Neutral Citation: [2014] IEHC 91

THE HIGH COURT

[2012 No. 482 P.]

BETWEEN

JOSEPH ELMONTEM

PLAINTIFF

AND

NETHERCROSS LIMITED TRADING AS ROGANSTOWN GOLF AND COUNTRY CLUB AND MAX USI

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered the 28th day of February 2014

1. The court is satisfied on the evidence that the second defendant was employed by the first defendant as head chef at its hotel, spa, golf and leisure complex at the date of the events giving rise to these proceedings. The evidence established that this was and is a very considerable enterprise employing between 70 and 100 people of mixed ethnicity. I am satisfied that the offer of employment was made by email dated the 17th March, 2010, under the signature of Ian McGuinness, who proved this document. He gave evidence that he was managing director of the first defendant since June 2004. The offer was accepted by the second defendant. The evidence established that the position was not advertised in the print media or in any trade journals. I am satisfied on the evidence of Mr. Brady, then general manager of the complex, and Mr. McGuinness that this was unnecessary as the existence of the vacancy would have been well known within the small group of non self-employed experienced and reputable chefs working in the State. I am satisfied that the decision to offer the position to the second defendant was made by Mr. McGuinness and not by Mr. Brady.

2. I find on the balance of probabilities that Mr. McGuinness at that time was not aware and was not aware at the time of the incident giving rise to the present claim, that the employment of the second defendant as head-chef by a former employer had been terminated following an incident in which he had assaulted an under-chef by throwing a pan at him in the course of their work. The person who had investigated that incident and who had terminated the second defendant's employment on that occasion was Mr. Brady, who was then general manager of that other business.

3. It is clear from the text of the offer contained in the email dated the 27th March, 2010, that Mr. McGuinness had met the defendant on at least one occasion before offering him the position of head-chef with the first defendant. There was no evidence that the second defendant had submitted or had been required to submit a curriculum vitae when applying for the position with the first defendant. I find on the balance of probabilities that Mr. Brady did not, as he now recalls, inform Mr. McGuinness of this previous assault, nor had he cautioned Mr. McGuinness about employing the second defendant. I am also unable to accept his "belief" that the second defendant had told Mr. McGuinness of this previous assault. The dismissal had, it appears resulted in a hearing before the Employment Appeals Tribunal at which the second defendant had been awarded the equivalent of a month's salary.

4. The evidence established that there were several other well qualified candidates for the position in addition to the second defendant. Mr. Brady told the court that the second defendant was an excellent chef, but had a problem controlling his temper. I accept the evidence of Mr. McGuinness that he would not have offered the position to the second defendant had he been aware of this previous incident in the second defendant's career. He and his fellow directors and shareholders, - the first defendant is a family owned and controlled company, - would have been concerned about the risk of involvement in employment disputes or litigation. On the balance of probabilities I find that Mr. McGuinness is correct in his recollection that it was Mr. Brady who had arranged for him to meet the second defendant and that Mr. Brady had been present at that meeting. I accept his recollection that Mr. Brady had told him that the second defendant was a very, very good chef and was ideally suitable for the position. Mr. McGuinness recalled that he had understood that the second defendant was at that time intending to accept the position of chef at a licensed premises known as The Graduate in Killiney having decided to move from another licensed premises known as The Vaults. Mr. McGuinness told the court that he was unaware of the previous assault or of the Employment Appeals Tribunal hearing. Mr. Brady gave evidence that the previous assault had occurred at a resort in Co. Wicklow. The evidence established that the second defendant lived at Lusk, which is closer to the first defendant's complex near Swords than Killiney. The manner in which Mr. McGuinness dealt with the second defendant following the incident in the present case is consistent with his evidence that he would not have chosen the second defendant for the position had he been aware of this previous assault. However, for the purpose of this action, the fact remains that Mr. Brady as general manager of the first defendant and therefore the immediate superior of the second defendant, was aware that the second defendant had demonstrated a propensity to behave violently towards fellow employees if angered.

