## DCPI 2441/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO 2441 OF 2011**

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##### BETWEEN

MOHAMMAD SHAKEEL Plaintiff

### and

WONG KIN YU 1st Defendant

KUT CHEONG GARMEN FACTORY

LIMITED 2nd Defendant

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD 3rd Defendant

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Before: Deputy District Judge W Y Ho in Court

Dates of Hearing: 15 June 2015 and 10 July 2015

Date of Judgment: 27 August 2015

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JUDGMENT

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1. This is the plaintiff’s claim against the 1st and 3rd defendant for damages arising from an accident that purportedly occurred during the course of his employment.

**THE PLAINTIFF’S CASE**

1. The plaintiff (“Mr Shakeel”) claims to be employed by the 1st defendant (“Mr Wong”). On 11 December 2008, Mr Shakeel was instructed to work on a premises situated at 5/F, Leung Ming Hing Factory Building, Kowloon City (“the Premises”). One of his duties was to dismantle the fake ceiling. At about 11:30am on the same day, his Chinese co-worker suggested they use the wooden ladder provided by Mr Wong. His co-worker suggested they each stand on one side of the ladder and told Mr Shakeel to put one foot on the ladder and the other foot on a stool. Mr Shakeel complied with the instructions.
2. After the co-worker finished his work, he pulled the ladder towards him. This caused the ladder to move and the stool on which Mr Shakeel was standing to topple over. Mr Shakeel lost his balance and fell from a height of 2 feet. By reason of the fall, Mr Shakeel sustained injuries to his right elbow.
3. On the same day, he was treated by Tuen Mun Hospital and was diagnosed to suffer from a fracture in the radial neck in the right elbow.

**THE DEFENDANTS’ CASE**

1. Mr Wong and the 2nd defendant were absent from all court hearings and did not participate in the proceedings.
2. The 3rd defendant (“ECASB”) puts Mr Shakeel on strict proof on all aspects of his claim. In particular, ECASB denies Mr Wong is Mr Shakeel’s employer and denies the accident happened in the manner as pleaded by Mr Shakeel.

**THE ISSUES OF THE CASE**

1. The issues of this case are as follows:-
   1. Whether Mr Wong was Mr Shakeel’s employer at the material time?
   2. Whether the accident happened in the manner as described by Mr Shakeel?
   3. If liability is established, what is the proper quantum of damages to be awarded?
2. The case rests principally on the credibility of Mr Shakeel.

**THE PLAINTIFF’S CLAIM AGAINST 2ND DEFENDANT**

1. Counsel for Mr Shakeel confirmed in his opening submissions that Mr Shakeel no longer pursues his claim against the 2nd defendant. However no formal application for withdrawal or discontinuance has been made.
2. During the trial hearing, I asked counsel for Mr Shakeel to clarify which defendant was referred to in the Statement of Claim when the term “Defendant” was used. Counsel confirmed in open court the term “Defendant” refers to Mr Wong only. In such circumstances, there is no cause of action pleaded by Mr Shakeel against 2nd defendant.
3. In absence of any cause of action pleaded against the 2nd defendant and in view of Mr Shakeel’s intention not to proceed against 2nd defendant, I order that Mr Shakeel’s claim against the 2nd defendant be dismissed with no order as to costs.

