001.
7. The Plaintiff’s evidence was that she was called upon by the Defendant to stay at home on 21st July, 2001 to clean the flat because the Defendant’s brother would return to Hong Kong on that day with his girl- friend.

***Issue***

1. **Whether the accident took place inside the premises.**

**21st July, 2001, Saturday**

1. It was not disputed by both parties that the usual day off from the Plaintiff was Saturday as stipulated on the employment contract.
2. The alleged accident took place on a Saturday and it should be the day off for the Plaintiff.
3. The Plaintiff’s evidence was that she was asked by the Defendant to work on Saturday 21st July, 2001 because her brother Wong Wai Kim would come back to Hong Kong on that day.
4. There were several versions as to **when** the Plaintiff told her not to take the day off: -
5. Her witness statement dated 14th September, 2005 said that it was 9 pm on 20th July, 2001 ( Friday ).
6. In the Further and Better Particular dated 21st September, 2001, it stated that it was a “ a week prior to 21st July, 2001” and also “ in the morning of 21st September, 2001”.
7. Under cross examination, she said that it was one week prior to 21st July, 2001.
8. The Defendant denied that she had given instruction to thePlaintiff to do cleaning on that day for simply reason that it was unnecessary.

**The Assigned Duty**

1. The Plaintiff said that the whole purpose of not taking the day off was to do the cleaning of the flat because the Defendant’s brother would come back to Hong Kong on that day with his girl-friend.
2. The only person lived in the flat was Mr. Wong.
3. From the evidence of the Plaintiff, it seems to me that Mr. Wong did not require too much attention of the Plaintiff. On the day in question, she said that Mr. Wong went to bed after breakfast and was inside his room without coming out from his room for lunch.
4. The Defendant said that the Plaintiff did not have much to do and daily cleaning or regular cleaning of the flat was part of her duties.
5. The Plaintiff also said that to clean the flat didn’t take much more than 3 hours.
6. The Defendant said that her brother came back to Hong Kong on a regular basis, apparently because of Mr. Wong’s health. Her brother’s girl-friend was not a stranger to their family, therefore, the Defendant’s brother and his girl-friend were not special guests as such that the flat needed to be clean for any special reason.
7. In fact, her brother was in Hong Kong between 14th to 18th July, 2001 and went away for three days and returned back to Hong Kong on 21st July, 2001. The Defendant stated that she did not give such an instruction to the Plaintiff to clean the flat simply because of her brother and his girl friend came back to Hong Kong.
8. Further, if the Defendant did request the Plaintiff to clean (which was denied) the flat one week before her brother came back to Hong Kong. The Plaintiff had plenty of time to clean the flat. There was no special reason that the Plaintiff had to clean only on that day.
9. In fact, the Defendant’s brother came back to Hong Kong on 14th July, 2001 and stayed until 18th July, 2001, if the Defendant wished the flat to be cleaned, it should be cleaned on or before **14th July, 2001.**
10. The Defence also noted the discrepancies of the alleged time of injury between the present claim and the EC application and the “alleged fall”.

**Time of the injury**

1. The Plaintiff claimed that the accident occurred at about noon time.
2. In her EC Application, the Plaintiff alleged that the accident took place around 3 pm.

**The alleged fall: -**

1. Paragraph 2(b) of the Statement of Claim stated that the accident occurred:

- the Plaintiff fell from a stool when cleaning the windows in the kitchen of the working premises.

1. Paragraph 8 of the Plaintiff’s witness statement stated that:

- Inside the kitchen, I stood on the stool to clean the windows. Suddenly the stool moved and I lost my balance and fell down from the stool.

1. The medical report of Queen Elizabeth Hospital which the Plaintiff attended on 22nd July, 2001 at 10:28 a.m.:

- Slipped and fell while cleaning the floor.

