DCPI 2473/ 2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2473 OF 2009

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BETWEEN

RAI PABITDARA Plaintiff

and

VEGETABLE MARKETING ORGANIZATION Defendant

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

Coram : Deputy District Judge A. Kot in Court

Date of Hearing : 1st to 3rd December 2010 and 6th December 2010

Date of Judgment : 23rd December 2010

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J U D G M E N T

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*INTRODUCTION*

1. The Plaintiff claims damages for personal injuries arising out of 2 accidents occurred on 17 October 2006 and 16 December 2007 respectively at the Cheung Sha Wan Wholesale Vegetable Market (“the Workplace”) against the Defendant, her former employer.
2. The Plaintiff alleged that she sprained her back whilst lifting a basket of garbage weighed 55 to 60 kg onto a trolley on 17 October 2006 (“the 1st Accident”). She resumed work with the Defendant after her sick leave and she sprained her back again on 16 December 2007 whilst moving a stack of baskets (“the 2nd Accident”). The Plaintiff said that the accidents occurred due to the negligence of the Defendant as an employer who has also been in breach of its statutory duties under the Occupational Safety and Health Ordinance and its Regulation.
3. The Defendant denied liability and denied the weight of a basket of garbage would be as much as alleged and also denied knowledge of the 1st Accident. As for the 2nd Accident, the Defendant denied it was the Plaintiff’s duty to move the stack of baskets in question. And in its Defence, it also stated that should the accidents did occurred, it is due to the negligence of the Plaintiff instead.
4. Mr. Sakhrani, counsel for the Defendant, in his final submission focused on the point that the Plaintiff had given inconsistent evidence as to how the alleged accidents occurred. He asked the court to disbelieve the Plaintiff and dismiss her claim accordingly.

*THE WITNESS*

1. The Plaintiff is the only witness for her case whilst the Defendant called its supervisor, Mr. Lee Shu Man (“Mr. Lee”) and Mr. Poon Sum Kwai (“Mr. Poon”) to testify. The statement of Mr. Wong Chiu Hung Lester (“Mr. Wong”) is agreed and admitted as evidence at the hearing.

*UNDISPUTED FACTS*

1. The Plaintiff started working with the Defendant as a general labourer since 1 May 2006 earning an average income of $7104.28 per month. Her duties include cleaning and sweeping of the floor, collecting garbage with baskets and transporting the baskets of garbage to the garbage pool using a wheel barrow. These were her routine daily work duties. At the time of the two accidents, the Plaintiff was on duty at the Workplace. The basket involved in both accidents is of 17 inches (430mm) in width, 24 inches (610mm) in length and 11.5 inches (290mm) in height and 6 lbs in weight.
2. The Plaintiff was granted 3 periods of sick leave, namely from 17 October 2006 to 24 October 2006, from 16 December 2007 to 22 January 2008 and from 15 April 2008 to 10 September 2009. She had not resumed her employment with the Defendant thereafter. A sum of $152,193.50 was being paid to the Plaintiff by the Defendant in answer to her claim for employees’ compensation for the 2nd Accident.

*THE 1st ACCIDENT*

1. The Plaintiff, in her evidence, said that she was told to load 4 baskets of garbage full of vegetable wastes onto a wheel barrow at the time of the 1st Incident. It was her duty to fill basket with waste and she can determine how much to be put in one basket and she was instructed to hold 25 to 30 kg at most which is easy for her. However, the 4 baskets in question were filled by another co-worker. The first one was of usual weight but for the second one, she realised it was in fact doubled the usual weight when she lifted it up, i.e. about 55 kg. She carried on to load it onto the wheel barrow and sprained her back as a result. She looked into the basket and found there were winter melon and other rubbish in it. She then told a supervisor called Ah Chung of the incident since Mr. Lee had already gone off duty.
2. Mr. Lee testified that he had never been told of the 1st Accident and having worked for the Defendant for about 30 years, he had never come across a basket of waste up to 55 to 60 kg and it would not be possible for a worker to handle a basket of that weight. According to Mr. Lee, a basket will usually hold waste of about 10 catties and when being filled up like what is shown on the photo (page 145 of Bundle) is at the most of 20 to 25 catties. Even with winter melon, the weight of a basket should only be 30 catties but there was different procedure for winter melon waste which would rarely be put in the basket.