5. The plaintiff is and has been since 2006 or 2007 financial controller of the first defendant. The evidence established that at approximately 17.30 hours on the 21st March, 2011, the second defendant called to the plaintiff's office enquiring as to why he had not received a V.H.I. card when other senior employees had received theirs in the post. I am satisfied on the evidence of the plaintiff, - the second defendant was present in court and represented by solicitors and counsel but did not give evidence, - that during their ensuing conversation the second defendant became increasingly aggressive. The plaintiff told the court that he had advised the second defendant that he would telephone the V.H.I. offices as soon as he could, but that he was then busy dealing with a Bank. He said that the second defendant had raised his voice and shouted, "you are always (expletive) busy". The plaintiff told the court that the conversation became so heated that he pointed his finger to the door and asked the second defendant to leave the office. Even were I accept, which I do not, the pleading that the plaintiff put his finger in the face of the second defendant in a provocative and aggressive manner and swore at the second defendant in an aggressive manner, this would not constitute negligence or contributory negligence on the part of the plaintiff in the circumstances of this assault.

6. I am satisfied on the evidence that the second defendant without warning struck the plaintiff who had remained sitting behind his desk, battering him violently about the face and head with both fists. The plaintiff told the court that when he had attempted to get up, the second defendant seized him by the neck and pushed him against the wall of the office and continued to punch him about the head and upper body. The plaintiff suffered a cut over his left eyelid, a black eye, contusions on the left side of his face, swelling of the facial soft tissues and bruising to his left shoulder area. I accept the plaintiff's evidence that he was very severely shocked and

traumatised and was in great pain and that his face and clothes were covered in blood.

7. Photographs admitted into evidence show blood spattered over documents on the plaintiff's desk and even on the ceiling of the office. The plaintiff gave evidence, which was not contested, that there were also blood stains on the carpet surrounding his desk. Mr. McGuinness gave evidence that he was on his way to the office having been informed of the incident, when he met the second defendant and noticed that the knuckles of both his hands were covered in blood. This assault took place in the presence of another employee, - a part time accountant, - who was working at a desk in the same office as the plaintiff. This gentleman, who was named, did not give evidence. This gentleman brought the plaintiff to Airside Clinic at Swords and then to Swords garda station where the plaintiff made a complaint to Gda. Paul Healy. If a statement was taken on the occasion it was not produced in evidence. It was accepted that the second defendant had pleaded guilty to criminal charges brought on foot of this complaint.

8. It is submitted by the plaintiff that the first defendant is vicariously liable for this assault on him by the second defendant. Additionally or alternatively he submits, that the first defendant was negligent and in breach of duty, including breach of statutory duty, in failing to provide him with a safe place of work and responsible fellow employees. I am satisfied that these claims are sufficiently made out and particularised in the personal injuries summons and in the replies to the various requests for particulars raised on foot of the summons.

9. I adopt the "close connection" test for the imposition of vicarious liability expounded, after an extensive review of decisions in this State and in other common law jurisdictions, by Fennelly J. (Murray C.J. and Denham J. (as they then were) concurring), in *O'Keeffe v Hickey* [2009] 2 I.R. 302 at 378, paras. 243 and 244, where he held:-

> "[243] 62. Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (*Lloyd v. Grace, Smith and Company* [1912] 1 A.C. 716); the employee stealing the fur stole left in for cleaning (*Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716) and the security officer facilitating thefts from the premises he was guarding (*Johnson & Johnson (Ire.) Ltd. v. C.P. Security Ltd.* [1985] I.R. 362). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In *Delahunty v. South Eastern Health Board* [2003] 4 I.R. 361, O'Higgins J., rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.
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> [244] 63. The close connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J. provides an excellent example of the practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the particular case. In *Bazley v. Curry* (1999) 174 D.L.R. (4th) 45 the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected.

