

HONG KONG / JUDGMENT

FAZAL DAD v. FEDERAL SECURITIES LTD

COURT

District Court

DECIDED

14 December 2007

CASE / FILE NUMBER

DCEC288/2006

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bjbj DCEC 288/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 288 OF 2006

IN THE MATTER OF AN APPLICATION BETWEEN FAZAL DAD Applicant and FEDERAL
SECURITIES LIMITED Respondent

Coram: Deputy District Judge Eddie Yip in Court Date of hearing: 28, 29, 30 November 2007 Date
of Handing Down of Judgment: 14 December 2007

JUDGMENT

The issue

1. The Applicant alleges to have fallen down into the basement and sustained injuries whilst guarding the site. The Respondent says the Applicant was absent from the site at the alleged time of accident. Liability is in issue. Quantum is in issue as to the percentage of permanent loss of earning capacity as assessed by the Board.
2. By consent, the parties adopt the witness statement(s) as part of the evidence-in-chief of each relevant witness. There are 4 bundles, A, B, C, and D, for the trial. Take an example, a reference to a document at means page 20 of Bundle B. The Applicant's evidence
3. The Applicant gives evidence. He has made a witness statement on 10 August 2006 [B20 27] and a supplemental witness statement on 25 April 2007 [B48 51]. By consent, A Barkat's witness statement [B15 18] is admitted without calling him. He calls no witnesses.
4. The Applicant was born in 1940 in Pakistan. He completed his primary education there. He came to Hong Kong in 1996. He had worked as a labourer in construction sites and as a security guard in various companies in Hong Kong [B28 30].

5. By a written contract [D33], Saif Rehman (Saif), the Respondent s boss, agreed to employ him as a security guard from 15 March to 14 May 2005. The stated salary was \$4,000.00. There were some extra allowances. Both parties agree to adopt the figure of \$4,701.55 as his monthly salary for the purpose of this trial.
6. He was to work as a night shift security guard at a private residential site called Sunrise Villa at 179 Castle Peak Road, Tai Lam, Tuen Mun, New Territories, Hong Kong (Post No. 8). It was a 3-storey house with a yard. It was remote and uninhabited [D43, D51 Plate 1-3]. His daily duty was from 7 p.m. to 7 a.m. He was instructed to phone up Saif s office every 2 hours, i.e., at 7 p.m., 9 p.m., 11 p.m., 1 a.m., 3 a.m., and 5 a.m. to report duty.
7. On 15 March 2005, he commenced to work under the contract.
8. On 13 May 2005, he performed his duty at the site. He phoned up Saif s secretary, Miss Lee, at 6.31 p.m., 8.47 p.m., and 10.46 p.m. [B35].
9. At around midnight on 14 May 2005, he heard some strange noises when he was at the first floor. This was the only place at the site. It was dark everywhere. He was not provided with a light torch. After patrolling for a while, he arrived at a ventilation pillar in the yard on the ground level [D51 52 Plates 3, 5-7, and 6]. It was 2.5 feet high [B23 para. 19] and flat-surfaced. He reclined himself half-leaning sideways on one elbow on a plywood. The plywood had a dimension of 92cm x 92 cm and fully covered the square opening of the ventilation pillar. He put his mobile phone beside him next to the plywood. After 10 minutes, the plywood suddenly broke. He fell down into the basement, which was 15 feet underneath. His shoulder, arm and leg on his left side were injured. It took him 2 hours to move to the bottom of the basement staircase, which was 25 feet away, and thence up the 15 steps of the staircase back to the yard. At the head of the staircase, which was 10 feet from the ventilation pillar, he could move no further. He shouted a couple of times for help but no one came to his rescue. All the water in his body was finished and his throat was closed, he could not get or use the mobile phone. He rested at the head of the staircase for more than 5 hours until Mohammad Suleman (Suleman) came to take up the day shift duty. Suleman found him and took him to Tuen Mun Hospital for treatment. The Respondent s evidence
10. The Respondent calls only Saif Gul Rehman (Saif) to give evidence. He made a statement dated 8 May 2006 [B1 8].
11. He is and was the managing director of the Respondent. He came to know the Applicant through friends. He agreed to employ the Applicant as a security guard on a 2-month contract between 15 March and 14 May 2005.
12. On about 12 May 2005, the Applicant requested him to extend the contract upon expiry. He refused on 2 grounds: The Applicant was always absent from work, sleeping, and failing to report duty on time; Post No. 8 was about to commence interior decoration work and thus become a construction site. There was a statutory ban of security guards aged over 65 in a construction site.