*THE 2nd ACCIDENT*

1. The Plaintiff said in evidence that she was handling a stack of baskets at the material time. She was moving a stack of basket on a trolley at Lane 5 and the stack inclined to a tilted position with the two or three baskets on the top of the stack fell out. The Plaintiff then used both of her hands to push the stack back to an upright position and felt pain on her back. She confirmed it was not a case that the whole stack of baskets collapsed on her whilst she was stacking them up to the 25th basket.
2. As for the 2nd Accident, Mr. Lee said that on the material day, when he went on duty at 3am, the Plaintiff told him that she hurt her waist whilst stacking the baskets at Lane 6. He allowed the Plaintiff to go off duty and he checked Lane 6 and found everything in order. As for Lane 5, it was a place reserved for a supplier called Kwan Ti and baskets within Lane 5 should be stacked up by staff of Kwan Ti and not the responsibilities of the employees of the Defendant.
3. Mr. Poon was the team leader of the Plaintiff on the day the 2nd Accident occurred. According to him, the Plaintiff’s duty on that day included stacking and checking of baskets at Lane 6 and at 1am, the Plaintiff should be working alone. Mr. Poon denied ever instructed the Plaintiff to stack up 25 baskets and neither had he ever seen the Plaintiff done so. It was the usual practice for 10 odd numbers of baskets to be stacked up together but Mr. Poon had seen staff of the suppliers stacked up 20 baskets. Upon seeing this, Mr. Poon had warned the supplier and had told them to put the excess ones down.

*SAFETY ASPECT*

1. The Plaintiff agreed that she was assigned to work with a more experienced worker when she joined the Defendant but this only lasted for 7 days. And she was never told what to do concerning work safety except be careful in carrying baskets but never shown how.
2. Both Mr. Lee and Mr. Poon said that the Plaintiff had been assigned to work with an experienced worker for half a month when she first joined the Defendant. Mr. Lee said he had told each worker the work procedure and what to pay attention to whilst Mr. Poon said he had told the Plaintiff to be careful about safety aspect and if there was any problem, he should be consulted. Yet the Plaintiff had never sought assistance from him.

*MEDICAL OPINION*

1. The Plaintiff was jointly examined by Dr. Chun and Dr. Wong on 21 January 2010. Dr. Chun had also examined the Plaintiff on 23 October 2008. Both experts agreed that there was certain degree of over-expression of symptoms and signs by the Plaintiff and the discs desiccation and facet joint hypertrophy noted on the MRI could be pre-existing. It is also agreed that the condition of the Plaintiff had reached maximal medical improvement and no further treatment is required.
2. Dr. Wong opined that the Plaintiff had sustained a soft tissue sprain injury to her back and the symptoms and signs were attributable to the two accidents and the disc protrusion could have been aggravated by the same incidents. In view of the disc desiccation and protrusion, the Plaintiff’s low back pain and numbness would not resolve completely. Dr Wong believes the Plaintiff did have genuine pain and tenderness as recorded by various medical staff on many occasions and the sick leave granted was reasonable. Since the Plaintiff’s job demand involved frequent standing and squatting and heavy manual work, Dr. Wong is of the opinion that the Plaintiff would have to switch to cleaning jobs of lighter nature such as cashier or car park attendant. He assessed the Plaintiff’s loss of earning capacity is about 5%.
3. Dr. Chun opined that the Plaintiff’s complaint of continuous pain at the low back was inconsistent with the alleged injury and the Plaintiff had exaggerated her pain and disability. The likely diagnosis was that she had a recurrent attack of per-existing low back pain. The MRI done on 20 June 2008 only showed degenerative change without any nerve root compression and these changes were not caused by the 2 accidents. Sick leave granted beyond 22 January 2008 is unreasonable since further sickness is most likely related to the recurrent nature of the low back pain. The Plaintiff is independent with her activities of daily living and is able to return to work with the Defendant and the risk for returning to work is low. The loss of earning capacity is assessed at 1%.
4. I preferred the evidence of the Defendant’s expert, Dr. Chun to that of the Plaintiff’s expert. There is nothing in Dr. Wong’s opinion to justify as to how he came to the conclusion that the Plaintiff’s injury was attributable to the two accidents. The fact that Dr. Wong also opined that the Plaintiff had exaggerated her signs and symptoms casts doubt as to how Dr. Wong can rely upon the complaint by the Plaintiff to the other medical personnel as to her condition. As rightly pointed out by Dr. Chun in his report, “doctors cannot tell who is having back pain or how severe the back pain is by the use of image studies” (page 219 of Bundle). And Dr. Chun, who had the opportunity of watching the surveillance recordings, should be considered having the opportunity to observe the Plaintiff in her normal daily life instead of just at the joint assessment session like Dr. Wong.

