Court of Appeal on vicarious liability and "horseplay" in the workplace

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Chell v Tarmac Cement and Lime Ltd [2022] EWA Civ 7

Introduction

1. In *Chell v Tarmac Cement and Lime Ltd* [2022] EWA Civ 7 the Court of Appeal gave further consideration of employers' vicarious responsibility for the actions of employees, and the extent of employers' duties to take positive steps to prevent "horseplay" – particularly in the context of acknowledged tensions between different employees or parts of the workforce.

2. The Appellant, Mr Chell, had been a contractor working on the premises of the Respondent. One of the Respondent's employees, Mr Heath, played a practical joke caused "pellet targets" to explode close to Mr Chell's ears by striking them with his hammer, causing noise-induced hearing loss and tinnitus. It was agreed there was no intention to cause injury.

3. The two men had not been working directly with one another on site. The incident had taken place on site and during work hours. The hammer was a piece of Mr Heath's work equipment, but the pellet targets were not and had no function in relation to his employment.

4. Part of the background of the incident was tension between Mr Chell and other contracted workers and direct employees of the Respondent including Mr Heath, who feared they were to be replaced by the contractors. Mr Chell had expressed his discomfort to his supervisor on site, who was an employee of the Respondent, on one occasion. It had been issue at trial whether Mr Chell had explicitly been asked to be taken off site, but the trial

judge had determined he had not. Nor had it been found that Mr Chell had specifically raised concern about Mr Heath.

Vicarious Liability

5. The trial judge had considered the principal authorities, including *Graham v Commercial Bodyworks Limited* [2015] EWCA Civ 47 (another case involving a practical joke) and the factors explored there for consideration when determining whether there is a sufficient connection between the wrongful act and the employer/employee relationship. One of those factors is "the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise".

6. One matter considered was whether the Respondent's actions in bringing the contractors onto site, and so causing friction which lay behind the incident, therefore created such a sufficient connection. The trial judge had concluded that if that tension had been serious enough to suggest a risk of physical confrontation that would have been a sufficient connection, but that this didn't apply on the fact.

7. Mr Chell was not successful in appealing on the basis of the trial judge's application of the above principles to the facts in this case. In particular, the Court of Appeal reiterated the judge's careful findings in relation to the nature and extent of friction between Mr Chell and Mr Heath which was not sufficiently serious as to suggest a physical confrontation.

Respondent's Breach of Duty of Care Owed to Mr Chell

8. The trial judge had not found for Mr Chell on a claim based on the Respondent's own duty to take reasonable steps to avoid Mr Chell being injured.

9. Mr Chell relied (although it's not clear whether just on appeal or at trial) upon Schedule 1 of the Management of Health and Safety at Work Regulations 1999 which includes reference to "social relationships" when setting out the general principles to be applied by employers in putting in place preventative measures.

10. While horseplay or the malicious actions of others could potentially be a mechanism giving rise to a foreseeable risk of injury and thereby a duty to prevent this, he did not find that such a duty arose on the facts on this case. Again, the lack of any indication of potential violence was a factor. Nor did he consider that such a duty extended to requiring a risk assessment covering horseplay, practical jokes or malice by employees.

11. The Court of Appeal concluded that the only foreseeable risk of injury related to horseplay that could be established in this case would be highly general in nature, and it was an

"unrealistic" suggestion of the Appellant that there was a duty to provide a specific instruction to employees not to engage in such horseplay. Such an instruction was implicit in the nature of employment.

Discussion

12. The Court of Appeal has provided confirmation – if any were needed – that there is no general duty on employers to take steps to prevent general "horseplay", malicious actions, or other dangerous activities among its staff, where the facts do not suggest there is a particular risk of this in the circumstances. An employer is not likely to be negligent in failing to expressly set out prohibitions that should go without saying.

13. The judgment may, however, provide some helpful commentary to Claimants in cases where the facts show that such a risk *was* clearly foreseeable or raised to the attention of employers. In particular, where tensions between staff or groups of staff have risen to the point where a physical confrontation is reasonably foreseeable there may well be a direct duty on employers to take reasonable steps to prevent this. Where this tension arises as a result of the circumstances related to employment, they may also have vicarious responsibility for employee's actions.

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