1. On 23rd July, 2001 when the Plaintiff attended Kwong Wah Hospital. She described the accident as “ a slip and fell”.
2. Dr. Choi’s report recorded that the Plaintiff “was cleaning a window, she fell from a chair.”
3. In cross examination, the Plaintiff said that she had not yet started cleaning of the window. She fell when she stood on the stool and in the process of climbing to the worktop of the kitchen before reaching to the window.
4. It seems that the Plaintiff had various versions as to how the fall occurred.

**The circumstances of the Plaintiff in leaving the Defendant’s home**

1. The Plaintiff told this Court that as soon as the Defendant’s brother arrived home, she made a complaint to him about the accident. The Defendant called her that evening to enquire about the accident.

34. Mr. Wong Wai Kim in his evidence denied that the Plaintiff had told him about the incident. He said that if the Plaintiff did mention about the accident, he would have told the Defendant.

1. The Defendant simply was not aware of the accident until 13-10-2001 when her sister-in-law, Miss Lam told her about a letter from the Labour Department dated 8th October, 2001. At that time, she was in Japan and scheduled to return to Hong Kong on 15-10-2001.
2. At the material time, Miss Lam has already worked in the Prudential Insurance for about 10 years. She said that she handled the insurance policy for the Defendant and that the Plaintiff was well covered under the insurance policy.
3. She said that the Plaintiff had an operation in **April, 2001** and she had been to the doctor over 10 times for clinical visits and that all the medical expenses including the operation fee were fully recovered.
4. Miss Lam further said that the insurance policy also covered the “ alleged accident”.

**10th Oct., 2001**

1. Therefore, when the Defendant’s late father handed to her the Labour Department’s letter dated **8th Oct., 2001**, that was the first time Miss Lam came to aware of the alleged accident.
2. It is worth mentioning here that the Defendant worked in a large company in a senior post which required her to travel to various places on a regular basis. At the time of the trial, she has been relocated to Beijing.
3. Miss Lam and her husband lived in Kadoorie Avenue which was within walking distance from the late Mr. Wong’s residence. They visited him 3 to 4 times per week.
4. According to Miss Lam, the Plaintiff submitted a total of seven medical certificates to her on the **10th October, 2001**. The dates of the medical certificates: -
   1. 22 July, 2001 back pain 1 day sick leave
   2. 23 July, 2001 back pain 1 day sick leave
   3. 24 July, 2001 back pain 1 day sick leave
   4. 30th July, 2001 back pain 1 day sick leave
   5. 2 Oct., 2001 back pain 1 day sick leave
   6. 6 Oct, 2001 back pain 2 days sick leave
   7. 9 Oct., 2001 back pain 1 day sick leave
5. She was very astonished and she asked the Plaintiff to put down her signatures on those medical certificates to acknowledge the facts that she only handed those medical certificates to Miss Lam on the **10th Oct., 2001**.
6. From her point of view, her first concern was the medical claim to the insurance company, if any, by the Defendant rather than any concern of criminal prosecution by the Labour Department.
7. Miss Lam further questioned the Plaintiff why these medical certificates were not submitted to her employer earlier and why not reported the accident to her employer earlier, Miss Lam got no answer from the Plaintiff.
8. In any event, the Labour Department did not prosecute the Defendant.
9. The reason why not to prosecute was unknown to this Court.
10. Miss Lam also helped the Defendant in completing the Form 2 to the Labour Departemnt on 15th Oct., 2001. In a gist, the information of Form 2 mainly said that the Defendant came to know the alleged accident on 10th Oct., 2001.

**13th Oct.,2001**

1. Miss Lam further said that the Plaintiff requested to resign because her daughter suffered from cancer in the Philippines. On this occasion Miss Lam then told the Defendant who was in Japan about this matter and the alleged accident.
2. In respect of the Plaintiff’s resignation issue, it was handled by the Defendant when she returned back to Hong Kong on 15th Oct., 2001.