**DISCUSSION**

*Whether Mr Wong was Mr Shakeel’s employer*

1. ECASB places Mr Shakeel on strict proof in respect of whether Mr Wong was the employer. Hence it is for Mr Shakeel to prove 2 matters:
   1. Mr Wong has been correctly identified as the person who hired Mr Shakeel.
   2. There was an employment relationship between Mr Wong and Mr Shakeel.
2. From the witness statement and the affirmation filed by Mr Shakeel, it is evident he was unsure of his employer’s true identity. He claims he was required to wear a t-shirt with the words “Leung Yau Engineering” printed on it whilst performing his work duties on the Premises and he thought Mr Wong was the boss of the said company. Upon further investigation conducted by his solicitors, Mr Shakeel found there were many companies with the same name. None of the business registrations produced to the court record Mr Wong as a proprietor of those companies. Furthermore, the companies that did respond to Mr Shakeel’s enquiries denied having ever worked on the Premises at the material time.
3. Mr Shakeel, through his solicitors, made further enquiries with the management office and the incorporated owners of the Premises. It was discovered the owner of the Premises engaged a Mr Lai of Fuk Hing Decoration Company to carry out renovation works on the Premises. However there is no evidence to show Mr Wong and Leung Yau Engineering were engaged by the owner of the Premises, Mr Lai or Fuk Hing Decoration Company to carry out dismantling works on the Premises.
4. Mr Shakeel explained, in court, he came to discover the full name and identity card number of Mr Wong through his friend, Zafar. In summary, Zafar came to know of Mr Wong’s full name and identity card number after obtaining Mr Wong’s identity card. Mr Shakeel believes the man identified by Zafar is the same man he calls Mr Wong because the description of the man given by Zafar matches the description of Mr Wong. However, as rightly pointed out by ECASB, this evidence was not in his witness statement and was revealed for the first time in Mr Shakeel’s evidence in court. Furthermore, Mr Shakeel did not call Zafar to testify in court. In absence of any supporting documents or evidence, it is unknown whether the identity card information obtained by Zafar relates to the man who hired Mr Shakeel.
5. In any event, even if Mr Wong was correctly identified, Mr Shakeel has provided insufficient evidence to establish he had an employment relationship with Mr Wong.
6. In considering whether an employment relationship existed between Mr Wong and Mr Shakeel, the court must consider the factors set out in the case of *Poon Chau Nam v Yim Siu Cheung* (2007) 10 HKCFAR 156.
7. The only information given by Mr Shakeel regarding his employment with Mr Wong is the following:
   1. He worked for a daily wage of $500.
   2. His working hours are from 9:00 am to 6:30 pm.
   3. Prior to commencing work on the Premises, he had worked on different sites in Fairview Park, Tseung Kwan O, and Causeway Bay.
   4. He was asked to work 26 days per month.
   5. His main duties were dismantling ceilings and lifting heavy objects.
8. Mr Shakeel has not provided any further evidence on matters such as who issued wages to him, who gave him work instructions, the degree of control exercised by Mr Wong, who provided him work equipment, whether he had any prospect of profit or risk of loss, and whether he was carrying on the business on his own account. There is insufficient evidence adduced by Mr Shakeel to prove, on a balance of probabilities, Mr Wong was his employer in accordance with the factors set out in *Poon Chau Nam*.
9. By reason of the matters set out above, I find Mr Shakeel unable to prove on a balance of probabilities Mr Wong was his employer at the material time.
10. The failure to prove Mr Wong as the employer would dispose of Mr Shakeel’s claim against the defendants. However, for the sake of completeness, I shall go on to consider whether Mr Shakeel sustained the injuries in the manner as pleaded in the Statement of Claim.

*Did Mr Shakeel sustain the injuries in the manner as pleaded in the Statement of Claim?*