10. Whether the actions of the second defendant on the 20th March, 2011, were closely connected with his employment must be considered in the context of such matters as, the nature of the employer's business, whether the risk of the sort of incident which occurred arose because of the nature of that business, the nature of the duties, broadly defined, which the employee was engaged to perform at the time the incident occurred, whether the act could be said to be incidental to or a consequence of anything which the employee was employed to do, whether at the time of the incident the employee could reasonably be said to have been acting, however, mistakenly or excessively in the interests of the employer or was merely pursuing some private end, whether the employee in the course of his duties was expected or encouraged to act aggressively, whether the assault arose out of vengeance or spite, or resentment or intemperate behaviour on the part of the employee and, many other similar factors. The fact that the opportunity to commit the act would not have arisen but for the access to the plaintiff's office afforded to the second defendant by his employment is not in my judgment sufficient to establish the requisite close connection between that employment and his tortious act.

11. Even on the most liberal construction of this test, I am satisfied, that to hold the first defendant vicariously liable for the tort of the second defendant would, on the facts hereinbefore set out, amount to imposing absolute liability on an employer. To alter the law to this extent would require, in my judgment, a clear act of the legislature. The presence of the second defendant in the plaintiff's office on the 20th March, 2011, was I am satisfied, in relation to his employment with first defendant. The terms of his employment, by reference to the email of the 27th March, 2010, contain the following:-

> "We have a company health scheme with V.H.I. and the company will cover the costs of V.H.I. for you personally, (cost €690), - if you want your family covered, the cost can be deducted from your salary."

The grievance which brought him to the plaintiff as financial controller of the company was therefore connected with his employment. However, what then occurred was nothing more than a vicious attack on the plaintiff motivated by some personal resentment which ignited an apparently ungovernable temper. In my judgment this could not be remotely consistent with the interests of his employer and had no close connection with any acts which fell truly within the scope of his employment as head chef with the first defendant. I find that the first defendant is not vicariously liable for the assault by the second defendant on the plaintiff.

12. There is a non-delegable duty at common law on an employer to take all reasonable precautions for the safety of each of its employees and not to expose them to a reasonably foreseeable risk of injury: to act as a reasonably careful and prudent employer would in the circumstances. A similar but more extensive duty is placed on employers by the provisions of the Safety Health and Welfare at Work Act 2005. Part of this duty is to provide and maintain a safe place of work and to provide competent co-employees. I am satisfied in the instant case that no failure to provide the plaintiff with a safe place of work has been made out. This aspect of an employer's duty relates to the physical condition in and under which an employee is required to work. It does not apply to the personal behaviour of a particular co-employee in an otherwise safe place of work. In the present case the evidence established that the plaintiff and the second defendant did not even work in the same building in this extensive complex. The incident which I have described occurred when the second defendant came uninvited to a building, - seemingly a former gate lodge on the premises, - where the second defendant and Mr. McGuinness alone had their offices. It is not suggested in evidence that the second defendant should not have come to the plaintiff's office on the occasion or that he was acting contrary to instructions in so doing, or in so doing

without making a prior appointment.

13. The Safety, Health and Welfare at Work Act 2005, came into force on the 1st September, 2005, (S.I. No. 328/2005). Section 8(1) of the Act of 2005 provides that:-

> "Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."

14. Without prejudice to the generality of subsection (1), section 8(2)(b) of the Act of 2005, imposes a duty on an employer of:-

> "Managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk."

15. Section 8(2)(g) of the Act of 2005, requires an employer to provide:-

> "The information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees."

16. Section 2(6) of the Act of 2005, defines, "reasonably practicable" as meaning that an employer:-

> "Has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work."

17. There is no definition in the Act of 2005, of "improper conduct or behaviour". I find that it would include such matters as bullying, harassment, rough play, practical joking, racial or other abuse or physical violence.

18. The evidence established that the first named defendant through its then general manager, Mr. Brady, was aware that the second defendant had on a previous occasion in a fit of temper caused physical injury to a fellow employee in the course of their joint employment. I am satisfied that Mr. Brady knew or ought to have known that there was a very real risk, not just a mere possibility, that this could occur again, if for any reason the second defendant's temper became aroused and that this exposed his fellow employees, including the plaintiff, to a risk of physical injury. I am satisfied that it was reasonably foreseeable that the second defendant was likely to prove a source of danger to other employees of the first defendant because of his apparently ungovernable temper.