13. The Applicant was angry and threatened to find a way to get money from the Respondent. He knew that the Applicant had been successful in getting compensation from his previous employer for an injury.
14. On 13 May 2005 at 11 p.m., Miss Lee told him that the Applicant's call was from a location with noises of TV and children. Post No. 8 was supposed to be a very quiet location. He suspected that the Applicant was not at the site. He also remembered the Applicant's threat. So he decided to go to check on the Applicant.
15. At about 12 a.m., he arrived at the site. The gate was locked from outside. He opened the gate and patrolled every part of the site, including the basement, with a light torch. He shouted the Applicant's name repeatedly. There was no response. The Applicant was not there. He guarded the site until 5.30 a.m. At 6 a.m., he phoned up Suleman, the day shift guard, to request for earlier attendance.
16. Suleman only arrived at 7.30 a.m. He phoned up Saif and informed Saif that Applicant was found injured. Saif instructed him to have the Applicant sent to the hospital. Closing submissions
17. I have considered the full written submissions of both parties. This Court's findings On the Applicant's evidence
18. The Applicant says after moving himself up to the head of the staircase in the yard, all the water in his body was finished. The mobile phone was only 10 feet away but he did not get or use it. When cross-examined as to why he did not get or use the mobile phone to make rescue calls, he first says his throat was closed. Later, he says he shouted for help a couple of times and then his throat was closed. He fails to explain for this change in evidence.
19. He says all the water in his body was finished and his throat was closed. However, his witness statements did not mention these at all.
20. In his witness statement [B23 para. 19], he stated that he sat over the plywood on top of the ventilation pillar of 2.5 feet high to help [him] to look around from height . In cross-examination, he says he was half-leaning sideways on one elbow . He fails to explain for this change in evidence.
21. I find this posture most bizarre. Firstly, this would hinder his turning his head around . Secondly, he admits in Court that he was rather tall. Instead of viewing from height , I think he would be losing height by this lower-than-sitting posture. Thirdly, this would hinder any quick response to a sudden attack or danger.
22. The Applicant had written in the Attendance Record for 7 a.m. He says he had been doing this regularly because it was Saif's instructions. Saif would sometimes transfer the guards to another site at short notice. However, his witness statement [B23 para. 15] stated that he did so because he wanted to get off as possible after duty. He fails to explain for this change in evidence.

23. I do not find the Applicant a credible or reliable person. I reject his evidence on all facts in issue. On the Respondent's evidence
24. The Applicant's solicitor submits [at p. 6 of his submissions] that there was no reason why Saif should not stay until 7 a.m. I disagree. It was a remote and vacant site. He had stayed there for 5 hours and phoned up Suleman at 6 a.m. to request Suleman to come earlier than 7 a.m. In any event, the fact of his not having deployed any guard there for the time gap has nothing to do with the present action.
25. The Applicant's solicitor submits [at p. 5-6] that I should not place weight on any hearsay evidence that is disputed by the Applicant. I regard this submission wrong in principle. However, as can be seen in this Judgment, I have actually not relied on any hearsay evidence disputed by the Applicant in rejecting the Applicant's evidence or accepting the Respondent's evidence.
26. I find Saif credible and reliable. I accept his evidence on all facts in issue. On the case as a whole
27. The Respondent has proved that the Applicant was not at the site between 10.46 p.m. (as reflected by his having last phoned up Miss Lee at that juncture) and 5.30 p.m. (as reflected by Saif's stay at the site until that juncture). I reject the Applicant's case that he was there at about 12 a.m. It follows that he could not have sustained any injury there at that juncture. I am satisfied that the Respondent has proved that the accident did not arise out of the employment.

Conclusion

28. The Applicant fails on liability and a fortiori quantum. There is no apparent reason why costs should not follow event. I make an order nisi that the Respondent shall get costs of the present action, inclusive of all costs reserved, if any, except for the first hour at the first day of trial when the Respondent argued on, and then abandoned, 3 summonses taken out by itself. The Respondent concedes that the Applicant shall get costs for this hour. The Applicant is legally-aided. The Applicant's own costs and the costs of the present action, inclusive of all costs reserved, if any, shall be taxed in accordance with legal aid regulations. This costs order shall be made absolute 14 days from today. (Eddie Yip) Deputy District Judge Representation: Mr. Richard Clement, of Messrs. Massie & Clement, for the Applicant. Mr. Peter Pannu, instructed by Messrs. K.B. Chau & Co., for the Respondent. - 1udk 1udk (#p# (#p# H)) >*6D :i#z *\mT ,ztpq zo/< xC&1 ({m8 ?<n:pK =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> H)) ?<n: FTql 0<\|a n*\U & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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