**15th Oct.,2001**

1. According to the Defendant’s evidence, when she returned from Japan and arrived home on 15th Oct., 2001, the Plaintiff told her two matters: -
2. the alleged accident on the 21st July, 2001 and the Plaintiff wanted to be compensated for her alleged injury.
3. she wanted to go home immediately because her daughter suffered from cancer.
4. There was no conclusion whether the Plaintiff could leave immediately or not because there was an outstanding issue of the employee compensation from the Labour Department.

**16th Oct., 2001 6 a.m.**

1. Two policemen came to knock on the door as the police received a report that the Plaintiff was being detained involuntarily.
2. In the presence of the police, the Defendant paid the Plaintiff to let her go.
3. The intention and the decision for the Plaintiff to leave the Defendant’s home was very determined. She must have been motivated by the seriousness of her daughter’s health that her mind was no longer in the job. That explained the fact that the Plaintiff’s boy friend “employed” the authority of the police to help the Plaintiff to get out from her employment with the Defendant when no decision was reached on the evening of 15th Oct., 2001.
4. From the Defendant’s side of the story was that they found out the alleged accident in Oct., 2001 shortly before the Plaintiff requested to leave the job due to her daughter’s health reason. The first person to know the accident was Miss Lam, not the Defendant.

**Two Bonesetter’s medical certificates 22nd and 23rd July, 2001**

1. Apart from the piles of medical certificates, there were two “bonesetter’s medical certificates” that the Plaintiff did not submit to the Defendant at all. These two certificates were dated 22nd and 23rd July, 2001 and each visit costs $450.
2. The Plaintiff said that she forgot to hand those certificates to the Defendant. I wonder how true it is bearing in mind that she visited the bonesetter on the following two days after the alleged accident and that $900 to the bonesetter was a lot of money out of her monthly earnings of $3,860.
3. If the Plaintiff was entitled to her claim, why would she fail to submit those medical certificates?
4. It is undisputed fact that the Plaintiff had previous experience to submit her medical certificates to the Defendant when she had an operation in April, 2001. In my view that it was very dubious that the Plaintiff had forgotten to submit the two bonesetter’s medical claims either in July or Oct., 2001, but in 2004 when she commenced the legal proceeding against the Defendant.

**The First Medical Certificate from Kwong Wah Hospital 21st July, 2001**

1. In this medical record, the very first line of the doctor’s hand-written notes showed that the Plaintiff had suffered from back pain two weeks before the alleged accident. The plain meaning was that there was no accident on 21st July, 2001.
2. The Plaintiff denied it and said that she had never told the doctor about this. She said that the doctor might be busy and made a mistake about it.
3. I accepted that public hospitals were often busy in the A & E Department, but I refused to accept that a doctor would be that careless /unprofessional to put down some information which did not come from the patient.

**Conclusion**

1. The Defendant, Miss Lam and Mr. Wong impressed me as honest and straightforward witnesses. They are clear and cogent in their evidence. I accepted their evidence.
2. The Defendant had claimed medical expenses for the Plaintiff before, in April, 2001 and that, had the Plaintiff informed the Defendant of the alleged accident, I have no hesitation to believe that the Defendant and Miss Lam would report the matter to Prudential Insurance.
3. I also believe the Defendant’s evidence that she had not requested the Plaintiff to stay at home to clean the flat on 21st July, 2001.
4. I found that the Plaintiff’s not credible or reliable. As a consequence, I am not satisfied that the Plaintiff was on duty on the 21st July, 2001 when the alleged accident occurred.
5. The Plaintiff has failed to prove a case against the Defendant as a result of which the action is dismissed.

**Order**

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1. The Plaintiff’s claim be dismissed.
2. Costs be to the Defendant, together with Counsel’s Certificate, if not agreed, to be taxed. Order nisi, 14 days to become absolute.
3. Plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations.

(M. CHOW)

Deputy District Judge

Mr. Louie K.K. MUI instructed by Messrs S.H. Chan & Co.,

for the Plaintiff.

Mr. C.K. WONG instructed by Messrs Johnson, Stokes & Master,

for the Defendant.