19. It was not submitted and I would not accept, that it was negligent or a breach of duty including statutory duty on the part of the first defendant to have employed the second defendant at all. The evidence did not establish that Mr. Brady was aware of any further assaults perpetrated or threatened by the second defendant on fellow employees. Mr. Brady had dismissed the second defendant following the previous assault. This may have led Mr. Brady to assume that such an incident was unlikely to recur. However, the cause of the previous assault was not a personal antipathy between the second defendant and a particular fellow employee no longer on the scene. The cause was the second defendant losing his temper to an almost maniac level with a co-worker over some dispute or perceived grievance in the course of their work. A real risk of a reccurrence therefore remained. In my judgment the making of such an assumption would not and did not excuse the employer from taking no measures whatsoever to prevent a recurrence. The first defendant did not exercise reasonable care and, certainly did not exercise all due care to put in place measures to prevent or to protect against, such an event. This was not a risk which could be entirely eliminated, but in my judgment was one which could have been adequately controlled without grossly disproportionate or expensive measures.

20. The first defendant, however, took no care to put in place measures to prevent a recurrence of such improper conduct or behaviour on the part of the second defendant likely to put the safety and health of other employees at risk. There was no evidence that the first defendant had a Safety Statement or a notified policy which identified conduct or behaviour in the workplace that would not be tolerated, - conduct such as verbal abuse or physical violence of or towards other workers. There was no evidence that Mr. Brady had notified and warned the second defendant in writing in clear and definite terms that physical violence towards any other employee would not be tolerated and would result in his being dismissed for gross misconduct. The evidence established that Mr. Brady ceased to be general manager of the first defendant in July 2010, prior to the assault by the second defendant on the plaintiff. However, the common law and statutory duty to put necessary protective and preventive measures in place arose immediately on the employment of the second defendant in March 2010 and continued unabated thereafter. The evidence did not establish that the first defendant had security staff or C.C.T.V. monitoring at the complex. This might have had an additional deterrent effect on the second defendant. However, one cannot lose sight of the fact that the second defendant perpetrated the assault on the plaintiff in the presence of another employee of the first defendant and a short distance from the office of Mr. McGuinness, managing director of the first defendant.

21. Mr. McGuinness gave evidence that prior to the assault on the plaintiff by the second defendant he had received a complaint from another employee that the second defendant had made very offensive racist remarks about the wife of that fellow employee. Mr. McGuinness said that he had immediately investigated this complaint. The second defendant had apologised to the other employee, - they were both from the same ethnic background, - and the apology was accepted. Mr. McGuinness told the court that he had given a verbal warning to the second defendant on that occasion. In my judgment an incident like this should have clearly brought home to the first defendant the urgent necessity of having a clear Safety Statement or policy with regard to improper conduct or behaviour at work, especially having regard to the multi ethnic nature of its large workforce.

22. I am satisfied that the plaintiff succeeds on this aspect of his claim. I find that the first defendant and the second named defendant are jointly liable to the plaintiff for the injuries suffered by him.

23. After the incident, the plaintiff was seen at the Accident and Emergency Department of Beaumont Hospital. X-rays taken of his facial bones showed no fractures. The plaintiff was given an anti-tetanus injection and his left eyebrow was sutured with three sutures. He was then discharged into the care of his general medical practitioner, Dr. Richard Aboud.

24. The plaintiff was examined by Dr. Aboud on the 28th March, 2011, one week following the assault. On that occasion Dr. Aboud noted that the plaintiff had substantial bruising on the left side of his face and over his eyes. There was a 2cm long sutured laceration over his left eyebrow. The entire soft tissue of his face was tender. The plaintiff had left sided jaw pain which limited

mouth opening. He complained of a clicking sensation when he opened his mouth. Dr. Aboud prescribed anti inflammatory medication and exercises, - which I assume were facial exercises. The plaintiff was re-examined by Dr. Aboud on the 4th March, 2011. On that occasion, the plaintiff complained of increased pain and a worsening of the clicking sensation in the left side of his temporo-mandibular joint. An M.R.I. scan was carried out on the 12th April 2011. This disclosed no bone lesion or soft tissue abnormality and joint alignment appeared satisfactory. The radiology Report notes that the imaging was somewhat suboptimal due to movement.