1. Mr Shakeel was extensively cross-examined on the information recorded by the doctors and nurses in the Accident and Emergency Department in the medical notes dated 11 December 2008.
2. I note the information recorded in the medical notes is fundamentally different from Mr Shakeel’s pleaded case in respect of the following matters:-
   1. Mr Shakeel’s pleads he suffered a fall thereby sustaining injuries to his right elbow. In court he clarified he fell from a height of 2 feet. On 16 December 2008, he told the medical staff that he fell from low height at work. However the medical notes record Mr Shakeel having told the medical staff he suffered a “slip and fall on floor”. This is re-confirmed by the medical report dated 25 February 2009 which states the “*chief complaint was slip and fell* [sic] *with right elbow pain*”.
   2. The Statement of Claim states the injury happened at work in Kowloon City. However the medical notes record the injury happened at home, that is, in Tuen Mun.
   3. Mr Shakeel’s evidence in court and in his witness statement is that the accident happened at about 11:45am. This is corroborated by his wife in that his wife claimed to have a received a call from him at about 12pm informing her of the accident. However the medical notes records the time of the accident as 13:00 hours.
3. Mr Shakeel explains he was in so much pain he did not know what was recorded in the medical notes. He adamantly denies he told the medical staff the matters listed above. He also claims he could only understand a little English.
4. I find his explanation to be inherently improbable.
5. Mr Shakeel conceded the address recorded in the medical notes is correct. Though he claimed to understand very little English, he did not say he had difficulty in communicating with the hospital staff or that he did not understand what they asked him. Furthermore, he confirmed he told the nurse and doctor he was injured at work and was adamant he never told the medical staff he was injured at home. In such circumstances, there is no reasonable explanation as to why the information recorded in the medical notes is drastically different from the version Mr Shakeel purportedly gave to the medical staff in respect of the mode of injury, the place of injury and the time of injury. In absence of any evidence of miscommunication or difficulty in communicating with the medical staff, I find it inherently improbable the medical staff would have recorded a version of events in the medical notes that is completely different from that as purportedly narrated by Mr Shakeel at the hospital on 11 December 2008.
6. I note Counsel for Mr Shakeel complained this line of questioning by counsel for ECASB was not part of ECASB’s pleaded case. It was submitted that in absence of any witness to explain the information recorded in the medical notes, such evidence cannot be used against Mr Shakeel. It was further submitted ECASB cannot put forward a positive case that Mr Shakeel sustained injuries at home. Having considered counsel’s submissions, I do not accept such submissions.
7. ECASB has clearly placed Mr Shakeel on strict proof of his case. In particular ECASB denied the injury happened as described by Mr Shakeel. Counsel for Mr Shakeel is mistaken to think that ECASB sought to put forward a positive case Mr Shakeel was injured at home. ECASB was simply casting doubt on Mr Shakeel’s case by using the information contained in the medical notes. The medical notes formed part of the trial bundle and there is no allegation that Mr Shakeel was taken by surprise by the document. In such circumstances, ECASB is entitled to cross-examine Mr Shakeel on the information contained in the medical notes. I see no cause for complaint.
8. I would also add it is evident from the Defence filed by ECASB that Mr Shakeel was required to prove all elements of his claim. If there was contradictory evidence that would cast doubt on his case, it is for Mr Shakeel to ensure there was a satisfactory explanation for such contradictory evidence so as to prove his case on a balance of probabilities. It is not for Mr Shakeel to sit back and assume that such evidence will be ignored by ECASB and then complain he did not know it would be used against him at trial.
9. In respect of Mr Shakeel’s explanation as to why he chose to go to Tuen Mun Hospital instead of a hospital near the Premises, I found his explanation to be unbelievable for 2 reasons.
10. Firstly, it is virtually impossible for him not to know that there are hospitals in Kowloon. On his own admission, Mr Shakeel came to Hong Kong in 1987 and has been living in Hong Kong for 21 years as at the time of the accident. I find it unbelievable Mr Shakeel would not know there were hospitals in the Kowloon area. Even if he did not have the precise address for each hospital in Kowloon, he could have either called the ambulance or a taxi to take him to the nearest hospital. If he was truly injured on the Premises in Kowloon City, there is no reasonable explanation why Mr Shakeel did not attend a hospital closer to the Premises for treatment.
11. Secondly, Mr Shakeel’s decision to attend a hospital far away from the Premises despite his claim of suffering great pain from the injury is unbelievable. Mr Shakeel claimed he was in great pain from the injury. He described that he was in so much pain that he did not know what the doctors and nurses had written in the medical notes. If he was in as much pain as he claimed to be, it is unbelievable that he would deliberately chose to take the bus for 1 hour to go to the Tuen Mun hospital instead of seeking medical treatment as soon as possible from a nearby hospital. I therefore do not accept Mr Shakeel was injured on the Premises at the material time.
12. I have also considered the evidence of Ms Bibi and considered whether her evidence supports Mr Shakeel’s case. However I noted Mr Shakeel’s evidence is inconsistent with his wife’s evidence on the following matters:-
    1. Mr Shakeel claimed that when he arrive in Tuen Mun, he saw his wife standing there waiting for him. However his wife claimed that when she arrived, it was Mr Shakeel who was waiting for her.
    2. Mr Shakeel claimed his wife was with him when he was being examined by the nurse at the triage station. However his wife said she was standing outside so she did not hear the conversation between Mr Shakeel and the nurse.
13. Furthermore, I find the evidence of Ms Bibi to be of little assistance. As conceded by Ms Bibi, she was not a witness to the accident. She is only able to give evidence that Mr Shakeel was not at home and that she accompanied him to the hospital later that day. She is unable to say whether Mr Shakeel did in fact go to work on the Premises that day and whether he sustained injuries at work. I therefore do not place weight on her evidence.
14. By reason of the matters set out above, I find Mr Shakeel’s evidence on how and where he sustained his injury to be unreliable and incredible. I therefore do not accept he sustained injuries in the manner he described and I do not accept he sustained injuries whilst at work.
15. I find Mr Shakeel unable to prove his claim against Mr Wong and ECASB on a balance of probabilities. Hence I dismiss Mr Shakeel’s claim against Mr Wong and ECASB.

**SUMMARY**

1. For reasons set out in this judgment, I order the plaintiff’s claim against the 1st, 2nd and 3rd defendants be dismissed.

**COSTS**

1. I make no order as to costs as between the plaintiff and the 1st and 2nd Defendant.
2. I make a costs order nisi that the plaintiff do pay the 3rd defendant’s costs of this action, with certificate for Counsel, to be taxed if not agreed. Unless any party applies to vary the costs order within 14 days hereof, the costs order shall become an order absolute.

( W Y Ho )

Deputy District Judge

Mr Neal Clough, instructed by Massie & Clement, for the plaintiff

The 1st and 2nd defendants acting in person, absent.

Mr Patrick D Lim, instructed by Gallant Y T Ho & Co, for the 3rd defendant