*LIABILITY*

1. Having heard the evidence, I do not find the evidence of the Plaintiff reliable. The account given by the Plaintiff in her testimony of the two accidents are different with the one pleaded in the Statement of Claim and her witness statement prepared for this proceedings as well as the statement to the loss adjuster after the 2nd Accident. No satisfactory explanation had been given to explain the inconsistent account.
2. As far as the 1st Accident is concerned, it was pleaded in the Statement of Claim that the Plaintiff was instructed to move garbage bags approximately 55 to 60 kg each from the market to the loading bay and in the course of so doing, sustained back injury. What is being pleaded in the Statement of Claim gives one the impression that she was instructed to lift and carry baskets of 55 to 60 kg. But it is the Plaintiff’s evidence that her duty included collecting of garbage into baskets and she used to fill up to a weight that she can comfortably carry. She was instructed to hold 25 to 30 kg and this was her practice before the 1st Accident and such a weight was easy for her.
3. When being cross-examined that she was the one to determine how much weight to be put in one basket, the Plaintiff then for the first time said that the 4 baskets of garbage she was instructed to load onto the wheel barrow were in fact filled by another co-worker who had gone off duty leaving the unfinished work to the Plaintiff. And it was the second basket she handled that was in fact doubled the usual weight. The fact that the basket in question was not filled by the Plaintiff but by another co-worker was never mentioned in the Statement of Claim or her witness statement in this proceedings. She explained such fact was being missed out due to her ability to explain things clearly. I am not impressed with the Plaintiff’s explanation and the fact that she volunteered the answer upon cross-examination rendered her explanation unsustainable.
4. The shift in the Plaintiff’s description of the 2nd Accident further demonstrated that the Plaintiff is not a reliable witness. There are 3 different versions of the 2nd Accident. In the Statement of Claim and her witness statement in this proceedings, she described the accident occurred whilst she was stacking the baskets to about 2 meters high and the whole stack of basket collapsed on her (page 3 and 89 of Bundle). In her statement to the loss adjuster dated 30 May 2008, the description was “I started stacking that empty basket (the 25th one) into that column. During such, my both hands holding that empty plastic basket was slightly fell backward. At that time I sprained my back when I was still holding that empty plastic basket with my both hands.” (page 242 of Bundle) In her evidence in court, the Plaintiff categorically denied the accident occurred whilst she was stacking the baskets. Instead, she said whilst she was moving a stack of basket from one place to another, the whole stack inclined and 2 or 3 baskets fell from the top. She used both of her hands to push back the stack and hurt her back.
5. The 3 versions described by the Plaintiff involved totally different causes that are simply irreconcilable. Had the Plaintiff been telling the truth, there should not be different versions of the accident. The Plaintiff had tried to excuse herself by saying that when she told her lawyer of the incident, all she had in mind was the baskets hence she described the incident in a wrong manner. But she cannot deny the fact that both the Statement of Claim and her witness statement had been read to her before she signed the Statement of Truth. When this was pointed out to her in cross-examination, she said the low back pain affected her mental ability. Yet, this was not supported by any of the medical evidence she adduced. Never in her history of medical consultation had any doctor concluded that her cognitive ability had in any way been impaired. As for the statement to the loss adjuster, the Plaintiff had initially denied saying those words but eventually she admitted she may have said so. The Plaintiff is evasive in her explanation.
6. Considering the Plaintiff’s evidence on the whole, I do not find her to be a truthful or reliable witness and I am not satisfied that the Plaintiff had sustained injuries in the manner she asserted so as to give rise to any claim against the Defendant. In the premises, the Plaintiff’s claim shall be dismissed.