25. The plaintiff was seen by Mr. Leo A. Vella on the 25th April, 2012. He noted that the wound over the plaintiff's left eyebrow had healed without leaving a noticeable scar. Mr. Vella recorded that the plaintiff was taking prescribed analgesic medication together with anti-depressant medication and sleeping tablets. He noted that the plaintiff was attending Ms. Elizabeth Buckely for psychological counselling. Mr. Vella found that there was some remaining bruising on the plaintiff's left shoulder, but recorded that the plaintiff had advised him that this was not causing the plaintiff any problems. Mr. Vella found that the plaintiff could open his jaw fully, but that there was a minor soft click in the left temporo-mandibular joint. Mr. Vella recorded that the plaintiff was obviously upset during this examination and appeared to be suffering from significant psychological upset or depression.

26. X-rays were taken of the plaintiff's mandible on the 9th August, 2011, which showed no fractures. The plaintiff was seen on the 17th August, 2011, by Mr. Padraig O'Callaigh, a consultant oral and maxillofacial surgeon. He advised the plaintiff that he had sustained no jaw or facial fractures. The plaintiff was again seen by Mr. Vella on the 8th November, 2013. Mr. Vella noted that on the 14th June, 2013, an x-ray mandible pantomogram showed a normal bony outline. Mr. Vella considered that the plaintiff had made good progress, but still suffered clicking in his left jaw on opening his mouth. He noted that the plaintiff continued to suffer occasional discomfort on his left temporo-mandibular joint. In Mr. Vella's opinion the medical record demonstrated that the plaintiff had suffered post traumatic stress disorder from the date of the accident on the 21st March, 2011, to the 5th October, 2012.

27. The plaintiff was re-examined by Mr. O'Callaigh on the 13th November, 2013. He noted that the plaintiff clinically continued to have a click in his left jaw on opening his mouth. The plaintiff advised him that this was getting better and he stated that it did not bother him too much. The plaintiff also complained of occasional discomfort in his left jaw. Mr. O'Callaigh noted that the plaintiff had been given some jaw exercise which caused the clicking to disappear. He found that the plaintiff's muscles of mastication were normal. On this occasion Mr. O'Callaigh considered that the persistent discomfort in the plaintiff's left jaw was most likely secondary to work stress which the plaintiff was then experiencing.

28. The plaintiff was seen by Dr. Aboud on the 21st November, 2013. He noted that the plaintiff still had clicking in his jaw on the left side. He records that the plaintiff's mood was stable but he was still taking two types of anti-depressants, an anti-anxiety tablet and a sleeping tablet. Dr. Aboud considered that the plaintiff was continuing to improve. The plaintiff complained of insomnia, anxiety, depression and early morning waking. Dr. Aboud concluded that the plaintiff was under considerable work stress at the time and that this stress was exacerbated by the stress of the pending court hearing. He noted that the plaintiff had attended for psychotherapy and considered that additional psychotherapy on a monthly basis for a further year would be of assistance to him.

29. A very short letter from Ms. Elizabeth Buckley M.I.A.C.P. dated the 1st January, 2014, was produced in evidence. This records that the plaintiff had been referred to her by Dr. Aboud for [psychological] counselling to assist him in working through the effects of the assault on him. She stated that he had attended for a total of sixteen sessions ending on the 15th June, 2012. In his report of the 22nd November, 2013, admitted into evidence with other medical reports, Dr. Aboud suggested that perhaps the specialist opinion of a psychiatrist might be of value. If any such was obtained it was not produced in evidence by any party during the hearing.

30. I am satisfied that as of the date of this judgment the plaintiff has recovered from the physical and mental injuries suffered by him as a result of the unexpected and vicious assault on him by the second defendant on the 21st March, 2011. I am satisfied on the evidence that there will be no future adverse sequelae. The court awards the plaintiff damages in the sum of €28,000 for the pain and suffering which he has endured to date. Special damage has been proved in the sum of €5,984. There will therefore be a decree in favour of the plaintiff for €33,984 against the first defendant and the second defendant as joint tortfeasors.