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FOIL UPDATE 13th January 2022

'Horseplay' in the workplace

Chell v Tarmac Cement and Lime Limited (2022) EWCA Civ 7

This was a second appeal in respect of the decision of a judge in the County Court dismissing the claimant/appellant's claim for personal injury and damage which occurred during the course of his employment. The claimant was employed by a company, Roltec Engineering Limited as a site fitter. In the course of that employment, he worked at a site which was operated and controlled by the defendant/respondent. On the day of the accident, Anthony Heath, a fitter employed by the defendant entered the workshop where the claimant was working. The claimant bent down to pick up a length of cut steel. Mr Heath put two pellet targets on the bench close to the claimant's right ear and hit them with a hammer causing a loud explosion next to the claimant's right ear. As a result, the claimant suffered injury, a noise induced hearing loss in his right ear and tinnitus.

The original causes of action were that:

i) The defendant was vicariously liable for the actions of Mr Heath; and

ii) It was liable to the claimant in negligence for breaching its duty to take steps to prevent a foreseeable risk of injury resulting in the claimant's injury.

IN BRIEF

The Court of Appeal dismissed the claimant's appeal against decisions in the courts below that the defendant was not vicariously liable or liable in negligence for the actions of its employee.

In an act of horseplay, the defendant's employee had hit two pellet targets close to the claimant's ear, resulting in hearing loss.

The judge dismissed both claims. His findings of fact and determination as to the law were upheld by a High Court Judge.

Dismissing the claimant's further appeal, the Court of Appeal held that with regard to vicarious liability the issue was whether Mr Heath's wrongful act was done in the course of his employment. It was only if the unauthorised act was so connected with what Mr Heath had been authorised to do that it might rightly be regarded as the mode of doing what was authorised.

The careful and detailed findings of fact made by the judge, unchallenged by the claimant, were fatal to this appeal. What they demonstrated was that there was not a sufficiently close connection between the act which caused the injury and the work of Mr Heath so as to make it fair, just and reasonable to impose vicarious liability on the defendant.

i) The real cause of the claimant's injuries was the explosive pellet target – it was not the employer's equipment.

ii) It was no part of Mr Heath's work to use pellet targets.

iii) There was no abuse of power. Mr Heath did not have a supervisory role in respect of the work which the claimant was carrying out and was not working on the task on which the claimant was engaged at the time of the incident.

iv) As to friction between the defendant's employees and Roltec's employees, the findings of fact made by the judge were:

a) Any bad feelings between the two sets of fitters eased in the run-up prior to the incident;

b) There were no threats of violence and the issue of tension was only raised once with a manager employed by the defendant;

c) The claimant had not asked to be taken off the site;

d) The claimant did not refer specifically to Mr Heath as the source of any tension.

v) The risk created by this employee was not inherent in the business. The employer's business provided the background and context for the risk and created the ground for it but that of itself was insufficient to create the close connection, particularly in the absence of other factors.

The defendant was not vicariously liable for the actions of its employee, Mr Heath, when he chose to strike a pellet target with a hammer in the proximity of the claimant's ear.

As far as the claim in negligence was concerned, the claimant relied on alleged breaches of statutory regulations which included the Management of Health and Safety at Work Regulations 1999, in particular the failure to carry out an adequate and sufficient risk assessment (regulation 3) and a failure to implement preventative and protective measures which were identified in that risk assessment (regulation 4).

In order to succeed on the alleged breach of the employer's duty of care, it must be shown that there was a reasonably foreseeable risk of injury to the claimant by reason of the actions of Mr Heath. It was accepted that horseplay, ill-discipline and malice could provide a mechanism for causing such a reasonably foreseeable risk but it was not made out on the facts of this case.

There was no reasonably foreseeable risk of injury to the claimant arising from the practical joke played by Mr Heath which could begin to provide a basis for a breach of a duty of care owed by the defendant to the claimant. Even if a foreseeable risk of injury could be established, on the facts of this case, the only relevant risk which could have been included in an assessment was a general one of risk of injury from horseplay. Common sense decreed that horseplay was not appropriate at a working site. The fitters were employed to carry out their respective tasks using reasonable skill and care, and by implication to refrain from horseplay. It would be unreasonable and unrealistic to expect an employer to have in place a system to ensure that their employees did not engage in horseplay. Further, the general site rules include a section that "No one shall intentionally or recklessly misuse any equipment". This was a warning against exactly what Mr Heath did.

As to the need to investigate, when the claimant had made a complaint, the bad feeling was reducing, no threats of violence were made, and the claimant did not ask to be taken off the Site.

The full case report may be found at: Chell v Tarmac Cement And Lime Ltd [2022] EWCA Civ 7 (12 January 2022) (bailii.org)