*QUANTUM*

1. Just in case I am wrong on the question of liability, I will deal with the issue of the quantum of damages for completeness sake.

*Pain, suffering and loss of amenities*

1. At the time of the accident, the Plaintiff was 37. She is now aged 38. She enjoyed good health before the accident. As rightly pointed out by Mr. Sakhrani, the Plaintiff resumed work after both accident and only complained of mild pain to the medical officer after the 2nd Accident (page 1138 of Bundle). And there is no evidence from the Plaintiff as to why there is an aggravation of pain after mid-April 2008. Given these facts, I found the pain suffered by the Plaintiff would not be great otherwise she would not be able to continue performing her duty after the 2 accidents and her injury is far from serious. I considered an award of $60,000 as conceded by the Defendant is more than adequate for the Plaintiff’s pain, suffering and loss of amenities.

*Pre-trial loss of earnings*

1. There is no dispute regarding the Plaintiff’s pre-accident earnings of $7,104.28. I did not accept that the Plaintiff would have been promoted to the position of supervisory labourer by December 2008. There is no evidence to substantiate such a contention and the Plaintiff had also confirmed in the witness box that she got no ground in support.
2. As far as the 1st Accident is concerned, there is no dispute that the Plaintiff did receive 80% of her salary during the sick leave period. So the only loss of earnings is the remaining 20% of her salary, i.e. $1989.19 ($7104.28 x 8/30 x 105%).
3. As for the 2nd accident, I accept the opinion of Dr. Chun that any sick leave beyond 22 January 2008 is unreasonable. There is nothing to explain why the Plaintiff should require sick leave after resumption of work for over 2 months. I found damages payable under this head should be $9448.69 ($7104.28 x 38/30 x 105%).

*Loss of earning capacity*

1. I accept the opinion of Dr, Chun that the Plaintiff should be able to resume her pre-accident employment with the Defendant. Even if she is not able to do so as a result of the accident, the Plaintiff had experience of working in a salon and in Chinese restaurants. She can take up these jobs or work as a security guard. The fact that the Plaintiff had not joined her husband for the training as a security guard sheds light on the Plaintiff’s willingness to look for a job. She cannot put up any reasonable explanation as to her failure to do so. I am not satisfied that the Plaintiff had suffered any loss of earning capacity or disadvantaged in the labour market and there shall be no damages awarded under this head.

*Future loss of earnings*

1. For the same reason sets out in the preceding paragraph, I decline to make an award under this head.

*Loss of MPF*

1. This has been included in the calculation of pre-trial loss of earnings.

*Special damages*

1. I am of the view that the figures suggested by the Defendant in its Answer for medical expenses, tonic food and travelling expenses are reasonable in view of the nature of the injury. It is assessed at $3,000.

*Total award*

1. The total award for the Plaintiff, if she had succeeded on the issue of liability is :

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| --- | --- |
| PSLA | $60,000 |
| Pre-trial loss of earnings | $11,437.88 |
| Special damages | $ 3,000 |
|  | $74,437.88 |

*The Order*

1. The Plaintiff’s claim be dismissed.
2. I see no reason why costs should not follow the event. I make a cost order nisi that costs of this action be to the Defendant to be taxed if not agreed, with certificate for counsel. This is an order nisi to be made absolute upon expiry of 14 days.

(Angela Kot)

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| --- |
| Deputy District Judge |
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Mr. Kenneth Leung instructed by Messrs M.C.A. Lai & Co. for the Plaintiff

Mr. Ashok Sakhrani instructed by Messrs Winnie Leung & Co for the Defendant